

CyberBytes

Subject: Failure to Conduct Adequate Discovery-Emerging Issues

Emerging Ethical Violation Claims, Judicial Sanctions, and Malpractice Threats are Heating Up

According to the ABA, substantive errors continue to be largest segment (46%) of all legal malpractice claims. Substantive errors are comprised of a failure to follow deadlines, failure to know the law, or failure to conduct adequate discovery. In today's digital age, the overwhelming abundance of electronic documents and e-mail generated by individuals as well as business organizations challenges all attorneys to seriously consider the adequacy of an e-discovery procedure. When it comes to concerns about e-discovery, the primary focus is on the omissions side of the equation. As a result of inadequate e-discovery, attorneys are now facing the risk of ethical violation claims, judicial sanctions, and even legal malpractice claims. Additionally, lawyers cannot overlook their responsibility to notify their clients of all stipulated obligations to preserve evidence which increasingly resides on computers and other storage media as well.

Ethical violation claims are directly tied to state mandates on professional responsibilities that require practicing attorneys to perform their legal services conscientiously, competently, and with good judgment. Equally important, is the adherence to a duty not to unlawfully alter, obstruct or destroy another party's access to evidence. To date, no such ethical violation charge has been published for failing to adequately perform e-discovery, however the potential for inadvertent violations abound. CyberControls, LLC is committed to raising your level of knowledge and awareness of e-discovery strategies and practices to avoid such ethical violation claims.

Legal malpractice claims stemming from inadequate e-discovery will soon be emerging as the next angle to go after attorneys when the disgruntled litigant decides the outcome of a case was unsatisfactory. No longer can an attorney afford to be complacent about staying current with computer forensic e-discovery techniques used to locate and recover relevant evidence not otherwise attainable through conventional requests. With over 93% of all information created and stored on computers, the probability of useful information and evidence stored on various computer hard drives in the custody of an opponent is quite high. A federal judge who authored the Metropolitan Opera case in 2003 offered, "The rules talk about the production of relevant information, so we seem to create the burden to seek e-data." Judge Preska added that she "can't imagine how counsel who is responsible cannot seek relevant electronic information." The pressure could not be much higher on attorneys when it comes to including aggressive e-discovery efforts in most litigation matters. By the mere absence of a thorough e-discovery effort, vulnerability for a future claim may emerge.

Judicial sanctions have risen in the area of defense counsel's lack of knowledge of computer technology often resulting in ineffective consultation and advice to their clients to exert all possible precautions to avoid spoliation of evidence. In the labor dispute case, *Metropolitan Opera Assoc, Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003), the court found that counsel gave inadequate instructions to their client's discovery obligations, including the disregard that the client had no document retention system resulting in the blatant disregard of the court's and Plaintiff's repeated discovery requests. The court granted severe sanctions, finding liability on the part of the Defendants with financial

liability being shared by the Defendant and defense counsel.

If defense counsel is concerned about the potential liability of sanctions stemming from inadvertent spoliation of electronic information and evidence through the routine business operations conducted by their business clients, employing computer forensics at the commencement of a lawsuit is an effective method of preserving evidence and should be seriously considered.

E-Discovery Services, Digital Forensic
Discovery Services, Pre-Trial E-Discovery
Consulting, Pre-Discovery Production Data

Audits and Expert Testimony are all available service offerings from CyberControls, LLC.

We invite you to call our firm to have frank discussion about a particular situation which involves e-discovery to explore the options and approaches that are available to effect a satisfactory outcome for you and your client. CyberControls can support you in those most difficult e-discovery challenges.

Call and ask to speak with one of our forensic consultants for an assessment as to how computer forensics may be a fit for a particular legal matter at 847-756-4890.