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Gibbons' E-Discovery Conference: Helping The Client Develop Defensible Practices

The Editor interviews Mark S. Sidoti, Gibbons P.C.

Editor: Mr. Sidoti, would you tell our readers something about your professional experience?

Sidoti: I earned my undergraduate degree from Fordham University and continued on to Fordham Law School, from which I graduated in 1988. I started my career with Gibbons – then Crummy, Del Deo, Dolan, Griffinger & Vecchione – right out of law school. I began my career defending products liability matters on behalf of pharmaceutical and medical device companies. That led me to develop a practice in clinical laboratory defense, and, in recent years I have represented the two largest laboratories in the country, serving as national counsel to one. I am a Director in the Gibbons products liability department, and have also been heavily involved in electronic discovery matters as Chair of the firm's E-Discovery Task Force.

Editor: You mentioned that you chair the firm's E-Discovery Task Force. What is the origin of this undertaking?

Sidoti: E-discovery has come of age in recent years, but many firms have yet to establish a group focused on these issues. This certainly was the environment more than three years ago when Patrick Dunican, our managing director, Michael Quinn, the firm's general counsel, and I discussed putting together a group to focus on e-discovery and information management issues. The group would focus both on training and compliance for the firm's attorneys and support staff, and, of course, client service. In a show of significant foresight, the firm's leadership fully supported this concept.

From the outset, the group has been inter-



Mark S. Sidoti

disciplinary. It includes the heads of the firm's information technology and knowledge management departments, as well as attorneys from most of our traditional practice groups. While much of the group's focus is on litigation, e-discovery and information management issues affect all of our clients in both transactional and litigation matters. For this reason, our team includes corporate, transactional and IP lawyers in addition to litigators, all of whom have developed significant expertise in e-discovery and information management law and practice.

Editor: Our publication is read by corporate counsel, general counsel and the members of corporate legal departments. I think by now most corporate counsel are aware of the importance of e-discovery in the litigation arena. What are the things that you would call to their attention in

connection with things other than litigation?

Sidoti: Active litigation is not always the focus of our clients' concerns and needs. We find that client interest in assistance from the Task Force is driven by two primary needs - the need for e-discovery counseling and assistance in the context of litigation, and the desire to formulate information management policies that afford maximum protection and corporate efficiency and pass muster under the new e-discovery law and rules. As litigation and discovery counselors, we serve as adjunct members of our litigation teams in most of the major matters the firm is involved with, and also provide clients with advice directly regarding e-discovery best practices. However, many of our engagements have been in the document management context, where we are asked to provide counseling on best practices, and to re-draft or create information management policies that comply with today's standards. Many corporate counsel now recognize that having carefully crafted and legally defensible information management policies in place will enable them to avoid many e-discovery problems down the road.

Editor: At the end of September, the E-Discovery Task Force is going to host a full-day conference on the latest developments in e-discovery. What audience are you trying to reach?

Sidoti: Our focus is general counsel and the members of corporate legal departments, who are the people facing the most pressing and difficult issues in this area. Anything we can do to put our clients in a position to prevail on the merits of any litigated matter, while avoiding the now all too common sideshow of e-discovery disputes, and the devastating

Please email the interviewee at msidoti@gibbonslaw.com with questions about this interview.

sanctions that can result, is what we want to offer. So, we believe it is time that we devoted a full day to providing clients with an education on a number of unique issues in e-discovery and information management.

Editor: What has taken place over the last couple of years that would indicate an undertaking of this magnitude is in order now?

Sidoti: Looking at the timeline helps here. The concept of e-discovery and information management as an area that could dictate the outcome of litigation, and turn straightforward cases into “bet the company” situations, began in the late 1990’s. Several very important federal court decisions resulted in companies being severely sanctioned for problems with their document preservation and production practices, and the spoliation, or wrongful loss or destruction, of relevant electronic information. The *Zubulake* decisions by Judge Shira Scheindlin of the Southern District of New York, dating to 2003 and 2004, represent one court’s undertaking to establish a framework within which to address e-discovery issues and determine litigants’ obligations to preserve and produce electronic documents. In early 2004, the Sedona Conference, a group of experts including Judge Scheindlin, developed what is called the Sedona Principles, a set of best-practices guidelines for e-discovery and document retention. The Sedona Principles constitute a template for revamping corporate policies in this area. Finally, and most recently, the Federal Rules of Civil Procedure were significantly amended as of December 2006 to reflect the courts’ need to deal with e-discovery issues and the parties’ obligation to address those issues. All throughout this process, courts have rendered more and more detailed and incisive decisions every year regarding parties’ e-discovery obligations, to the point where there are now literally hundreds of published opinions from which to draw guidance.

It seems that it is the Federal Rules changes, along with several of the most severe sanctions decisions, that have really gotten the attention of corporate counsel. I feel strongly that we are now in a critical phase – during the next couple of years both the courts and corporations will be struggling with how to interpret, apply and comply with the new rules. While all of this is being sorted out, there will be a great deal of uncertainty and clients will continue to look for guidance.

Editor: I note that the conference is to include a corporate counsel roundtable. What issues are of particular concern to corporate counsel?

Sidoti: The key issues relate to having infor-

mation management and retention processes and procedures in place that make sense in 2007. By that I mean policies that are responsive to the FRCP amendments and to what the courts are saying about spoliation. When I speak to a client, the first thing I ask is whether they have any such policies and, if so, when they were last updated. Most often, our engagements begin with a review and reworking of these policies.

Of course, many companies are concerned with best e-discovery practices in litigation. For many who have significant litigated matters that arise with frequency, it is essential for them to understand e-discovery in *today’s* legal environment. This is more than just understanding the rules, which is itself no small undertaking. Corporate counsel are concerned with understanding, for example, what can be done by way of pre-suit preparation and when it is appropriate to push back on an adversary’s demands for production.

Editor: Suppose the client has not taken any steps to address the issues that arise in the e-discovery environment. Please take us through the steps in getting an action plan in place.

Sidoti: I cannot stress enough how important it is for companies to ensure that their efforts in these areas are endorsed by the highest level executives at the company. Obtaining “buy in” from the CEO and general counsel, among others, is crucial – senior management and the rank and file will take their cues from how seriously these leaders treat this subject. Moreover, the courts have been wholly intolerant of anything less than full acceptance of responsibility for appropriate e-discovery conduct and compliance by the highest level executives.

A second step concerns a review of the company’s current policies and a determination of what must be done to bring them into compliance with the new rules and emerging case law.

I follow this step with an audit of current litigation. If there are pressing e-discovery issues in pending cases, they must be addressed in such a way as to avoid the perception that the company’s internal policies are being revised for the sole purpose of addressing current litigation difficulties. In light of the sanctions that have been imposed where the separation is not clear, it is crucial to have these processes proceed on separate tracks to the extent possible. Often this requires expert advice.

Editor: Would you tell us about Rule 26(f) and the emphasis you propose to place on it at the conference?

Sidoti: Amended Rule 26(f) involves a number of changes, but the principal one is that

the parties are now obligated to have a discussion about how they are going to handle their e-discovery issues *before* they have their initial conference with the court. That entails disclosing the electronic documents that may be relevant to the case, describing how those documents are maintained, identifying the person or people most knowledgeable about them and the company’s IT infrastructure, and designating the format of production for electronic documents and similar issues. Also, the parties must disclose their objections to producing certain types of electronic data, for example, data they might consider “inaccessible” as the new rules and commentary define that term. Because this obligation is still relatively new, and parties continue to struggle with how to effectively conduct these meetings, our conference will include a mock demonstration of such an exchange moderated by Michael Arkfeld, who is a nationally recognized expert and author on e-discovery topics.

Editor: Do you anticipate doing this conference again, say every couple of years?

Sidoti: We are certainly going to repeat this undertaking, but I think the schedule might be more frequent than every couple of years – at least for the foreseeable future. The continuous flow of e-discovery related court decisions and the sheer volume of emerging issues will likely require a more ambitious schedule.

Editor: The conference represents a very substantial investment on the part of Gibbons.

Sidoti: Yes. It is an extraordinary investment by the firm. The people who are going to present – include the Task Force attorneys and our distinguished speakers – are bringing exceptional experience to the table, to say nothing of the time they have put into the undertaking. In holding this conference, Gibbons recognizes there are very real issues on the horizon that must be addressed, and that it has an ongoing commitment to its clients to assist them in navigating the changing landscape of e-discovery.

Editor: Would you give our readers the conference’s particulars?

Sidoti: The conference will be held in our new offices at One Gateway Center in Newark, NJ, on September 27 from 8:30 a.m. to 4:45 p.m., followed by a cocktail reception. Light breakfast and lunch is included, and there is no charge for attendance. Anyone interested in attending can learn more about the conference by visiting www.gibbonslaw.com or by sending an email to rsvp@gibbonslaw.com.