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The Phoenix

The Impact of the New Provisions Regarding Electronically Stored Information

Effective July 1, 2008, the Ohio rules governing procedures in civil lawsuits contain provisions addressing Electronically Stored Information (ESI) that have ramifications upon all parties involved in litigation inclusive of employers defending against claims of unlawful employment practices in the state courts of Ohio. Specifically, Ohio rules now contain provisions allowing for the discovery of ESI. ESI includes multiple types of data such as that stored on network servers, e-mail servers, workstations, laptops, portable hard drives, personal digital assistants, employee personal computers, DVD diskettes, CDs and voicemails. For years, Ohio employers have been dealing with ESI issues related to lawsuits brought in the federal court system based upon federal laws such as the Americans with Disabilities Act and the Civil Rights Act as the federal rules governing procedures have had provisions for ESI for quite some time. Employers must now take note that new responsibilities involving ESI apply to employment claims brought in the state courts of Ohio.

The new Ohio rules appear to be closely patterned after their federal counterparts and the wealth of case law that already exists in the federal system interpreting the same. In the federal system, courts have found that a duty to preserve ESI begins with a "triggering event," such as receipt of written correspondence from an employee announcing his/her intention to bring forth a lawsuit, a charge being filed with the Equal Employment Opportunity Commission, etc. Employers in Ohio must now be attuned to such "triggering events" that may be deemed as having put an employer on reasonable notice of a potential lawsuit and, therefore, placed a responsibility upon the employer to actively preserve potentially relevant ESI.

After a "triggering event," action by an employer to actively preserve ESI is commonly referred to as implementing a "litigation hold" regarding ESI. An employer's failure to institute a "litigation hold" after a "triggering event" may lead to serious consequences including negative instructions to the jury, spoliation (destruction of evidence) claims, monetary sanctions, attorneys' fees, default judgment being entered and the piercing of the attorney-client privilege. Employers would be

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The Cleveland Heart Walk

BSMPH is pleased to announce that it will be participating in the Cleveland Heart Walk on Saturday, August 15, 2009, at 9:00 a.m. All employees of our firm have been encouraged to participate in sponsored events to help raise money for this important cause. If you would like to join us in the walk, please contact Christen Wilk at ***cwilk@bsmph.com***.

Potential Liability Issues and Discoverability of Medical Records

In the past year, the Ohio Supreme Court decided three cases addressing discoverability of medical records and potential civil liability for improper dissemination of medical records. All three of these cases construe and build upon the court's holding in *Biddle v. Warren General Hospital* (1999), 86 Ohio St.3d. 395.

In *Biddle*, the Supreme Court created an independent tort for the unauthorized disclosure of medical records to third parties. A hospital sent medical records to its retained law firm to screen patients for supplemental social security disability eligibility and assist collecting past due medical bills. The Supreme Court held that the law firm was liable for the unauthorized release of medical records because the authorization used by the hospital was limited to the insurance carrier or third-party payer and can only be used in circumstances "necessary for the completion of hospitaliza-

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The Impact of the New Provisions Regarding Electronically Stored Information cont.

well-advised to contact legal counsel upon gaining information which may put the employer on reasonable notice of a possible civil action so legal counsel can determine if a "triggering event" has occurred and, in turn, created a preservation duty upon the employer.

Specific examples of negative consequences for an employer failing to actively preserve ESI after a "triggering event" are abundant in the federal court system. In *Mosaid Techs. Inc. v. Samsung Electronics Co., Ltd.*, the U.S. District Court for the District of New Jersey awarded sanctions against a defendant who failed to place a "litigation hold" regarding ESI which consequently allowed e-mails to be destroyed. The court also allowed a spoliation inference jury instruction even though the plaintiff did not specifically use the word "e-mail" in its written discovery requests. The *Mosaid Techs. Inc.* court stated:

> The duty to preserve potentially relevant evidence is an affirmative obligation that a party may not shirk. When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a "litigation hold" or "off switch" on its document retention policy to stop the destruction of that evidence. As discoverable information becomes progressively digital, e-discovery, including e-mails and other electronic documents, plays a larger, more crucial role in litigation.

In *Easton Sports, Inc. v. Warrior Lacrosse, Inc.*, the U.S. District Court for the Eastern District of Michigan Southern Division found that the termination of a personal e-mail account (Yahoo) just after a "triggering event" constituted spoliation warranting a negative instruction to the jury. The *Easton Sports, Inc.* case illustrates the need for employers in Ohio state courts to not only preserve ESI on their systems "in the office," but also personal electronic devices that an employee may have utilized for business purposes. Both *Mosaid Techs. Inc.* and *Easton Sports, Inc.* should serve as a warning to employers defending claims in Ohio state courts that a failure to institute a "litigation hold" may lead to sizeable adverse consequences.

The new provisions may also be used "offensively" against an employee claiming an unlawful practice. In short, plaintiff-employees most likely possess ESI themselves and the door swings both ways. ESI in the possession of a plaintiff may be in the form of cellular phone photographs, voicemails, documents stored on personal home computers and information contained in on-line accounts for social networking, such as FaceBook and MySpace. Case law exists in the federal court system that shows employers defending against claims of unlawful practices in Ohio state courts just how valuable of a tool the new provisions may be for the employers.

In *Smith v. Café Asia*, the U.S. District Court for the District of Columbia dealt with the issue of a defendant seeking ESI on the plaintiff's cellular phone, namely photographs. In the *Smith* case, the court ordered the plaintiff to preserve the images contained on his cellular phone and to permit inspection of the same by defense counsel. In *Leon, M.D. v. IDX Systems Corp.*, the United States Court of Appeals for the Ninth Circuit affirmed the trial

By Keith Hansbrough, Esq.

court's spoliation sanction against the plaintiff and the dismissal of plaintiff's claims with prejudice due to evidence that the plaintiff deleted ESI from his employer-issued laptop computer during the pendency of the litigation.

In conclusion, while the new Ohio provisions regarding ESI appear on their face to simply be innocuous details for producing ESI during the discovery phase of litigation, employers defending against employment claims in Ohio state courts would be well advised to take note of the massive impact ESI will undoubtedly have upon employment litigation in the years to come.

Will You Marry Me?.... Please Sign Here!

Nothing can add more emotional tension to an engagement than the word "prenupt." However, since divorce may be "unavoidable," a prenuptial agreement is smart financial planning.

According to statistics, it is estimated that between 40 and 50 percent of first marriages end in divorce in the United States. Second and third marriages have even higher divorce rates; it is estimated that second marriages fail at a rate of 60-67 percent and third marriages fail at a rate of 73-74 percent.

A prenuptial agreement is popular with individuals who want to protect hard earned assets or as added comfort for those who have already suffered through a divorce. Simply purchasing a generic prenuptial form agreement may not help to protect assets. A generic form may contain clauses which will not be enforced by Ohio courts.

What is a Prenuptial Agreement?

Agreements entered into before marriage are referred to by the interchangeable names of premarital, prenuptial or ante nuptial agreements. When signed after marriage, they are referred to as postnuptial agreements.

Each legal agreement is intended to accomplish the same result: Detail each party's rights and obligations and how assets will be allocated in the event of divorce or death.

Who Should Consider a Prenuptial Agreement?

- Anyone with assets (business, home, stock, retirement funds, etc.)
- Anyone with children or grandchildren from a previous marriage.

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Will You Marry Me?.... Please Sign Here! cont.

- Anyone who is supporting the other party through college or advanced education.
- Anyone who has significantly more assets than the other party.
- Anyone who has, or will have, a degree or license in a potentially lucrative profession (such as medicine).

Valid Prenuptial Agreement?

- The agreement must be in writing and voluntarily signed by both parties.
- The agreement should be signed well in advance of the wedding day. The courts have found that if an agreement is presented a very short time before the wedding, coercion will be presumed and the agreement will be presumed invalid if the postponement of the wedding would cause significant hardship, embarrassment or emotional stress.
- Full and fair disclosure of all assets, liabilities and income.
- The agreement must be fair and reasonable.
- The agreement cannot violate public policy by encouraging divorce. The most obvious example of this is where the contract requires one party to pay the other party an unreasonably large amount of money or property upon divorce that is not contingent upon future circumstances.
- Both parties should be represented by separate legal counsel or have had adequate time to obtain legal counsel. It is unethical for one attorney to represent both parties to an agreement.

By Kimrey D. Elzeer, Esq.

Potential Liability Issues and Discoverability of Medical Records cont.

By Steven J. Hupp, Esq.

tion claims." "It is for the patient - not some medical practitioner, lawyer or court to determine what the patient's interests are in regard to confidential medical information." *Biddle, supra at* 408.

In *Medical Mutual of Ohio v. Schlotterer*, Slip Opinion No. 2009 - Ohio - 2496 (decided June 3, 2009), a health insurance company sued a physician to recover reimbursements due to his alleged improper-billing practices. After Medical Mutual filed the case against the doctor alleging fraud and breach of contract, Medical Mutual moved to have the physician produce his patient records. The doctor's counsel resisted this discovery but the trial granted Medical Mutual's motion to obtain these records. On appeal, the Court of Appeals held that the disclosure of these medical records violated the physician/patient privilege under R.C. 2317.02(B) (1).

The Ohio Supreme Court reversed and held: "A patient's consent to the release of medical information is valid and waives the physician/patient privilege if the release is voluntary, express and reasonably specific in identifying to whom the information is to be delivered." The court noted that each of the Medical Mutual insured patients had signed a certificate of coverage, which included release language consenting to the release of their medical information. The Supreme Court applied the simple language of the release and permitted the discovery of these medical records to Medical Mutual's attorneys.

In *Hageman v. Southwest General Health Center* (2008), 119 Ohio St.3d. 195, the Ohio Supreme Court held: "An attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation." In the *Hageman* case, the divorce attorney sought the records of her client's spouse. After filing for divorce, plaintiff's wife sought the medical records of a psychiatrist that had been treating her husband. Prior to a hearing on custody rights, the wife's attorney issued a subpoena to the psychiatrist seeking production of the husband's medical records.

In *Hageman*, the court held that confidentiality of medical records is waived for purposes of litigation but that waiver is limited to the case in which they were obtained. An attorney cannot use medical records lawfully obtained through the discovery process for one purpose for other unrelated cases or proceedings.

Recently, the court held that simply blocking out the names and personal identifiers from medical records is insufficient for purposes of preventing disclosure of medical information. In *Roe v. Planned Parenthood Southwest Ohio Region, Slip Opinion no. 2009 – Ohio - 2973* (decided July 1, 2009), the parents of a fourteen year old girl who underwent an abortion without their consent sought the medical records of all minors who had abortions from the defendant. The court prevented the production of these records and further rejected plaintiff's suggestion that the personal information be simply redacted. "Redaction of personal information does not divest the privileged status of confidential records."

All of these cases share a common theme. A requirement that the patient sign a specific medical records release which states the purpose for which the release has been given. Further, any improper retrieval or dissemination of medical records will create civil liability.

Ohio Supreme Court Recently Upheld the Enforceability of a Nursing Home Arbitration Agreement

By Jeffrey W. Van Wagner, Esq.

On May 7, 2009, the Ohio Supreme Court issued an Opinion which validated an Arbitration Agreement in the discrete setting of a long term care facility and allowed the enforcement of the Agreement which divested the Common Pleas Court of jurisdiction to decide a dispute between the nursing home resident and the nursing home facility. In *Hayes v. Oakridge Home*, Slip Opinion No. 2009-Ohio-2054, the Ohio Supreme Court specifically held:

"[W]e hold that an Arbitration Agreement, voluntarily executed by a nursing-home resident upon her admission and not as a precondition to admission, is not rendered procedurally unconscionable solely by virtue of the resident's age. We further hold that an Arbitration Agreement, voluntarily executed by a nursing-home resident and not as a precondition to admission, that waives the right to trial and the right to seek punitive damages and attorney fees is not substantively unconscionable."

The court restated the traditional analysis for purposes of examining Arbitration Agreements and indicated that in order to invalidate such an Agreement, the arbitration provision must be both procedurally unconscionable and substantively unconscionable. The court determined that the Agreement at issue in *Hayes* did not meet the criteria for invalidation.

For more than a few years now, nursing home facilities and companies have endeavored to limit expensive litigation which can result as a consequence of "nursing home malpractice litigation." Facilities, and the companies which own and operate the facilities, have not sought to limit the ability of a resident to recover if injuries and damages result from substandard nursing home care. Rather, the facilities and the owners have sought to obtain greater certainty with regard to the award of damages associated with nursing home malpractice claims and have sought to expedite the extensive and expensive litigation process in the event a nursing home malpractice lawsuit is brought against a facility. Various facilities and nursing home owners have created, discarded, recreated and attempted to implement arbitration provisions associated with the admission of a nursing home resident to a facility. Until the *Hayes* decision, the efforts to draft and enforce an Arbitration Agreement in the context of a nursing home dispute between a resident (family or estate) and the facility were unsuccessful. With *Hayes*, nursing home facilities and owners have an opportunity to fairly and economically resolve nursing home malpractice disputes without resort to the Ohio court system.

The thrust of the argument against enforcement of the Arbitration Agreement was that it was both procedurally and substantively unconscionable. The principal basis for claiming that the Agreement was procedurally unconscionable related to the fact that the resident was 95 years of age. Indeed, the Court of Appeals had ruled that the Arbitration Agreement was procedurally unconscionable because the resident was a 95 year old woman with no business or contract experience. The Court of Appeals had also determined that the agreement was substantively unconscionable because it took away the resident's rights to obtain attorneys fees, punitive damages and a jury trial.

In the analysis set forth by the court's majority, both procedural and substantive unconscionability were well explained. The court held with regard to procedural unconscionability:

"In determining whether an Arbitration Agreement is procedurally unconscionable, courts consider "the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, business acumen and experience, *** who drafted the contract *** whether alterations in the printed terms were possible, [and] whether there were any alternative sources of supply for the goods in question."

Further, the court held that with regard to a determination of substantive unconscionability the following applied:

An assessment of whether a contract is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially reasonable. Factors courts have considered in evaluating whether a contract is substantively unconscionable include the fairness of the terms, the charge for the service rendered, the standard in the industry and the ability to accurately predict the extent of future liability. No bright-line set of factors for determining substantive unconscionability has been adopted by this court. The factors to be considered vary with the content of the Agreement at issue.

In *Hayes*, the court determined that the Arbitration Agreement at issue was neither procedurally nor substantively unconscionable and was thus enforceable.

A more expansive and descriptive article regarding nursing home arbitrations can be found on line at www.bsmph.com.

BSMPH Attorneys At Law
BONEZZI SWITZER MURPHY POLITO & HUPP CO. L.P.A.

1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114-1501

Phone: (216) 875-2767
Fax: (216) 875-1570
E-mail: info@bsmph.com

Be sure to visit us on the web at
WWW.BSMPH.COM

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