E-Discovery Malpractice Suit Raises Concerns Over Outsourcing Document Review

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The recent legal malpractice lawsuit filed by J-M Manufacturing Co., Inc. ("JME") against the company's lawyers, McDermott Will & Emery ("McDermott"), over the production of 3,900 privileged documents to the federal government in a qui-tam investigation raises issues for not only law firms, but for parties and e-discovery vendors alike. While perfection often can be an impossible standard, the lawsuit highlights the risks and concerns of relying on outside vendors, software companies and contract attorneys in the review and production of electronically stored information ("ESI").

The lawsuit, filed on June 1, 2011, in the California Superior Court and subsequently removed to federal court, represents the first time that a law firm has been sued for e-discovery malpractice – a lawsuit that some commentators say has been on the horizon ever since the Federal Rules were amended. The amended complaint alleges the following relevant facts:

- In response to subpoenas from the federal, California and Tennessee governments, McDermott and J-M Manufacturing identified 160 custodians likely to possess responsive ESI.

- McDermott worked with J-M Manufacturing to collect the custodians' data, which was then transferred to two outside vendors, Stratify, Inc. and Navigant Consulting, Inc.

- Navigant and Stratify ran a search-term and privilege filter through the collection to identify relevant documents and separate out documents protected by the attorney-client privilege.

- After McDermott produced the documents to the federal government, the federal government notified McDermott that a significant amount of the production included attorney client privileged documents and asked McDermott to conduct a privilege review and resubmit the documents.

- McDermott retained contract attorneys to perform the privilege review. Nevertheless, the second production included 250,000 documents, 3,900 of which were later determined to be privileged.

- After JME replaced McDermott with Sheppard Mullin Richter & Hampton, LLP ("Sheppard"), Sheppard was informed that JME's document production included privileged documents, which the federal government subsequently turned over to counsel for the whistleblower (the "Relator").

- The Relator refused to return the privileged documents arguing JME waived the attorney-client privilege.

Although the merits of the case have yet to be determined, the lawsuit highlights the risks of using outside vendors and contract attorneys in managing large e-discovery productions. Gathering, recovering, reviewing, and producing ESI can be an expensive, time-consuming, and tedious process. The majority of today's business records are electronic, and the Sedona Group has estimated that the cost to process one gigabyte of data in response to e-discovery requests may be as much as $30,000. Given the volume of some ESI collections, a manual review of ESI can be cost-prohibitive and impossible. It is not surprising,

therefore, that in some cases it is impractical to use anything other than computerized keyword searches to identify responsive and privileged documents.

The courts have recognized, however, the limits and challenges of relying solely on keyword searches to identify privileged documents. Specifically, the court in the well-known *Victor Stanley v Creative Pipe, Inc 2008 WL 2221841 (D. Md. May 29, 2008)* case noted that designing search protocols "involves technical, if not scientific, knowledge." The Victor Stanley Court observed that designing a computer-assisted privilege review requires (1) careful advance planning by persons qualified to design an effective search methodology; (2) collaboration on search terms; and (3) testing for quality assurance. Accordingly, the use of keyword searches to cull ESI for privileged documents requires extensive involvement of e-discovery search and retrieval experts and the application of quality controls.

Even with the existence of clawback agreements – the absence of which lead, in part, to the waiver of the privilege in *Victor Stanley* – keyword searches to identify privileged documents is risky and ill advised. As the Sedona Conference noted in its Commentary on Achieving Quality in the E-Discovery Process, a review for privilege "can require an even more nuanced legal analysis and, as such, can be a more expensive review per document than review for relevance or confidentiality." Incorporating processes such as creating a "potentially privileged" category of documents that receives a second level review can safely minimize the cost and burden of reviewing ESI for privilege. Finally, lawyers with experience in and knowledge of the e-discovery process must manage and supervise the e-discovery process. In other words, litigators need to understand e-discovery and be able to lead the collection and review of ESI.

Along with the use of keyword searching, many firms utilize contract attorneys to review large ESI collections in an effort to minimize further the cost and burden of responding to e-discovery requests. Nevertheless, parties get what they pay for when it comes to the supervision of contract attorneys. Without question,

contract attorneys require training on the substance of the case and the document review software, and must be closely supervised by lead counsel. In addition, quality controls must be implemented, including the review by more experienced, senior attorneys of large subsets of documents that were reviewed and coded by each contract attorney.

McDermott's use of contract attorneys also gave rise to an allegation in the complaint that McDermott unlawfully "marked up the fees and costs paid to contract attorneys and vendors" by not disclosing the markup. The ABA has opined that firms are required to disclose their use of contract attorneys to their clients only under limited circumstances, and has reasoned that except in those circumstances, the firm would not have to reveal to the client the fees paid to the contract attorney or the agency. Regardless of the merits of JME's claims regarding disclosure, transparency in e-discovery billing is crucial and can mitigate the risk of misunderstandings later.

Although the merits of JME's claims are unclear, the lawsuit serves as a reminder for e-discovery counsel of the importance of creating a defensible e-discovery process with the necessary quality controls to avoid the disclosure of privileged documents. If nothing else, the lawsuit may prompt counsel and parties to revisit *Victor Stanley* and consistently follow best practices in the retrieval and review of e-discovery.

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