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Taking Responsibility for the e-Discovery Process

Co-author: Christine Soares & Sophia Lee

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Christine Soares co-authored this article with Sophia Lee, chief counsel in litigation at Sunoco, Inc. and secretary of the Philadelphia Bar Association.

Your company has just been sued in federal court. In this age of electronic discovery, you know you will apportion a large majority of your litigation costs to discovery, with the bulk of the expense for e-discovery. You also know the process of gathering, recovering, reviewing and producing electronically stored information ("ESI") can be expensive, time-consuming and tedious. Your company may not have all of the resources in place to handle the task, and the job may even be too big for your outside counsel to handle in its entirety. It is no wonder, then, that when discussing pre-trial strategy with your litigation team, outsourcing the e-discovery process is a topic on the table.

Outsourcing, however, is not without risk. Often, IT consultants do not understand the law, the review team is not intimately involved in the case, and counsel lacks basic knowledge of information systems, affecting their ability to

manage the process. Combine all three risks into one case, and you have the makings of a perfect sanctions or legal malpractice storm.

The recent legal malpractice lawsuit filed by J-M Manufacturing Company, Inc. ("J-M Manufacturing") 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 highlights some of the risks inherent in outsourcing the e-discovery process. 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, and transferred the data to two thirdparty e-discovery vendors, Stratify, Inc. ("Stratify") and Navigant Consulting, Inc. ("Navigant").

- Navigant and Stratify ran search-term and privilege filters 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 nonresponsive and attorney-client privileged documents and asked McDermott to conduct a privilege review and resubmit the documents.

- Prior to the second production of documents, McDermott retained contract attorneys from Hudson Global Resources to perform the privilege review. The second production included 250,000 documents, 3,900 of which were later determined to be privileged.

- J-M Manufacturing was later informed that the document production including the privileged documents was subsequently produced to counsel for the whistleblowers, who refused to return the documents, arguing the attorney-client privilege had been waived.

While it is not the purpose of this article to comment on the merits of the case, the lawsuit serves as a sobering reminder that although outside counsel can delegate the tasks of e-discovery to both the client and third-party vendors, the overall responsibility for ediscovery cannot be delegated. The e-discovery process must be defensible at every step, both to the opposition and to the courts regardless of who actually handles the task. Below is a checklist of best practices for both in-house and outside counsel to consider, discuss and monitor throughout the litigation to ensure confidence in the client relationship and the e-discovery process.

Issue Litigation Hold Notice

The duty to preserve information for discovery is triggered whenevera party reasonably anticipates litigation. A litigation hold notice should issue to key custodians expected to have relevant information in their possession, custody or control. The language of the memorandum should be clear and understandable to non-legal personnel, explain the nature of the information to be preserved, and provide adequate instruction as to how the information should be preserved and collected. The notice should adequately explain the nature of the litigation to help the custodians determine what information needs to be preserved. To determine the efficacy of the notice, counsel may want to consider testing the notice on a small focus group for ambiguities or concerns. The obligations attendant to the litigation hold notice do not end at its issuance. Counsel should periodically review the notice as the litigation progresses and more details are learned about the dispute to determine whether any part of the notice needs to be modified or whether the list of key custodians needs to be amended. Counsel should also determine an appropriate time span for reissuance of the notice as a reminder to

the custodians of their continuing obligation to preserve while the litigation is pending. Once the litigation has resolved, a separate notice should be issued to the key custodians indicating the litigation and the duty to preserve have ended.

Identify Key Custodians

To determine the key custodians, counsel should interview employees and third parties who are familiar with the disputed issues to determine who may have discoverable information. The interviews should cover both the nature and location of the relevant information, as well as the substance of the litigation. The substantive understanding will help with development of the list of filtering terms (described below) and litigation strategy, such as determining whether certain information should be designated as confidential and/or privileged. The interview is an opportunity to remind the custodians of the negative inferences and impact on the company where there is spoliation or destruction of evidence, as well as to answer any questions or clarify issues posed by the custodians. Interviews should also be conducted to determine whether the universe of custodians has been captured in the distribution for the notice. Counsel should amend the litigation hold notice to include new custodians when they are discovered. The team should also track the list of custodians who have acknowledged receipt of the notice.

Understand Data Management Systems

It is not enough for counsel to give the client's IT personnel lists of search terms and custodians and direct them to collect the ESI. Understanding the client's data management systems is a critical component to a defensible e-discovery strategy and a responsibility that cannot be delegated. In fact, most mistakes involving the collection of ESI that result in discovery disputes and/ or sanctions occur because counsel fails at this best practice.

Counsel must, at a minimum, work with the client's IT personnel to understand the company's data retention architecture and where the ESI resides. If counsel

is not up to this task, counsel should work with another attorney (not an IT expert) who is competent to do it. Knowing where data, metadata, files, communications, e-mails, etc. are stored on a client's computer system is essential. One of the most effective ways to understand the client's information systems and processes is by creating and implementing a data map, which outlines, in detail, what information is available within an organization and where it resides. A data map also aids with understanding the purpose of the data, e.g., how the data are inputted and how the data are used or reported, which helps with making determinations about whether information should be designated as confidential and/or privileged. Counsel can create a data map at any time, even before the client is involved in litigation.

In addition, recognizing the interplay of the client's records retention policy with the data management system will help counsel with understanding the temporal parameters of the data. While the litigation hold notice supersedes the rules of the retention program in that destruction deadlines applicable to relevant information are suspended, understanding the parameters of the data management system may help to explain why data predating a certain time may be unavailable. Depending on the complexity of the data management system, counsel should consult IT personnel or an IT consultant to explain the functionality of a system. The IT expert should be available to testify if called upon.

Thereafter, counsel must actively monitor the collection, rather than completely delegate the collection of ESI to an IT expert and wait for the documents to arrive. If discovery misconduct is found, the court will sanction the party and its counsel, not the IT expert.

Agree Upon Filtering Terms

No one wants to review millions of documents, and reviewing large ESI collections leaves more room for error. Based on information gleaned from the custodian interviews, counsel should develop a list of filtering terms that will yield

relevant and responsive documents. The filtering terms should effectively narrow the number of documents that need to be reviewed and prepared. The filtering terms should be tested against a data sample to ensure a defensibly high yield of responsive information. As recommended by the Sedona Conference, quality assurance and iterative formulation are components to defending keyword search methodologies. Keyword searches should be repeated and tested. The results of the keywords should be evaluated, and errors should be identified. For example, a keyword that results in a high percentage of ESI may indicate the term is too broad or needs to be included with additional terms.

Counsel should consult opposing counsel on the filtering terms to avoid disputes about improper or incomplete searches. In the wake of the Sedona Conference Cooperation Proclamation, the federal courts have increased their scrutiny of filtering term disputes and are imposing an absolute duty of cooperation on parties in developing effective keyword search methodologies.

The courts have recognized the limits and challenges of relying solely on keyword searches to identify privileged documents. Accordingly, if counsel uses keyword searches to cull ESI for privileged documents, counsel must closely manage the process, consult heavily with e-discovery search and retrieval experts and apply significant quality controls.

Develop and Train on Document and Data Review Protocol

Developing a review protocol and training the review team is of paramount importance. Counsel should prepare a written review protocol based on the understanding gained from the client and custodian interviews regarding what data should be considered relevant, responsive and/or privileged. The review protocol should be as detailed as possible and approved by the client to ensure agreement on a going-forward basis during this phase of discovery.

Important to this step of the discovery process is for the litigation team to determine who is responsible for managing different levels of review, e.g., first-

level relevance, second- and third-levels for responsiveness and privilege, and for managing the privilege log. 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 secondlevel review can safely minimize them cost and burden of reviewing ESI for privilege. Whether it is done by outside counsel or in-house counsel, this process must be thorough and thoughtful to be defensible.

Whether the client, outside counsel or contract attorneys review the documents, lead counsel must supervise the review team at all times. The review team should receive abundant training and should have access to the supervising attorneys when questions arise. Daily meetings with the supervising attorneys and the review team are highly recommended, as they will bring potential issues to light.

Develop and Enforce Quality Controls

Once the review is complete and the quality of the labels checked and assured, the production of responsive and non-privileged documents and data to opposing counsel begins. Without proper controls, opposing counsel stands a good chance of arguing for waiver of privilege when privileged documents are inadvertently disclosed. To avoid these arguments, the litigation team should develop and enforce the quality controls discussed above, such as frequently sampling the accuracy of data labels and closely monitoring the accuracy rate according to individual members of the review team. Depending on the volume of data to be reviewed and the time required for adequate review, the litigation team may consider hosting refresher trainings for the review team.

Conclusion

Almost five years have passed since the federal e-discovery rules were enacted. Although ESI has played a predominant role in pretrial discovery, attorneys continue to make serious mistakes in the collection and production of ESI. The courts have handed down hundreds of sanction awards, and the number increases every year. However, collecting and producing ESI can be simple and seamless when it is properly managed by counsel and best practices are followed. Counsel can avoid and effectively defend against sanctions and legal malpractice lawsuits by following such best practices and taking responsibilityfor the e-discovery process.