CLIENT SELF-COLLECTION IS RISKY BUSINESS

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On July 2, 2020, United States District Judge William Matthewman entered an Order in *Equal Employment Opportunity Commission v. M1 5100 Corp d/b/a Jumbo Supermarket, Inc. Case No. 19-cv-81320*. The Order explains the reasons why attorneys should not allow clients to self-collect potentially relevant electronically stored information ("ESI"). Point II of the Order is appropriately titled "*The Perils of Self-Collection Of ESI By A Party Or Interested Person Without The Proper Supervision, Knowledge Or Assistance Of Its Counsel*". Judge Matthewman went beyond what was required for his ruling to explain why allowing a client to self-collect is not only potentially damaging to the client's case, it can also result in sanctions against the attorney and his client and ethical violations by the attorney. In particular, the Order addresses the obligations of attorneys to their client and the Court to have the requisite skill and experience to properly direct and supervise the collection and preservation of potentially relevant ESI.

Judge Matthewman was greatly troubled by the failure of counsel to know what specific search efforts the client made to collect potentially relevant ESI; to supervise the client's ESI collection efforts; and, in particular, the fact that the two individuals that searched for responsive documents were self-interested employees in the age discrimination case.

The Order first addresses the law regarding an attorneys obligations relating to discovery responses.

> "The relevant rules and case law establish that an attorney has a duty and obligation to have knowledge of, supervise, or counsel the client's discovery search, collection, and production. It is clear to the Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to "self-collect" discovery without any attorney advice, supervision, or knowledge of the process utilized. There is simply no responsible way that an attorney can effectively make the representations required under Rule 26(g)(1) and yet have no involvement in, or close knowledge of, the party's search, collection and production of discovery."

An attorney's signature on a discovery response is not "a mere formality", it is a representation to the Court that the discovery response and production is complete. An attorney cannot properly make that representation without having been involved in the collection and preservation process. To meet his or her obligations, an attorney should meet as soon as possible with the client and the client's IT person or someone with knowledge of the client's system architecture to map where the potentially responsive data is located, including all devices and other repositories. Once the location of all potentially relevant data is determined, the attorney must guide and oversee the collection and preservation process—typically with the assistance of outside vendors. The need for a forensically sound collection process cannot be overstated.

The case law is clear that self-collection of ESI by a client raises a real risk that data could be destroyed (including metadata in the collection process) or otherwise corrupted. No one needs to be reminded that the past ten years have shown how easily the substantive issues can be overwhelmed by the "discovery on discovery", leading to not only increased costs but, in some instances sanctions, including adverse inferences or case dispositive rulings.

Even when attorneys retain outside eDiscovery vendors to assist in the collection and preservation of ESI, a best practice in most cases, the attorney must have the requisite knowledge to oversee the vendor's collection and preservation efforts. An attorney cannot delegate to the vendor the attorney's ethical obligations of competency and confidentiality. And, the vendor is guided by the attorney and the completeness of the collection, preservation and production falls on the attorney.

A simple way to avoid many of the above problems is to work with opposing counsel at the outset of the litigation. Early and continued cooperation through meet and confer conferences allows the parties to attempt to agree on the relevant ESI sources, custodians, time limitations, whether search terms or predictive coding or some combination will be used, and, hopefully, to agree on an ESI Protocol to assist both the parties and the Court.

Rob Wilkins is Co-Chair of the E-Discovery Subcommittee and the Data Breach & Internet Subcommittee of the ABA Section of Litigation's Commercial and Business Litigation Committee. He is an active member of The Sedona Conference Working Group 1, Electronic Document Retention and Production, and Working Group 11, Data Security and Privacy Liability