Memorandum

To: William Crackle
From: General Counsel, Snap Crackle & Pop LLP
Date: February 22, 2013
Re: Mork Investigation: document production issues

Questions Presented

1. Malpractice liability. Our firm outsourced discovery duties in the government’s False Claims Act investigation of a major client, Mork. We inadvertently produced thousands of privileged documents containing sensitive information on Mork’s drug development, sales, and marketing. Do we have any malpractice liability to Mork?

   Short answer: Probably not. Malpractice liability would turn on whether we took reasonable care to prevent inadvertent disclosures. Comparing our precautions to those deemed reasonable in analogous cases, it seems that we exercised due care.

2. Contacting Mork. Should we tell Mork anything about our mistake? If so, what?

   Short answer: Yes. Ethical considerations require that we disclose the error. We also should consult Mork about updating the production set and filing a protective order concerning the inadvertent disclosures.

3. Managing future risks. How should we manage further rounds of document review?

   Short answer: Before undertaking further rounds of discovery, we should mitigate risks by improving supervision and vetting of vendors, better describing to our clients how we use vendors, more thoroughly documenting vendors’ work, and ensuring that our use of vendors fits within our existing professional liability insurance coverage.
1. Malpractice liability

Courts typically frame legal malpractice claims in terms of professional negligence. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8:13 (2013). This claim has three elements: (1) a basis for imposing a duty of professional care, (2) a lawyer’s failure to perform both reasonably and prudently, and (3) proximate harm to the plaintiff. *Id.* Malpractice liability to Mork will turn on whether we took reasonable care to prevent inadvertent disclosures. Analogous caselaw suggests that we did.

1.1. Basis for Duty

The attorney–client relationship gives rise to a duty of professional care that a contract may either limit or expand. Dan B. Dobbs, *The Law of Torts* § 718 (2012). Since we routinely outsource large discovery matters, it seems doubtful that we would have agreed to an expanded duty of care. We also took care to avoid making specific promises to Mork’s general counsel when informing him that we would work with a third-party discovery vendor. Thus, a court would likely hold us only to the professional standard.

1.2. Performance of Duty

The professional duty of care requires an attorney to “exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.” Mallen & Smith, *supra*, § 20:2. To date, there has been only one reported malpractice claim regarding a law firm’s use of vendors—and it has not yet reached trial. Pleadings, *J–M Mfg. Co., Inc. v. McDermott, Will & Emery*, No. BC 462832 (Cal. Super. Ct.). Thus, courts considering early vendor-related malpractice claims will likely flesh out the professional standard of care by looking to recent opinions dealing with clawback, a process that
enables parties to preserve privilege of inadvertently produced documents. To take advantage of clawback, a disclosing party must prove three points regarding the documents at issue:

(1) that it inadvertently disclosed them;

(2) that it took reasonable steps to prevent their disclosure; and

(3) that it took prompt, reasonable steps to recall them upon learning of their disclosure.

Fed. R. Evid. 502(b).

There are two reasons why clawback caselaw would matter in a malpractice suit over our botched production. First, recent clawback disputes often deal with both voluminous e-discovery and an objective standard of care (“reasonableness”)—as would a court’s determination of our professional duty of care in Mork’s discovery matter. Second, the injury most likely to result from the Mork production would itself stem from waived privilege of the inadvertently produced material. Thus, we could obviate two elements (breach and injury) of Mork’s potential malpractice claim by showing that our handling of the botched production favorably compares to attorney conduct that courts have deemed reasonable in clawback disputes that took place under similar circumstances.

Looking to reasonableness, a court will consider factors like error rate, deadlines, and complexity of a production—but no single factor is determinative. See Fed. R. Evid. 502 advisory committee’s note. Production methodology may also factor into reasonableness. Merenda v. Detroit Med. Ctr., 2009 WL 454670 (E.D. Mich. 2009). See also United States v. TRW, Inc., 204 F.R.D. 170, 179 (C.D. Cal. 2001) (lauding a disclosing party’s two-layer system of pre-production review, despite its use of ministerial decisions

So far, we remain on track to meet our professional duty of care to Mork. It turns not on perfection, but on the reasonableness and diligence of our efforts on Mork’s behalf. Working under a tight deadline, we meticulously gathered—from nearly two hundred custodians—well over one million documents. We hired not one, but two e-discovery vendors to screen those documents. Compare our exercise of care to that in the aforementioned cases. Our circumstances seem as complex as those in Palladium and Kandel. Our document collection seems more thorough than that in Kilopass. Our two-layer screening method matches that which received praise in TRW.

Furthermore, courts seem cognizant of challenges posed by the digital age. See Heriot v. Byrne, 257 F.R.D. 645, 660 (N.D. Ill. 2009) (allowing clawback from a production with a 13.1% error rate and noting that the vendor alone erred, while the client and its attorney acted reasonably). See also Kilopass at 3 ("[T]his is not a case where only the third-party vendor made a mistake."). Use of e-discovery vendors may also indicate complexity, a view that perhaps led the Heriot court to flatly reject the notion that a
disclosing party must follow up on its vendor’s work: “[I]mposing on disclosing parties a
duty to re-review would chill the use of e-vendors, which parties commonly employ to
comply with onerous electronic discovery. Against this grain the Court cannot cut.”

Heriot at 660.

Heriot, and the dearth of caselaw to the contrary, suggest that our failure to re-
screen documents received from Global and Brooklyn will not doom us. While one of our
reviewing teams operates out of Reviewistan, its staff consists solely of attorneys and
specially trained non-lawyers—and we require them to attend a weeklong seminar on New
Oz law. Our nearly flawless track-record in outsourcing demonstrates respect for both our
clients and the courts.

1.3. Injury

Malpractice injury comes in several forms, including (a) loss of a right, remedy, or
interest or (b) imposition of liability. Mallen, supra, § 21:1. It may even include prejudicing
of the client’s defense in a lawsuit brought against him by a third party. Outboard Marine
Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730 (7th Cir. 1976). Still, to prove an injury, the
client must show (1) that he would have avoided the injury, but for the attorney’s conduct,
and (2) that his injury fell within the scope of foreseeable risks created by the allegedly

Since we can probably claw back the inadvertently produced documents, it seems
unlikely that Mork will suffer an injury from our error. But if clawback fails, potential
injuries include: loss of Mork’s underlying False Claims Act case; legal costs of the failed
clawback attempt; economic harm related to dissemination of the waived information
(e.g., competitive harm or embarrassment); and loss of the recently filed suit against a
private party seeking production of the inadvertently disclosed documents. Injuries relating to litigation, however, would remain unclear pending the outcome of each underlying case.

2. Contacting Mork

Our ethical obligations require us to disclose our error to Mork. We should also consult with Mork about updating the production set and filing a protective order to guard privilege on the inadvertently disclosed documents.

2.1. Disclosing the Error

Rules of professional conduct require attorneys to keep clients informed on the status of their case. Model Rules of Prof’l Conduct R. 1.4 (2012). This applies, at least, to “significant developments affecting the timing or the substance of the representation.” Id. at cmt. 4. These include any material errors in representing the client. See In re Hasty, 227 P.3d 967, 974 (Kan. 2010) (finding misconduct where an attorney failed to disclose discovery errors to his client). See also Model Rules of Prof’l Conduct R. 1.4 at cmt. 7 (“A lawyer may not withhold information to serve [his] own interest or convenience . . . .”).

The newly increased scope of our representation (which now encompasses both a clawback attempt and an updated production effort) and the delay caused by our production error thus require that we disclose it to Mork. And since Mork warned us about sensitive information at the outset of discovery, our error likely counts as a “significant development” from Mork’s perspective.

Practically speaking, our error may rile Mork. We may soften its blow, however, by explaining to Mork that we have never before experienced problems with outsourced

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discovery. In fact, the practice has enabled us to meet astounding deadlines for our clients while saving them millions of dollars—without garnering a single complaint.

2.2. Curing the Error

To claw back the inadvertently disclosed documents, we must quickly and reasonably act to preserve privilege. Fed. R. Evid. 502(b). In some cases, the disclosing party can meet this obligation simply by complying with Fed. R. Civ. P. 26(b)(5)(B), which allows it to notify the recipient via a detailed writing that identifies the information at issue and sets out a basis for the alleged privilege. See Williams v. District of Columbia, 806 F. Supp. 2d 44, 52 (D.D.C. 2011); Palladium at 851. Upon receiving notice, the receiving party must return, sequester, or destroy that information and cannot use it until the claim gets resolved. Fed. R. Civ. P. 26(b)(5)(B). But see Model Rules of Prof’l Conduct R. 4.4(b) (2012) (requiring recipients who recognize an inadvertent disclosure to promptly notify the sender).

If the receiving party does not respond within a reasonable time, the producing party should take further steps to guard privilege. See Williams at 52. The court may grant a request for a retroactive protective order concerning the inadvertently disclosed information. See, e.g., Pearce v. Coulee City, No. 11–CV–0030–TOR, slip op. at 3 (E.D. Wash. Aug. 24, 2012). Any such request may require the attorney to consult with his client. See In re Hasty at 974 (Kan. 2010) (finding misconduct where an attorney failed to consult his client about filing a remedial motion regarding a missed discovery deadline); Model Rules of Prof’l Conduct R. 1.4 cmt. 5 (noting that the consultation should include an explanation of general strategy, prospects of success, and any risk of significant expenses).
Here, the government noticed the inadvertent disclosure in its initial review of Mork’s production, and it immediately told us of the error, obviating our requirement to notify it. As an added precaution, though, we should consult with Mork about requesting a protective order that could prevent the government from sharing inadvertently produced documents with either the False Claims Act relator (if any) or the private party who has recently filed a separate suit.

If Mork takes steps toward a malpractice suit, we should explain to it how we met our duty of professional care, using the examples cited above. We might also explain that bringing a malpractice action before resolution of the clawback issue could hurt Mork’s efforts to prevent a finding of waiver in the underlying case, as it cuts against the reasonableness finding needed to claw back inadvertently disclosed documents. Finally, we might point out that the law would permit us to disclose other privileged documents to defend our firm in a malpractice action. Model Rules of Prof’l Conduct R. 1.6(b)(5) (2012).

3. Managing Future Risks

While our existing precautions for outsourcing seem reasonable, the rapid expansion of e-discovery will drive a continually evolving duty of professional care. To ensure our ongoing compliance with that standard, we should revisit our approach to outsourcing. Important topics include mastering search filters, obtaining client consent, screening vendors, billing for vendors’ services, supervising vendors, and insurance coverage.

3.1. In the Mork Matter
Future production errors in the Mork matter pose a twofold threat. First, they would cut against the reasonableness of our efforts to protect Mork’s privileged information—likely precluding additional clawback attempts. Second, they would provide evidence of incompetence, as our ethical obligations require us to keep abreast of “benefits and risks associated with relevant technology.” Model Rules of Prof’l Conduct R. 1.1 cmt. 8 (2012). Thus, another production error might greatly increase our chances of facing and losing a malpractice suit. See Fishman v. Brooks, 396 Mass. 643, 649 (Mass. 1986) (“[A] violation of [a disciplinary] rule may be some evidence of the attorney’s negligence.”).

After dealing with the clawback issue, we should plot the course for further discovery in the Mork matter. To begin, we should refine our electronic search—we can likely cut down on production errors by sampling the results of reframed search requests and adjusting our search parameters. We should also avoid giving a vendor’s foreign-educated attorney sole responsibility for this critical task; we could either complete it in-house (with assistance from counsel at Mork) or consider hiring a more experienced vendor.

We should also seek informed consent from Mork before sharing its confidential information with any new vendor. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 451 (2009) (prohibiting lawyers from outsourcing a client’s confidential information absent informed consent adhering with Model Rules of Prof’l Conduct R. 1.6). Although a nonspecific manner of obtaining consent may suffice (since Mork is a sophisticated consumer with its own legal team), we can reduce potential for liability by sitting down with Mork’s General Counsel to discuss the advantages and disadvantages of seeking a new vendor. See Id. at R. 1.0 cmt. 6 (2012). Moreover, we should screen
prospective vendors to ensure professionalism on par with our own obligations, particularly those regarding confidentiality. *Id.* at R. 5.3 cmt. 3 (2012). We do not have to share vendors’ pricing structure with Mork, but we should ensure that our billing remains reasonable. *Id.* at R. 1.5 (2012). This means that bills for the outsourced work should thus reflect the time constraints, locality, and expertise of the vendors’ attorneys rather than our own. *Id.*

Finally, upon further production, we should remind opposing counsel of its duty to notify us of further inadvertently produced documents. *Id.* at R. 4.4(b).

3.2. Beyond Mork

Moving forward, we must implement defensible practices for managing risks associated with our use of vendors. Through five steps, we can drastically reduce our exposure to malpractice liability.

First, we ought to establish a solid governance structure for supervising outsourced discovery. *See* Model Rules of Prof’l Conduct R. 5.3, cmt. 3 (authorizing outsourcing to nonlawyers and providing factors to consider when selecting them). Second, we should adopt a best practice for vetting the security of potential vendors’ electronic and physical architecture, as well as the legal and ethical environments of the jurisdictions in which they practice. *See* ABA Formal Op. 451. Third, we should carefully document our use of vendors and the work that they perform for us. Fourth, we should ensure that our contracts with our clients (a) offer a detailed description of how we use vendors; (b) obtain written consent for our outsourcing; and (c) seek to limit our liability concerning use of discovery vendors.
Fifth—and perhaps most importantly—we should adapt our practices based on how our professional liability insurance policy would treat our use of vendors. See generally Michael Bell, *The Emergence of Legal Vendor Risk*, in *Emerging Issues* 6175, (Matthew Bender & Co., 2012). Many vendors, due to their small size and lack of assets, probably maintain inadequate insurance coverage to compensate for the multimillion-dollar liability that they may create. Unfortunately, however, no insurer could adequately compensate us for the potential loss of goodwill and reputation that we might suffer through a malpractice battle.

**Conclusion**

In sum, we have a good chance of avoiding malpractice liability to Mork, assuming that we take reasonable steps to rectify the inadvertent disclosure. We must, however, disclose our error to Mork and discuss with it how to move forward. And before outsourcing further discovery matters, we should take steps to shield our firm from potential malpractice liability.