Expert E-Discovery For M&A Second Requests

*The Editor interviews **Kathryn McCarthy**, Senior Managing Director, FTI Consulting, Inc. She is a noted expert in second request antitrust investigations and e-discovery process, and she regularly advises on matters that involve international data privacy issues. The Editor invited Ms. McCarthy to talk about second requests and the unique e-discovery process that accompanies them.*

Editor: Welcome, Kathryn. Please start our discussion by telling us how many second requests you have worked on.

McCarthy: In my 17 years of practicing law, I have worked on over 40 second requests – seven during a single year – in connection with the Hart-Scott-Rodino Antitrust Improvements Act (HSR). This work involved antitrust regulatory work stemming from M&A transactions in a number of industries, such as software, pharmaceuticals, consumer products and heavy equipment, and my experience has encompassed both volume and variety.

To put this in perspective, the Department of Justice and the Federal Trade Commission publicly reported 225 second requests between 2008 and the end of 2012. Because of this, I feel confident in saying I've worked on a healthy percentage of second requests and can provide a considerable amount of expertise to clients in this process.

Editor: Is this depth of experience unique within the industry?

McCarthy: I believe so, because prior to joining FTI, I was the e-discovery expert for second requests across my law firm. While other attorneys at the firm were staffed on one or two second requests per year, my expertise was called upon for *every* second request the firm handled. As a result, I worked on many more second requests than an average attorney might handle and enjoyed very broad exposure to this work.

Editor: Can you mention a second request project that was particularly challenging?

McCarthy: One project that stands out was a second request for an Asian company. It was uniquely challenging because of translation issues as well as data privacy concerns. We worked with the government agency to negotiate modifications to the subpoena in order to avoid having to translate each and every document; however, even after receiving substantial modifications, we still had eighty thousand documents to review and translate in four months' time.

We weren't allowed to use machine translation, so we had to use human translators, which involved setting up a workflow where translators all around the world worked 24 hours a day to meet the deadline. At the same time, the company had offices in Europe, and there were privacy concerns about data collected from the European custodians, so this data couldn't simply be transported into the United States. Thus, we were dealing with issues on both fronts – the translation piece and the data privacy issues – and we had a very tight deadline to meet. By working with a team of Japanese- and English-speaking attorneys in both Japan and the United States as well as tracking the translation review in real time to monitor productivity, we managed to complete the project in an expedited time frame, and we were successful in getting clearance from the agency for that second request.

Kathryn McCarthy

Editor: What makes the second request discovery process unique?

McCarthy: Second requests involve a different discovery process than occurs during a typical litigation. As part of the merger process, a company must file an HSR form, which details potential competitive overlaps, and thirty days after the HSR filing, the government either allows the transaction to close or it presents the company with a second request for information. The second request is an extremely broad subpoena, not just for documents but also for data.

The company decides when to respond to a second request, but most want to act very quickly. The longer you wait, the longer it will take to get a decision as to whether the merger can go forward, and in most situations, companies are feeling pressure from the board of directors, management and stockholders – all of whom are anxious for resolution.

So while the company is motivated to set a short time frame, it is also dealing with a broad subpoena and therefore must allow for enough time to collect, process and produce the documents. This combination of factors is a distinctive aspect of discovery in the context of second requests versus litigation.

Editor: In sending information to the government, how do you address concerns regarding confidentiality and privilege?

McCarthy: I find that companies are always surprised by the breadth of the subpoena and what they have to turn over to the government. To deal with privacy concerns, attorneys usually mark every document as highly confidential and then remind the government that the documents are exempt from FOIA, which means that the government has to alert the company before it uses the documents in a public manner.

Keep in mind that once the investigation is over, you can ask the government to return all your data – actually have original media returned – or you can request a written affirmation that all company data was eliminated from the government's systems. Truthfully, once an investigation is over, people are so happy to have completed the process that they often forget this important follow-up step to address privacy and confidentiality concerns.

Edition: What are some important points about managing privacy issues in the international arena? In which countries do you have experience collecting data?

McCarthy: Most of my privacy work has been focused in Europe, with much of that in the UK, Germany and Switzerland, and I've also worked in China, Japan and Australia. My first observation is that as many companies become multinational, there are a growing number of countries in which data might need to be collected. And as more companies are forced to collect data from around the globe, there's a better understanding that the privacy laws can complicate responding to document requests and, in some cases, might prohibit a party from responding at all.

Some countries, such as those in Europe, have well-established and stringent privacy laws, while other countries don't have major concerns in this area. So another important point is this: never assume, based on having already worked in a particular country, that your prior methods are still valid. You always have to check whether the privacy laws have changed, because these laws are in flux globally as countries become more concerned with their citizens' private information.

Editor: What is the biggest mistake that lawyers make in handling e-discovery for second requests?

McCarthy: The biggest mistake is to underestimate the importance of documenting the discovery process. When I was working on second requests as a law firm attorney, I counted on companies like FTI Consulting to handle that aspect, among others. Let me explain. As you interview custodians for the purpose of finding documents that are responsive to a government subpoena, it's important to keep track of what's collected from each custodian and of the reasoning behind including or excluding certain documents. This way, if questions subsequently come up, you can answer them with confidence.

And that mistake could be augmented if there is follow-on litigation. You've already collected and then tagged all the documents for privilege and responsiveness in connection with the second request process, so naturally you want that same production to suffice for the litigation discovery. But that won't work if you can't adequately describe the variables from your original process, for instance what date restrictions or search terms you applied. Not having a good handle on this prior work creates inefficiencies, and that mistake could prove to be very costly.

Editor: You recently joined FTI Technology from Simpson Thacher. How does this experience translate to your new role, and what makes FTI unique?

McCarthy: At Simpson, I held the position of counsel and for more than 10 years focused largely on antitrust regulatory matters, antitrust litigation and other investigations, with occasional focus on FTC or FCPA investigations. During those years, I worked with FTI as a client and also was acquainted with other providers, so I could really see what each provider did very well and maybe not so well. Above all the others, FTI was my trusted advisor. I could always reach out to FTI with one-off questions or just to bounce ideas around, so it was a nice relationship.

Now that I am with FTI, I get to see things from a different and more targeted perspective. As an attorney, discovery is only one piece of the litigation puzzle, which also includes briefs, motions and court appearances, whereas at FTI, e-discovery is our business, so I am surrounded by people who are very forward thinking. It's great to be in a place where everyone is focused on the same goals, which for us are servicing our clients and planning for their anticipated needs going into the future.

FTI is unique in being a cutting-edge provider that brings together people from various backgrounds, such as in my case with a legal background and current focus on learning about the technology side. I'm excited to be working with a variety of law firms and also directly with corporations, and I look forward to becoming the same kind of trusted advisor to them that FTI was to me as a client.

Editor: And I imagine your expertise in M&A second requests will be an asset for FTI going forward. Can you comment in this?

McCarthy: FTI has a long history of helping firms respond to second requests, and my experience will build on that excellence and allow that product offering to expand. As an attorney tasked with selecting an e-discovery consultant for a second request, my biggest concern was to select a provider with specific experience in this area. So I am very excited in my new role to work with the people who helped me as a client and to really build on FTI's already strong history.

Editor: What is the biggest surprise in your transition from a law firm to legal service provider?

McCarthy: The biggest surprise is learning what goes on behind the scenes, notably on the technology side. The large team that works on this side is not client-facing, so I never appreciated just how much work and communication were involved for a technology team in order to ensure that all parts of a project, including those the client can see, are handled in an efficient, accurate and seamless manner. In short, it's a real eye-opener to see what happens on the other side of a client call.

Editor: Are there any closing remarks you'd like to bring to our readers?

McCarthy: One interesting aspect of my transition from a law firm is that I will no longer be practicing law, which means I will have to resist the urge to provide legal opinions. That said, what I can bring to the table in my role at FTI is the benefit of all that legal experience to provide a knowledgeable point of view and fresh ideas to the attorney who is working on a particular matter. I look forward to becoming this kind of trusted advisor in my new role at FTI.

Please email the interviewee at kathryn.mccarthy@fticonsulting.com with questions about this interview.