eDiscovery Workflows Part II

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This is the second post in a three-part series dedicated to discussing considerations at each stage of the eDiscovery process. Today's post focuses on identifying and interviewing custodians.

Because it is critical to assess the nature and extent of a client's electronically stored information (ESI), attorneys must identify ESI custodians[1] and find out what information the individual possesses regarding the legal matter. This is often accomplished through custodian interviews or questionnaires. Although there are more ways than one to achieve this goal, often the interviews or questionnaires explore the "who," "what," "when," "where," and "how" of the matter.[2] Interviews are conducted because it is helpful to secure a narrative about who did what, when, and why, preferably in chronological order. The chronology is to help evaluate potential witnesses and the strength of your client's case. When done properly and thoroughly, custodian interviews can, among other things, provide information necessary to negotiate the reasonable scope of discovery in the matter.

Interview Process

Starting with "who," it is important to think of this as a two-part inquiry. In the first instance, we seek to identify the likely ESI custodians, their roles, and who should be interviewed. But then, in each interview, there is a second part – "Who else" Each custodian should also be asked about others who are likely in possession of ESI and documents relevant to the legal matter as well as anyone else with knowledge about the matter. Once custodians are identified, the goal is to understand "what" the custodian knows about the legal matter and what documents and ESI they possess.

The question of "when" involves two separate issues. First, when should the interviews be conducted? In general, it is better to interview custodians earlier than later. The reason being it is important to have a workable understanding of your client's ESI (and the custodians) before engaging in discovery conferences like those required under Federal Rule 26(f). There is also a "when" inquiry that should be directed to the custodians: when is the relevant time frame for the legal dispute? Knowing relevant date ranges helps control eDiscovery costs and promotes efficiency because one can limit data collected, processed and reviewed to that during the relevant time frame. For example, if the contract that is the subject of the lawsuit was negotiated, executed, and breached in 2022, then there is likely no need to preserve, collect, process, or review information prior to September 2021.[3]

One of the most important questions to ask ESI custodians is where they keep relevant information and documents. For example, what electronic devices do they use? Laptops? Desktops? Smartphones? Do they use personal accounts or devices for work related activities? Do they use cloud storage or is the information stored locally or on a server? Is any device that contains relevant information sync'd? And if so, to where is that device sync'd? Are there applications a custodian may be using that you haven't considered? Have you, for example, identified and discussed the many social media platforms that a custodian may use? But don't forget about platforms used to discuss work projects.

Understanding where data is located is more than half the battle![4]

Finally, it is important to understand how custodians save and store information. Do they delete items regularly or on a schedule? Do they archive or back-up information, and if so, how? Do they use removable storage devices? Understanding this information will help the attorney get ahead of issues involving information that may have been deleted, additional repositories/sources of potentially responsive information, and negotiate a scope of discovery.

In addition to the who, what, when, where, and how, a custodian interview should include questions specific to the case including, for example, code words, acronyms, and abbreviations that were used on the project and nicknames for relevant projects and people. Identifying the key words, names, and dates will help cull potentially responsive "wheat" from the ESI "chaff." They will help save hours and thousands of dollars of review.

One final consideration is to document the process. Documentation is both a sword and shield in this regard. It should allow you to negotiate a reasonable scope of discovery while demonstrating what you included or excluded in preservation and collection was reasonable.[5]

Conclusion

A properly conducted custodian interview can be invaluable. Indeed, they can arm attorneys with critical information about the case, help identify potential witnesses, locate relevant ESI, prepare an attorney for discovery conferences, and offer the ability to negotiate a proportional scope of ESI.

SEE PART I eDiscovery Workflows

[1] The Electronic Discovery Reference Model (EDRM) defines a custodian as a "(p)erson having administrative control of a document or electronic file; for example, the data custodian of an email is the owner of the mailbox which contains the message."

[2] Notwithstanding advanced technologies available, a good client interview may provide the best advantage in saving money and managing the risks of eDiscovery. Besides getting a good idea about the facts of your case and the value of potential witnesses, a good client interview helps to achieve a cost-effective review and a defensible, proportionate discovery response.

[3] September 2021 – a few months prior to the purported start of negotiation was drafted only to provide a small cushion of time, in the event negotiations began sooner than recalled. However, depending on the information gleaned during custodian interviews, Jan. 1, 2022, may be a defensible cutoff date. Likewise, if interviews reflect that prior contracts or agreements are relevant to the agreement at issue in the action, it may be necessary to recalibrate and preserve earlier records that bear on the terms of the contract at issue.

[4] If your client has an IT department, it is important to interview IT and understand the applications and policies being leveraged by employees. It's crucial to take time to confirm with the custodians that various IT policies are being followed—and if they're not, where any additional information could be located. For example, IT may say that clients aren't supposed to store email on their desktops and that it's all stored in the email server or archive system. If that isn't true, and if custodian desktops are overlooked, important responsive data could be missed.

[5] For example, 9 out of 10 custodians identify a single location on the shared drive as the location where project materials were saved. With some verification efforts, you can use those interview results to avoid collecting additional repositories of likely non-responsive data. Your interview documentation helps to support as reasonable your collection decisions.

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