

Fear and Loathing in Evidence Preservation

Smoothing data collection concerns

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Most in-house counsel know the types of inquiries that should trigger evidence preservation or collection protocols. Once there is reason to believe there will be litigation or investigation, the duty to preserve kicks in immediately. But what's next? First, make a list of people who are likely to have control over potentially evidentiary documents and contact this long list of custodians. Then send out a document retention letter or request for documents and wait for your data to roll in, right? Wrong. Before sending any communication to your custodians, you should consider that they are not attorneys and are usually uncomfortable with the entire litigation process. Considering and having ready answers for the following 10 questions -- which your custodians are sure to voice -- will help to make your collection efficient and cost effective. It will avoid business interruptions and settle the fear and anxiety your custodian may be feeling. Being organized about these answers will inspire confidence and cooperation from your custodians and will be sure to make your job easier.

What Are the Issues Being Litigated and What Is Your Role in Their Resolution?

Attorneys deal with litigation matters every day so they tend to become commonplace. However, your custodian most likely has a very different role and is unfamiliar with discovery and the litigation timeline. When you approach a custodian, he or she will feel like he/she is under investigation. Collecting e-mail from a custodian puts her under examination. Litigation can be a frightening experience for people unused to it, so be patient and explain the case. Explain what you need from your custodian after he provides his documents. Let him know if he will be deposed, if they will need to testify or if they will need to sign an affidavit. Ease such fears up front for a smoother document collection process.

Have You Notified Your Supervisor and In-House Counsel?

Custodians want to be sure their supervisors and in-house counsel have been notified about any document collection or pending litigation, especially if the notice comes from a third-party vendor. They have a full-time job that doesn't include your document demands so they will need a supervisor to prioritize their tasks and workload. In-house counsel should be cc'd on at least the initial communication to ensure that everyone has the same information. In-house counsel may also want to review any documents that are being forwarded.

What About Chain of Custody?

Collecting data should be a heavily documented process, i.e., mapping the chain of custody through every step. Custodians may be giving you original documents or documents under protective order. Tracking and carefully documenting the movement of these documents ensures you the trust of your custodian. Expect occasional custodians who swear they never gave you that folder, that box, or that CD -- even though they've signed the Chain of Custody Form. So, it helps to be able to whip out that form and remind them of exactly what was given out.

Chain of custody is defined as the movement and location of real evidence from the time it is obtained to the time it is presented in court. The data you are collecting, especially the electronic evidence, is both fragile and malleable. Courts must authenticate evidence before it can be presented so your responsibility is to make that easy. Having affidavits and forms prepared that capture each custodian's name, title, contact information and exactly what they are handing you will help you with admissibility in the future. The Chain of Custody Form should capture the media type you have collected, file names and counts, how it was sent and

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any other relevant inventory information. The form can also be a convenient place to document any special concerns about the data such as classification status, Privacy Act information, or business confidential. Once received, the data should be labeled by time, date and source. It should be stored in a secure place with limited access. Every person who touches the data should be documented.

Should You Provide Only Documents You View As Relevant?

Custodians are going to have many questions about the extent of material needed. They are going to see e-mails that they don't think are relevant. As the attorney, you need to consider exactly what you want the custodian to provide.

Both under- and over-collection have concerns. Over-collection may be more costly up front and take more time. There is also the additional cost of processing large amounts of data, removing duplicates, legal review and production. However, you can be assured that you have collected the entire universe of relevant documents plus extraneous nonrelevant documents. Under-collection can be a concern if your case changes and key witnesses suddenly surface or new issues arise. Before you ask your custodians to produce their data, think about the issues in your case. Are new issues likely to arise? Are the issues so complicated your custodian may not understand that a seemingly innocuous e-mail is actually very important? If so, then take the time to educate your custodians. If that is not possible and you are afraid something will slip through the cracks, then collecting the entire universe of documents is advisable.

What About Duplicates?

Custodians looking to be helpful will offer to "de-duplicate" your collection. This can be time consuming and potentially dangerous if the custodian erases too much. Defining a duplicate is difficult and should only be done by the primary attorney on the case. A suggestion here would be to again think about the issues in your case. Does your case rely on issues of who-knew-what-when? Do you need to have all copies of an e-mail to prove that multiple people saw it? Also, don't forget that electronic documents can be de-duplicated automatically if you are processing and loading to an online repository.

What About the Non-Disclosure Agreement?

Non-disclosure or confidentiality agreements protect the secrets parties need to share with each other but don't want known to the general public. Before any documents can be collected, custodians should clear the NDA with their in-house counsel or supervisor.

What Format Should Be Used?

Transferring data, especially electronic e-mails and files, can be complicated and confusing to a non-technical attorney and custodian so it is essential that these issues be considered for a smooth collection.

For a clean chain of custody and authentication, the presenting attorney must be able to show several key factors. First, the attorney must show the court that no information was added or changed during the transfer process. Second, the attorney must show that a complete copy of the data was made and that a reliable copying process was used. Finally, the copy process must meet industry standards for quality and reliability and be capable of independent analysis.

Electronic files should be transferred on a write-proof CD, DVD or hard drive. E-mails should only be transferred in a PST. They should never be forwarded to the document collector. Mailing CDs or DVDs requires careful packaging so that your media won't be subject to the heat or rough handling. When shipping the media, make sure to include a copy of the chain of custody form and keep a copy of the shipping label in case the package gets lost. Make sure your custodians don't write on the media -- using a pen on a CD can render the CD unreadable. Often, data requires passwords so make sure your custodians provide these.

Who Is Asking for Data?

Third-party vendors can be a very effective way of collecting data. They will most likely be experienced in data collection, thorough, save the attorney time and allow her to concentrate on other matters. Third-party vendors can be especially helpful if there are a large number of people and places you are collecting from. Another great advantage is your third-party vendor can act as an expert witness for the court, testifying on how collection was done, its thoroughness and relevant documentation. These advantages should be weighed

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against the cons of both cost and less control by the primary attorney. Also, the primary attorney needs to make sure the vendor understands the importance of documentation and the limits of their authority.

To increase the effectiveness of a third-party collector, the primary attorney needs to make sure the custodian understands that authority is being given and they are free to ask the same questions they would to the primary attorney. The attorney should be cc'd on at least the initial conversation between the vendor and the document custodian. The attorney's name and contact information should be provided to give the custodian comfort that they can be contacted with any concerns or questions. Your third-party vendors should have the answers to all the questions presented in this article so they can provide answers as completely and coherently as the primary attorney would have answered.

Where to Look for Data

Upon receiving your request for data, custodians will quickly think about their electronic and paper files that are in plain view. However, there are likely to be many more documents. Remind custodians that files may have been shipped to archival locations both within their office and outside. Files may reside on their home computers or on an older computer they previously used or a computer from another work station they used while their own was being repaired. Ask custodians to consider any legacy e-mail systems that have been used, specific date ranges or targeted hot dates

that will likely yield relevant data. Also custodians should think about alternative spellings or addresses of relevant people. Finally, custodians should also consider variable locations of files such as the network, local drives, CDs/ DVDs and tape backups.

Where Does the Data Go After It Is Used?

When you have finished collection, custodians will want to know what will happen to the data. You most likely want to maintain data until the matter has been resolved in case of authentication or other evidentiary concerns. After that, consider whether you will return the data to the custodian or simply destroy it. Documentation of its destruction should be sent to the custodian or in-house counsel.

CONCLUSION

Conducting a thorough and effective document collection requires forethought and anticipation of your document custodian's concerns. Answering these 10 concerns will ensure a smooth collection, avoid business interruptions and settle any fear and anxiety your custodians may have. Good luck!

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