In the Know:

Purpose, Process and Benefits of Custodian Interviews

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In the current Digital Age and eDiscovery world, custodian interviews are more critical and technical than ever.[1] The crucial information gained during these interviews informs the entire scope of the eDiscovery process and data map development as well as assists in the preparation for disclosure in keeping with Rule 26(f).[2] It can also assist in meeting the expectations of jurisdictional rules. Furthermore, the value of such interview information goes well beyond a matter. It can inform a company about employee compliance, technology use and more.

After custodians have been identified and legal holds have been issued, custodian interviews must follow. It's useful to the process that collection doesn't take place without these custodian interviews. To that end, counsel will find LLM, Inc.'s white paper on best practices for custodian interviews informative and essential to successful eDiscovery and more.

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MAKING INTERVIEW PREPARATIONS

Like the Boy Scouts of America, counsel should be prepared before conducting custodian interviews. Because each interview will have information that is very specific to it, the preparation must not only be thorough, but also customized. Part of this preparation involves creating a plan, prioritizing the interviews of key custodians (first, second, third tiers), setting expectations for each interview and keeping track through detailed documentation. The next steps will demonstrate how to do these things.

1. Assess the Scope

When litigation is reasonably anticipated, the obligation to preserve and issue legal holds is set in motion. The first step is to properly assess the scope of the case in order to understand the cause of action, claims and issues.[3] The exact approach counsel should take can be informed by examining company size, complexity of the issues, amount in controversy and the number of potential custodians.[4] In addition, a meet and confer can help delineate the path ahead. During the meet and confer, proportionality should be considered to weigh the costs of eDiscovery against the controversy amount. The late Jack Halprin, former head of eDiscovery for Google, highlighted the value of this.

> "Tackling these issues early in the case will make meeting the preservation obligation less risk filled and help create a more systemized, defensible, and cost-effective eDiscovery process."

2. Identify Custodians

After the careful analysis, counsel should delve into identifying the players. Who are the key custodians? They can include the client, current and former employees, IT department and third-party service providers. Once they've been identified, issue legal holds. After, identify keywords. Halprin cautioned that while the "knee-jerk reaction may be to place all employees in the organization on hold for large or complex cases," counsel must carefully examine the "benefit versus the burden."[5] He added:

> "Costs can add up quickly, and placing an employee on hold unnecessarily increases the risk that data may be preserved unnecessarily and made it discoverable in future cases."

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Attorneys Jill Griset and Melissa Laws of McGuireWoods recommend considering date limitations in the process. As a result, depending on the date restrictions, some custodians may be involved at different times.[6] Counsel can include or exclude some custodians based on the established timeline/date range.

3. Identify Data and Domain

After people come things and places. Counsel needs to identify key electronically stored information (ESI) and carefully consider the size of the legal holds distribution, as Halprin advised, and also whether these legal holds are defensible. Then, where does the ESI reside? This is the appropriate point to confer with the IT department for an understanding of the data infrastructure.[7] This information can provide key insight into company's policies on business and personal locations where data can be stored. Companies who have information governance and RIM policies in place may already have the start of data maps and data infrastructure. Possible locations include computers, mobile phones, email accounts, flash drives, voicemail, social media, servers and "any device or system that contains memory."[8] As times and technologies evolve, continue to evaluate the SaaS tools used by employees in the cloud, such as project management, team collaboration, chat programs and more. Gareth Evans, partner at Gibson, Dunn & Crutcher, advises identifying "files and computers of administrative or other personnel who prepare, send, receive or store documents on behalf of custodians."[9]

And though we are in the Digital Age, counsel must also consider data captured on paper. Furthermore, it's important to learn from IT just how custodians store information. Is it archived regularly or deleted often? Is data storage removable? These are important questions to consider.

4. Learn the Language

Becoming familiar with a company's internal lexicon is also important for custodian interviews. It will prove valuable later for searches and culling. Identify specific company abbreviations, acronyms, project names, lingo and more. An example of knowing and then incorporating the correct lingo in an interview is when counsel asks if a custodian stores data on "shared drives." The custodian may respond with a "no." But if he or she is asked about storage on a "Z: drive," the answer may be "yes." Speaking the same language is essential.

COMPONENTS OF SUCCESSFUL CUSTODIAN INTERVIEWS

1. Digital Questionnaire and In-Person Interviews

To lay the groundwork for a successful in-person interview, digital questionnaires should be the starting point. They can be used to gather, document and store information, which is in keeping with a sound preservation process. The who, when and what are captured not only for process, but also for future reporting and analysis.
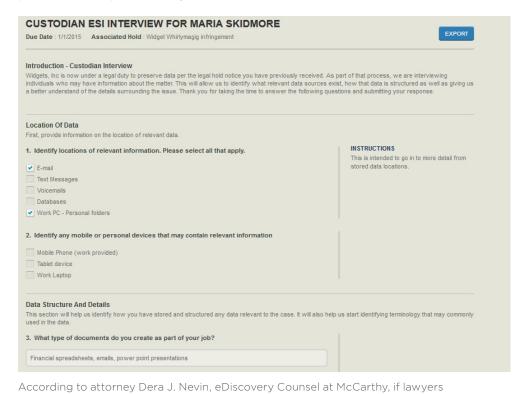
The follow-up interview becomes the deeper point of contact. It's worth noting here that in-person interviews may not be the right approach for all custodians in all cases. In some cases, only the key custodians may need to be interviewed, and less important custodians may only need to fill out an electronic survey. In particularly sensitive investigations, interviews should not be required, as data may need to be collected without witness knowledge. Furthermore, logistics might be another consideration, like if the custodian is not on-site or in reasonable proximity for an in-person interview.

It is preferable to conduct the interview in person or on the phone. Personally speaking with custodians is essential to a sound discovery process. Interviews increase the likelihood that custodians will help counsel discover all relevant information for preservation and collection. In the possible event that some information

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is missed, counsel and company will have a strong argument that they acted reasonably and not negligently by asking the custodian probing questions.

In-person interviews are also important if counsel would like to more precisely cull relevant data from non-relevant data. In the discussion, counsel may establish at a granular level whether certain data sets are entirely relevant, a mix of relevant and non-relevant or all non-relevant. This information can also later be applied to search and review strategies

What follows is an example of custodian interview questions, present within Liquid Lit Manager(TM).

CUSTODIAN ESI INTERVIEW FOR MARIA SKIDMORE

Due Date : 1/1/2015   **Associated Hold** : Widget Whirlymagig infringement   EXPORT

Introduction - Custodian Interview
Widgets, Inc is now under a legal duty to preserve data per the legal hold notice you have previously received. As part of that process, we are interviewing individuals who may have information about the matter. This will allow us to identify what relevant data sources exist, how that data is structured as well as giving us a better understand of the details surrounding the issue. Thank you for taking the time to answer the following questions and submitting your response.

Location Of Data
First, provide information on the location of relevant data.

1. Identify locations of relevant information. Please select all that apply.

- ☑ E-mail
- ☐ Text Messages
- ☐ Voicemails
- ☐ Databases
- ☑ Work PC - Personal folders

INSTRUCTIONS
This is intended to go in to more detail from stored data locations.

2. Identify any mobile or personal devices that may contain relevant information

- ☐ Mobile Phone (work provided)
- ☐ Tablet device
- ☐ Work Laptop

Data Structure And Details
This section will help us identify how you have stored and structured any data relevant to the case. It will also help us start identifying terminology that may commonly used in the data.

3. What type of documents do you create as part of your job?

Financial spreadsheets, emails, power point presentations

According to attorney Dera J. Nevin, eDiscovery Counsel at McCarthy, if lawyers haven't worked with ESI before, they may feel uncomfortable conducting a custodian interview.[10] Nevin encourages the involvement of an expert, such as a service provider, lawyer or clerk specialist, but absolutely recommends that counsel responsible for case preparation also be present for the interview to ensure that the correct information is being collected. Furthermore, this will help ensure that privilege is maintained for conversations and that the focus stays on the dispute issues.

2. Get Settled and Acquainted

When interviewing custodians, it's important that counsel take the time necessary to explain the process to the custodian, put him or her at ease and lay the case out to establish a "framework of relevance."[11] The custodian's name, alternate spellings or previous aliases, title and work history should be thoroughly documented.

By separating privileged documents during this stage, an appropriate and comprehensive list of search terms can be created.

3. Discuss Privilege Communication

It's imperative to discuss privilege communication. One recommended order is as follows.[12]

- Ask if the custodian has communicated with attorneys on this particular matter. (This will determine whether attorney-client privilege must be addressed.)
- If so, counsel must create a list of each attorney's name and contact information.
- Identify and isolate potentially privileged documents.

By separating privileged documents during this stage, an appropriate and comprehensive list of search terms can be created. Through this review efficiency, a company can save time and money.

4. Whatcha Got?

As mentioned during preparation steps, it's imperative to gain a sense of the type of data key custodians could possess. Confirming this during the actual interview could also illuminate other types of data that custodians make use of in their work roles.

Understanding all the data a custodian works with can be tricky because individuals often respond to the question of "What data do you have?" with discrete files. Many job roles require interaction with more complex software applications and databases, where the data is structured in a database behind the scenes. The user only sees the front end and often doesn't consider the data or the database involved on the back end when thinking of his or her work files. Therefore, counsel should ask other questions designed to lead to structured data sets, such as: "What reports do you send or receive regularly?" "What do these reports contain?" "How are they created?" "Do you enter data into a system?" "How do you do your work that is not captured in email, word-processing documents or spreadsheets?" While the entire structured data set may need to be collected, it's often both more practical and contextual for collection and review purposes to collect the specific reports used by the employee, as these reflect the data a custodian sees in the way he or she uses it. At the very least, the information gleaned from the custodian provides scope for what data the custodian uses within the structured data set and can better inform a discussion with IT on how to preserve and collect the data for litigation. This type of data is also often constantly changing, so getting historically exported or printed reports, running report snapshots and instigating discussion with IT is important to start as soon as the data is identified.

5. Location and Collection

While counsel should have a sense of where custodians are storing documents from preliminary work done with the IT department, an inquiry can help confirm or illuminate additional locations, such as mobile, personal computers, hard drive/USB drives and Dropbox. The method and form of collection must also be considered. "The data must be collected in a forensically sound manner with metadata intact and must be preserved as it is maintained in the ordinary course of business."[13] Ultimately, it's imperative that the custodian neither deletes nor alters the document in his or her possession.

6. Discover Other Custodians

While counsel has created a preliminary list of key custodians, those very custodians can point to other custodians who are also in control of pertinent, possibly responsive documents. As mentioned in the preparation steps, these custodians can include current and former employees, the IT department and third-party service providers. If possible, no potential custodian should be left unturned as the preservation of evidence is at stake.

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7. Stay in Touch

At the conclusion of each interview, counsel should provide each custodian with contact information should he or she have any questions regarding data location or compliance.

THE RESULTS OF THE INTERVIEW: COMPLIANCE AND TECHNOLOGY CHECK

How sturdy are a company's policies and document procedures? The custodian interview is an opportunity to check. Inquire with the custodian if he or she is aware of and complies with the document retention policy.[14] Confirm that he or she understands a legal hold, provide a copy of the current notice and emphasize that it supersedes company document retention policies. Advise the custodian of the matter's sensitivity in and outside of a company.

In addition to checking on compliance, the information gathered during a custodian interview can also be used to update company data maps, provide insight on how employees are using existing technology in a company and identify points of data risk. For example, the interviews may reveal that employees are storing data on unauthorized devices; a department has added new applications of which IT was not aware; employees are struggling to do their jobs using outdated technology; and that a company has a large storage room of hardware that has never been cleaned out. While these findings could be easily overlooked and eventually thrown away because they do not relate to the litigation at hand, they are actually very useful to a company. As such, the custodial interview process should include summarizing these types of issues.

AGAIN AND AGAIN: THE ITERATIVE PROCESS

It's important to emphasize the iterative nature of the custodian interview process. Custodians who were put on hold day one may not end up actually having any relevant information and new custodians may be identified later.

It's important to leverage custodian information across multiple cases and eDiscovery projects.

Given the process' nature, counsel should seek to learn what they don't know. For example, counsel may ask, "Who else would have this relevant information? Exactly what would they have?" Counsel should stay nimble and anticipate these types of changes and be ready to act on new information as it is revealed. While newly identified custodians should be put on hold as soon as possible, any employees unnecessarily put on legal hold earlier in a case should be released.

Finally, it's important to leverage custodian information across multiple cases and eDiscovery projects. As similar issues arise, the information can prove valuable. For example, the interview can be reused. Counsel knows where that data resides and can review. If the topic and relevancy is the same, counsel can reuse the collected data. In short: Counsel doesn't have to reinvent the wheel and speak to custodians all over again.

CONCLUSION

The value of custodian interviews to the eDiscovery process can't be emphasized enough. Therefore, proper preparation, conducting and review are essential, especially in order to demonstrate reasonable action was taken. Additionally, the value of information gathered during the interviews goes well beyond the matter. It can inform a company about the present state of compliance and technology use for the future.

REFERENCES

1   Wayne Wong, *The 5 Vital Components of a Successful Custodian Interview*, (Sept. 7, 2012), *available at* http://www.insidecounsel.com/2012/09/07/the-5-vital-components-of-a-successful-custodian-i?slreturn=1445805631.

2   *Id*

3   Jack Halprin, Esq., *Top Ten Issues in Meeting the Preservation Obligation,* (May 2, 2011), *available at* http://www.acc.com/legalresources/publications/topten/Preservation-Obligation.cfm.

4   *Id.*

5   *Id.*

6   Jill Griset and Melissa Laws, *Navigating a Case Through E-discovery*, (2012), *available at* https://www.mcguirewoods.com/news-resources/publications/navigating-e-discovery.pdf.

7   *Supra* note 1.

8   *Id.*

9   Gareth Evans, *Chancery Provides Framework for ESI Discovery, Preservation,* (Nov. 20, 2013), *available at* http://www.gibsondunn.com/publications/Documents/EvansChanceryESIDiscovery.pdf.

10 Dera J. Nevin, What Is a '*Custodian Intervie*w' and *Why Should I Do One?,* (July 2, 2012) *available at* http://www.canadianlawyermag.com/4217/What-is-a-custodian-interview-and-why-should-I-do-one.html.

11 *Supra* note 1.

12 *Supra* note 1.

13 *Supra* note 3.

14 *Supra* note 1.