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Opinion

Technology: Self-collection is not always the fox guarding the henhouse

Some self-collection processes, however, may be too risky

By Gareth Evans

Self-collection of documents and electronically stored information for use in litigation is sometimes described as being akin to the fox guarding the henhouse. The premise is that companies and their employees supposedly can't be trusted to do the collection themselves. They may be tempted, the theory goes, not to collect harmful documents. Or worse, they may be tempted to destroy them.

That characterization greatly oversimplifies reality, particularly considering the range of self-collection techniques that companies may employ. Whether a fox may be guarding the henhouse really depends on the particular type of self-collection process a company employs. It also depends upon who is doing the self-collection.

Some companies that are regularly involved in litigation have dedicated teams, processes and technologies in place for the implementation of legal holds and for the collection of potentially relevant documents and data. When made up of legal and IT professionals with appropriate knowledge, training and skills — combined with defensible processes — these in-house teams can offer levels of service and professionalism that rival those of any e-discovery vendor. Indeed, the work they do may be indistinguishable for all practical purposes from that of a very good vendor. Similarly, an outside vendor or counsel with appropriate skills and experience may supervise a company's IT department in the collection of data, provided that the IT personnel have the appropriate tools and processes to extract the data in a forensically sound fashion that is acceptable for litigation.

Under such circumstances, it would likely be unfair to suggest that a company's self-collection of documents and data is inherently deficient or suspect. Other self-collection techniques, however, may be riskier and susceptible to greater criticism.

The self-collection technique that has been the target of the greatest criticism is when custodians — *i.e.*, the employees whose documents are being collected — are deputized to search for and collect relevant documents themselves. This criticism may be most warranted when the employee was personally involved in alleged misconduct, or when his or her objectivity or trustworthiness is in question. Employees may be reluctant to reveal their mistakes or misdeeds where they have such a personal stake in the controversy. Consequently, more than one court has held that it is unreasonable to allow a party's interested employees to identify and collect relevant information, particularly when they have the ability to delete unfavorable documents.

Knowing which employees may have been involved in alleged wrongdoing, or whose trustworthiness may otherwise be questionable, may be difficult to determine, however, until the documents and data have been collected and reviewed. For this reason, even only allowing custodians who were presumably not involved in alleged wrongdoing to self-collect is not without risk.

Another criticism often brought to bear upon custodian self-collection is that ordinary employees may not be

capable of identifying relevant documents. The court in *Jones v. Bremen High School District 228* stated that "most non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not." Indeed, as anyone involved in document reviews in complex cases can attest, it can be difficult for trained lawyers to accurately make relevance and responsiveness calls.

Some courts have also found that it is unreasonable to expect ordinary employees to conduct legally sufficient electronic searches, as it is not part of their daily responsibilities, and they likely will not have the skills, training or tools to do so.

In light of the foregoing, is there ever a case where custodian self-collection is warranted? It's really a matter of the circumstances and stakes in the case, the particular processes that are employed, and how much risk a company can and should prudently take on.

Depending upon the overall stakes involved in the matter (for example, where the stakes are relatively low), if an employee without a personal interest is provided proper direction and supervision, and a defensible process is employed, the risks may be such that a company may wish to rely upon such self-collection.

Some of the risks may be mitigated in various ways. For example, the employee may be given a set of very broad key words to run and a tool to extract the hits in a forensically sound fashion, which may help to minimize the subjective element. Additionally, a hybrid approach leveraging off of the employee's familiarity with his or her own documents may be employed: The employee self-identifies relevant documents, but the IT department or an outside vendor also conducts a separate search and collection.

Some protection can be built in by ensuring that the custodian's potentially relevant data is preserved and cannot be deleted before having him or her engage in identifying and collecting documents. Be aware, however, that such preservation is not always a panacea, as the costs of a "redo" can be prohibitive, and courts may be more inclined to impose harsh sanctions than to adjust the case schedule to allow time to re-collect, review and produce documents.

The stakes in some matters — for example, high-stakes litigation or governmental investigations — may be such that the company would be better off employing a process that is not susceptible to the risks of custodian self-collection, and the problems associated with later potential challenges and criticism.

Most importantly, when considering the potential benefits of self-collection, also consider the potential costs if things don't go according to plan. Sanctions motions can be unhappy experiences, to say the very least, for everyone involved. Indeed, they can be devastating to companies and careers. The consequences of spoliation in a governmental investigation can even be worse. In many cases, therefore, the marginal cost of sound collection by outside or inside professionals will be well worth avoiding those sometimes enormous risks. ■

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