

# Streamlining eDiscovery: The Case for Supervised Collections and Custodial Interviews

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Despite the many technological advances in the collection, processing, and review of electronically stored information, it remains vital to conduct custodial interviews focused on data identification to confer a litigation advantage, reduce downstream costs, minimize disputes, and mitigate discovery risk. Undue reliance on back-end keyword searching or custodial self-collections can yield results that are both over- and under-inclusive, increasing the volume of irrelevant data swept into review workflows while missing key information. Otherwise avoidable discovery disputes may then ensue. By contrast, a purposeful collection approach — combining custodian interviews with supervised collections — yields superior results. eMerge offers custom collection solutions incorporating custodial interviews into remote, supervised collections for this very reason.

## What Is Self-Collection?

“Self-collection” in eDiscovery generally refers to a custodian self-identifying and collecting relevant documents at the request of counsel. Although the defensibility of this practice varies based on the nature of the matter, the role of the custodian, and the level of supervision and guidance provided by counsel, it is generally disfavored. See *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, No. 22-MD-03047-YGR (PHK), 2024 WL 4125618, at \*14 (N.D. Cal. Sept. 6, 2024) (an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to ‘self-collect’ discovery without any attorney advice, supervision, or knowledge of the process utilized.); see also *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 935 (N.D. Ill. 2021) (observing that “without proper guidance and oversight from counsel, custodian self-collection can be a risky move” after tens of thousands of documents were not timely produced). Self-collections introduce heightened risk that relevant information is omitted and make it challenging for counsel to confirm the completeness of the collection or accurately represent the criteria used to identify relevant information.

In a worst-case scenario, self-collections enable unscrupulous custodians to intentionally withhold relevant information without counsel’s knowledge and can lead to mandatory sanctions on counsel for violations of Fed. R. Civ. P. 26(g). See *Rojas v. Town of Cicero*, 775 F.3d 906, 909 (7th Cir. 2015) (If an attorney or party violates Rule 26(g), sanctions are mandatory... Rule 26(g)(3) gives the judge discretion over the nature of the sanction but not whether to impose one); *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12CV2884-BAS-MDD, 2015 WL 4714908, at \*13, 15 (S.D. Cal. Aug. 7, 2015), *vacated in part as moot*, 171 F. Supp. 3d 1020 (S.D. Cal. 2016) (deeming unreasonable outside counsel’s acceptance of defendant’s erroneous representations that no responsive documents existed “without asking other employees or collecting or sampling documents); see also *Collins-Williams v. Contour Eastwyck LLC*, No. 1:20-CV-3129-CAP, 2022 WL 17828934, at \*92 (N.D. Ga. Dec. 15, 2022)

(finding that acceptance at face value of what client provided in response to discovery insufficient under Rule 26(g)). For all of these reasons, some jurisdictions, such as Delaware Chancery Court, categorically forbid the practice. See *Goldstein v. Denner*, C.A. No. 2020-1061-JTL, 2024 WL 303638 (Del. Ch. Jan. 26, 2024) ([a]n attorney may not simply rely on custodian self-collection of ESI” and instead “must test the accuracy of the client’s response to document requests to ensure that all appropriate sources of data have been searched and that responsive ESI has been collected — and eventually reviewed and produced).

Because of these risks and the improved availability and capabilities of tools like Microsoft Purview and Google Vault, some companies may rely on search-term-based queries to identify potentially relevant information. While this method provides more objective collection criteria, it may also miss the mark unless paired with a custodian interview.

### **What Is a Custodial Interview?**

A custodial interview is a structured conversation with individuals (custodians) in possession, custody, or control of potentially relevant data to a litigation or investigation. These interviews are often combined with a more substantive conversation led by the merits attorney regarding the custodian’s role in the underlying facts and issues. The primary objectives are to reaffirm the custodian’s ongoing preservation obligations while identifying both custodial and noncustodial data that may be pertinent to the legal matter.

To make these interviews more efficient, eMerge typically combines a remote interview with a screen-share and simultaneous forensically sound collection of identified relevant electronically stored information. We developed this workflow to enable a more detailed, real-time inquiry into the data sources readily accessible to each custodian. This process allows our attorneys to make substantive decisions and rule out irrelevant sources from the collection on the fly, thereby reducing costs and improving the precision of the collection. The interview also helps to:

- Identify sources that need to be prioritized for review without filtering;
- Target sources that would benefit from search term filtering;
- Refine our search terms to be more effective; and
- Gain knowledge about the data that improves the accuracy of our review.

### **Which Custodians Should Be Interviewed for ESI Issues?**

Any custodian warranting an interview for substantive reasons and fact-gathering ordinarily should also be interviewed regarding relevant ESI sources. Additional questions about their use of technology, communication methods, and document storage habits should take minimal time and provide valuable insights that will help make analysis of any data collected more efficient and accurate. Ideally, this interview should be conducted in tandem with a screen-sharing session to see where and how they work. During such interviews, we have successfully:

- Identified key additional custodians, systems, and shared drives used by a team that were not previously known by the IT department or legal team;
- Meaningfully narrowed the pertinent folders from a voluminous shared repository; and
- Prioritized the documents needed for review by lead merits counsel to assist with drafting responsive pleadings.

Custodians identified as deposition witnesses should also be interviewed regarding ESI-related issues as part of deposition preparation, even if they were previously interviewed during earlier stages of discovery. By engaging in a dialogue regarding ESI just prior to the deposition, the deponent will be better positioned to field any eDiscovery-related questions posed during the deposition itself. This follow-up interview also helps identify potential gaps in prior collections and productions while supplementation is still timely. Sanctions cases involving the discovery of previously unproduced ESI first identified during depositions abound. Even where the oversight was inadvertent, the optics and delays caused by dilatory productions can lead to protracted and expensive motions practice if not sanctions against clients and their counsel for failing to make a “reasonable inquiry” earlier in discovery. See, e.g., *DR Distributors* at 927 ([A] reasonable custodian interview consists of locating the relevant people and the locations and types of ESI. ... Counsel have a duty to know and understand their clients’ ESI systems and storage) (internal citations omitted); *Brown v. Tellerate Holdings Ltd.*, No. 2:11-cv-1122, 2014 WL 2987051, at \*20 (S.D. Ohio July 1, 2014) (noting when applying sanctions that counsel has “an affirmative obligation to speak to the key players ... [to] identify, preserve and search the sources of discoverable information); *Bernal v. All Am. Inv. Realty, Inc.*, 479 F. Supp. 2d 1291, 1327 (S.D. Fla. 2007) (Blind reliance on a client’s representation is rarely a reasonable inquiry).

Any custodian who identified sources in a legal hold questionnaire that require additional information to ensure appropriate preservation or collection may also merit an interview. For example, if a custodian disclosed the use of shared repositories (e.g., SharePoint sites, shared drives, or Teams channels), an interview will help focus preservation and collection efforts on the specific portions of those repositories most likely to contain potentially relevant information.

Although the benefits of an interview far outweigh the risks and costs, some custodians with more tangential involvement or whose roles overlap with those interviewed may not require an independent interview. Depending on the nature of the case and the amount in controversy, these interviews may be deprioritized. Similarly, repeat custodians on largely duplicative matters may not require repetitive interviews to verify known and common document sources. But given the rapid evolution of technology and communications platforms, overreliance on past practices may be misplaced.

### **Why Custodial Interviews Are Crucial**

In addition to their role enabling defensible preservation and collection efforts, conducting ESI interviews helps to reduce discovery disputes and accelerate the identification of key information supporting claims and defenses. By helping to pinpoint the exact sources of relevant data and providing context to the data, collection interviews improve the accuracy of responsiveness and privilege assessments. For example, we may learn that a custodian collected and prepared damages-related documents at the direction of counsel and stored them in a specific folder. The compilation of files that may otherwise seem like routine business records would warrant work product production. Had those same files been collected via keyword-based searches or dragnet-style device imaging, this critical context could have been lost.

Custodian interviews markedly reduce the risk of spoliation or incomplete data collection associated with self-collections or search-term-only collection strategies. See *ZAGG Inc. v. Ichilevici*, No. 1:23-CV-20304, 2024 WL 557899, at \*3 (S.D. Fla. Jan. 30, 2024) (describing self-collection as “highly problematic” and “rais[ing] a real risk that data could be destroyed or corrupted); *Deal Genius, LLC v. O2COOL, LLC*, No. 21 C 2046, 2022 WL

17418933, at \*2 (N.D. Ill. Oct. 24, 2022) (remarking Microsoft 365 does not fully index the data encompassed within the organization's systems, nor can it accommodate complex Boolean searches, wildcard operators, proximity operators, connector terms, or "fuzzy logic" searches); *Deal Genius, LLC v. O2COOL, LLC*, 682 F. Supp. 3d 727, 734 (N.D. Ill. 2023) (One of the most problematic limitations of search terms is that they tend to be under-inclusive.).

Courts have cited approvingly to custodian interviews as a way for counsel to discharge their obligations. See *DR Distributors* at 963 (With regard to ESI, reasonable inquiry necessitates a proper custodian interview. A proper custodian interview has been required for years before this case was even filed.). These interviews are invariably more effective when they are carefully tracked and documented. Our dedicated eDiscovery attorneys and collections professionals routinely do just that, preparing collections memoranda replete with screenshots and other details to memorialize the process.

### **Key Components of an Effective Custodial Interview**

Once custodians have been identified for custodial interviews, it is important to prepare and involve the right people. Those conducting the interview must understand the scope of the legal matter, the custodian's role, and technical issues associated with the client's and custodian's systems and devices.

eMerge leverages discovery attorneys and data collection experts who reference tailored questions to elicit comprehensive information about data sources and usage. We document these interviews through screenshots and completion of standard interview forms to ensure we cover all common (and many less common) locations and resolve issues known from other matters. Clients may have their own teams and resources, but outside counsel should still confirm the workflow and oversee the process. *Hedgeye Risk Mgmt., LLC v. Dale*, No. 21CV3687ALCRWL, 2023 WL 4760581, at \*3 (S.D.N.Y. July 26, 2023) (It is not appropriate to take a client's self-collection of documents, assume it is complete, and not take steps to determine whether significant gaps exist.). As the case evolves, follow-up interviews may be worthwhile.

Custodian interviews are most efficient when a detailed interview with the client's IT or discovery team is first conducted to understand the systems available to custodians and confirm the client's own internal capabilities and workflows for collection. For longstanding clients with known systems and workflows, a brief call or communication to identify any material changes since the last collection is recommended.

Finally, custodian interviews are more effective if counsel has prepared the custodians for what to expect to alleviate any anxiety and ensure sufficient time for the interview. Common concerns include worries about the collection of irrelevant or personal information. The interview process is one tool we use to reduce those concerns by minimizing the collection of irrelevant personal or sensitive data and reassuring custodians about confidentiality and data security. If such data is commingled with relevant data, the interview process helps us better understand the data and refine our workflows to separate and remove irrelevant information in a defensible manner.

### **Common Concerns and How to Overcome Them**

Some of the most common, albeit misguided, justifications we encounter for *not* conducting custodian interviews and their associated risks are summarized below.

**Concern:** Interviewing custodians bothers them and wastes time.

**Response:** An efficient interview should take less than an hour in most cases and will lessen the likelihood of additional burdens on the custodian's time if the collection is subsequently found to be incomplete or deficient.

**Concern:** A discovery attorney-led interview will increase the costs of litigation.

**Response:** Our remote interview and collection process is less expensive than the back and forth of a custodian-driven collection and includes both an interview led by a discovery attorney and a real-time collection conducted by a specialized collection technician. The downstream costs of over- and under-collecting data far outweigh the cost of an effective custodian interview.

**Concern:** A custodian-led self-collection is more accurate and efficient than an interview.

**Response:** Relying on the custodian to identify relevant information and send it to the attorney does not allow for mandated oversight, may result in alteration of metadata (*i.e.*, spoliation), and foregoes critical documentation of what criteria were used and what sources were searched.

**Concern:** An interview is unnecessary when a client has an existing workflow for collection and preservation of ESI for litigation (*e.g.*, searching emails and home drives using key terms; exporting the "custodial file" from the systems of record, etc.).

**Response:** Outside counsel is still responsible for ensuring a reasonable inquiry was made and that appropriate sources are identified, collected, and documented. Where formal interviews are not conducted, the associated risks should be disclosed in writing to the client.

## **Conclusion**

Custodial interviews and supervised collections facilitate a more defensible and cost-effective eDiscovery process by focusing the collections, helping our attorneys identify key documents sooner, and reducing the risk of incomplete preservation, collection, and production. Please contact [eMerge](#) at the onset of your matter to ensure that custodial interviews are a central element of your preservation plan.

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