E-discovery: Identifying your company’s high-risk custodians in initial case assessment

Senior trial counsel are often uniquely well-positioned to handle potential rogue witnesses. BY MATTHEW PREWITT

In this series, I consider how the high stakes of e-discovery have transformed early case assessment into a data management exercise and suggest how in-house counsel can work with trial counsel to ensure that e-discovery issues do not divert attention from strategic case evaluation. In this column, I discuss the importance of including senior trial counsel in initial contacts with key custodians in order to identify the potential high-risk custodians within your company.

Skilled trial counsel are not just good talkers. They are patient listeners and observers of human nature who, through years of experience, have learned how to identify a witness’s conflicting motivations and to assess witness candor. These skills are just as valuable in early case assessment as they are in deposition or at trial. Indeed, since every litigation requires some type of early case assessment, and very few cases ever actually proceed to trial, the initial stages of the litigation may be the best opportunity for your company to realize the value of the senior trial counsel you have retained for the matter. Tapping this experience and judgment should be an essential part of your company’s defense against internal e-discovery misconduct.

The consultants and e-discovery counsel who often have front-line responsibility for conducting the initial survey of potentially responsive electronic data and implementing the company’s litigation hold may have substantial technical expertise. However, they typically lack both a sufficient “big picture” understanding of the case and a sufficient depth of experience to identify what in some cases is a key preservation risk for the company—the executive who attempts to obfuscate the discovery record in pursuit of a personal agenda or misguided company loyalty. Check-the-box custodian interviews and litigation hold memos will not protect your company from the rogue insider who deliberately destroys or conceals relevant evidence.

Trial counsel is uniquely well-positioned to identify and address high-risk custodians. First, trial counsel is the most likely member of the outside counsel team to enjoy the confidence of in-house lawyers. Every case has a back story within the corporate organization, and understanding how company politics, personal loyalties and fallout from the litigation may impact the career longevity of key witnesses is an important part of initial case assessment that typically unfolds in conversations between in-house counsel and the lead outside attorney for the engagement. These confidences usually are not shared with more junior attorneys on the team, much less the e-discovery consultants. It is the senior attorney’s role, in conjunction with in-house counsel, to use this information to help assess the risk of rogue custodians.

Second, trial counsel may be able to elicit responses in witness interviews that an employee may be reluctant to share with in-house counsel. The conversations between in-house and outside counsel about the back story for the case often will include some discussion of which witnesses should meet privately with only outside counsel for at least some part of the initial witness interview, and what topics should be explored in that time.

Third, senior counsel has the judgment to know whether and how she may be able to win over the potential rogue witness. Few high-risk custodians are truly committed to obstructing discovery. Instead, most rogue custodians strike their own path because they lack confidence in outside counsel’s ability to manage the litigation in a manner that suits the custodian’s objectives. For the custodian acting solely out of misguided loyalty to the company, trial counsel’s message may be relatively straightforward, explaining how the witness’s cooperation with the direction of counsel will contribute to a successful litigation outcome, and modulating that message to address the business impacts of greatest concern to the witness. Where the witness is pursuing a personal agenda to protect his career or reputation, counsel’s challenge is to minimize that conflict and persuade the witness that charting his own path carries even greater risk. There are some witnesses who are so compromised that this sort of reassurance is simply impossible, and an unpleasant conversation involving both the witness and in-house counsel may be the only way to obtain reasonable cooperation. The senior counsel’s ability to make these distinctions is part of what your company is paying a higher hourly fee for and one reason why senior trial counsel should be an active participant in initial case assessment.
Of course, as a former President was fond of saying, “Trust, but verify.” The other essential step for guarding against the rogue witness is for trial counsel to collaborate with other members of the e-discovery and corporate information technology team to modify the preservation plan, devise additional safeguards against custodian misconduct and initiate targeted initial collections and reviews where appropriate. The challenge of limiting these discussions to a group that can be trusted to preserve client confidences and to protect reputations underscores the advantage of retaining outside counsel who are fully conversant in the technical nuances of electronic discovery.

Matthew Prewitt is a partner in the Chicago office of Schiff Hardin, where he concentrates in complex litigation and also co-chairs the firm’s Trade Secrets Client Services Team. He is an adjunct professor at Chicago-Kent College of Law where he teaches a seminar in complex business litigation. He may be reached at mprewitt@schiffhardin.com.