

The Eight Inherent Risks of Custodian Self Collection

Self Collection is Not Systemised, Repeatable or Defensible and Increases Risk of Spoliation, Says Guidance Software

Custodian self collection is inherently risky because it is not systemised, repeatable, or defensible, according to Guidance Software Inc., The World Leader in Digital Investigations™. When faced with an investigation or the threat of litigation, counsel's first reaction may be to ask individual custodians to collect their own data. Custodian self-collection seems logical, as custodians should know where their documents and electronically stored information (ESI) are located. However, custodian self-collection has not found much favour in the courts, and counsel seeking to reduce the risk of spoliation should choose systemised, repeatable, and defensible enterprise-wide process.

Guidance Software has identified eight inherent risks of custodian self-collection. These include:

1. Employee has a potential self-interest and intentionally deletes, omits or modifies the ESI.
2. Employee has a potential self-interest and properly preserves the ESI, but opposing counsel discredits the collection based on the self interest.
3. Employee is too busy and uninterested in the case and ignores the preservation instructions.
4. Employee completes the preservation in a haphazard manner and accidentally omits relevant ESI.
5. Employee does not understand how to properly preserve relevant ESI and accidentally deletes or modifies the evidence.
6. Employee moves the ESI to another folder causing changes to important file system metadata.
7. Employee misinterprets the preservation instructions and omits relevant ESI.
8. Employee moves the data to a central location, thereby destroying the context of the document in regards to where it was originally stored.

The legal hold notice alerts custodians of their duty to preserve potentially relevant ESI, but custodian self-collection takes the process a step further and places the burden of determining relevance and collecting the ESI on the custodian. Technical limitations, lack of legal understanding, and improper preservation techniques such as “drag-and-drop” are all grounds for potential errors. Even with proper instruction and training, employees may lack the expertise to determine relevance and preserve and collect ESI in a defensible manner. Furthermore, some employees may not understand or remember that relevant ESI may be stored as sent emails or drafts of documents.

“In addition to the risks, there are three key inherent weaknesses in taking a self collection approach,” said Albert Barsocchini, Assistant General Counsel for Guidance Software. “First, self-collection is not systemised—different criteria and search techniques will be used by all custodians across the same case. Second, it is not repeatable, as the individual custodian must use his or her best judgment for preservation, leading to inconsistent results across multiple cases. Third, it is not defensible, as counsel who rely on self-collection cannot have confidence in the accuracy and thoroughness of the process or determine how much relevant information custodians may have failed to produce. Monitoring compliance is essential, as the courts have held organisations liable for the bad faith of individual employees—despite counsel’s own good faith efforts.”

Counsel can eliminate the risks inherent in custodian self-collections and mitigate the spoliation risks by employing an enterprise search and collection solution. There are many enterprise-enabled, automated search, collection, and preservation solutions available, and the right technology will enable legal teams to search for potentially relevant information across the enterprise objectively, applying the same criteria to every search, monitoring compliance, and ensuring that ESI is properly preserved.

“Enterprise search and collection solutions bring an objectivity and defensibility to the process that custodian self-collection can not, eliminating the problems with custodian self-collection and mitigating the risk of spoliation,” added Barsocchini. “The right solution will also enable counsel to monitor the preservation process as these solutions typically offer extensive reporting features that can track the progress of the preservation effort. An added benefit is that they can provide an organisation with a repeatable, defensible, and systemised process in compliance with the courts.”

In-house counsel should seek to eliminate the risks of custodian self-collection and build an eDiscovery process that will preserve ESI in the manner envisioned. A process that uses enterprise search and collection tools to search for responsive data from all prospective custodians will assist counsel in limiting their organisations’ exposure to spoliation sanctions and penalties while facilitating compliance with court requirements.

About Guidance Software (GUID)

Guidance Software is recognized worldwide as the industry leader in digital investigative solutions. Its EnCase® platform provides the foundation for government, corporate and law enforcement organizations to conduct thorough, network-enabled, and court-validated computer

investigations of any kind, such as responding to eDiscovery requests, conducting internal investigations, responding to regulatory inquiries or performing data and compliance auditing — all while maintaining the integrity of the data. There are more than 25,000 licensed users of the EnCase technology worldwide, and thousands attend Guidance Software's renowned training programs annually. Validated by numerous courts, corporate legal departments, government agencies and law enforcement organizations worldwide, EnCase is also frequently honored with industry awards and recognition from *eWEEK*, *SC Magazine*, *Network Computing*, and the *Socha-Gelbmann* survey.

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