e-Discovery Team ®

LAW and TECHNOLOGY – Ralph Losey © 2006-2018

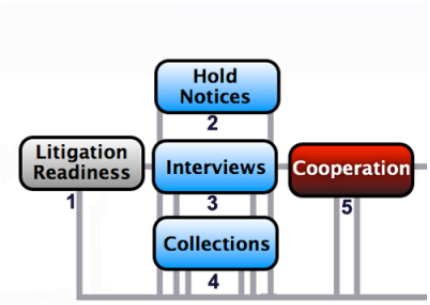
The Importance of Witness Interviews: 'What Happens in Vegas Shouldn't Stay in Vegas'

A discovery order in Vegas shows the importance of witness interviews and what can happen when you take a *cavalier attitude* towards preservation. *Small v. University Medical Center* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr), Case No. 2:13-cv-0298-APG-PAL (https://scholar.google.com/scholar?scidkt=14902985800321649 61&as_sdt=2&hl=en) (D.C. Nev., 9/9/18) (FLSA class action seeking unpaid wages for skipped meal breaks). The lengthy order is entitled *Report and Recommendation and Final Findings of Fact and Conclusions of Law* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr) and imposes severe sanctions on the defendant. The order proves, when it comes to e-discovery at least, w*hat happens in Vegas* ***doesn't*** *stay in Vegas.* The truth does and should come out, including where's the electronic evidence. Interviews are a good way to find out what really happened.

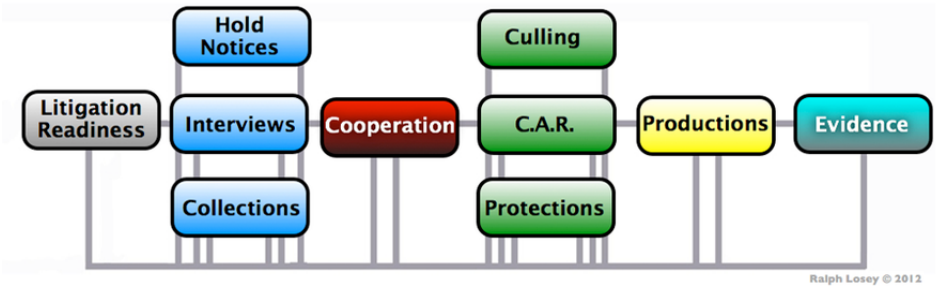
This is a long blog – 5,122 words – but it is still a lot shorter than the 123 page *Short* opinion, which is not short at all. I counted, it is 48,980 words. Not that I'm complaining, but it is one of the longest discovery orders I have ever read. It has many good instructional elements. Specialists should probably read and skim the whole opinion.

The *Short* opinion also has the distinction of having taken longer to prepare than any other discovery order I have ever read – FOUR YEARS! Can you imagine any decision taking that long? I am sure there were good reasons, but still. That is a full presidential term.

First Steps of e-Discovery: Prepare and Preserve



The FLSA suit arose from a DOL investigation that faulted the defendant employer hospital, UMC, for failing to keep "accurate records" of the time worked. UMC's alleged records failures continued after it was sued. They failed to give timely preservation notices and failed to interview key custodians. That's a failure of the first two legal tasks a lawyer is required to do in Electronic Discovery Best Practices (EDBP), steps two and three (step one is prepare). *See* EDBP.com (http://edbp.com) (detail shown above right with all ten legal activities shown below); *also see*: Favro (http://www.driven-inc.com/about/our-experts/), Phillip, *Vegas Court Spotlights the Importance of Custodian Interviews with New ESI Sources* (https://www.law.com/legaltechnews/2018/08/30/vegas-court-spotlights-the-importance-of-custodian-interviews-with-new-esi-sources/?cmp=share_twitter) (LegalTech News 8/30/18) (further discussed below); John Patzakis (https://blog.x1discovery.com/about/), Three Key eDiscovery Preservation Lessons from Small v. University Medical Center (https://blog.x1discovery.com/2018/09/12/three-key-ediscovery-preservation-lessons-from-small-v-university-medical-center/) (Next Generation eDiscovery Blog, 9/12/18).



Judge Peggy Leen's Order

Magistrate Judge Peggy A. Leen (https://www.nvd.uscourts.gov/court-information/judges/magistrate-judge-peggy-leen/) is the learned judge who wrote the opinion in *Small v. University Medical Center, Report and Recommendation and Final Findings of Fact and Conclusions of Law* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr). The order affirms and implements most of the recommendations of the Special Master for e-Discovery appointed several years ago in this case, Daniel Garrie (https://www.linkedin.com/in/danielgarrie/).

The Special Master's Report (https://scholar.google.com/scholar_case?case=9174085198509227705&q=Small+v.+Univ.+Med.+Ctr.+of+S.+Nv&hl=en&as_sdt=6,44&as_ylo=20 was issued four years earlier on August 18, 2014, two years after the suit was filed in July 2012. The Report was notable for characterization of defendant's discovery misconduct as so egregious as to "***shock the conscience***" and make "***a mockery of the orderly administration of justice.***" It was a long, complicated report (https://scholar.google.com/scholar_case?case=9174085198509227705&q=Small+v.+Univ.+Med.+Ctr.+of+S.+Nv&hl=en&as_sdt=6,44&as_ylo=20

When she completed her work she ruled in large part for the plaintiffs and sanctioned the defendant:

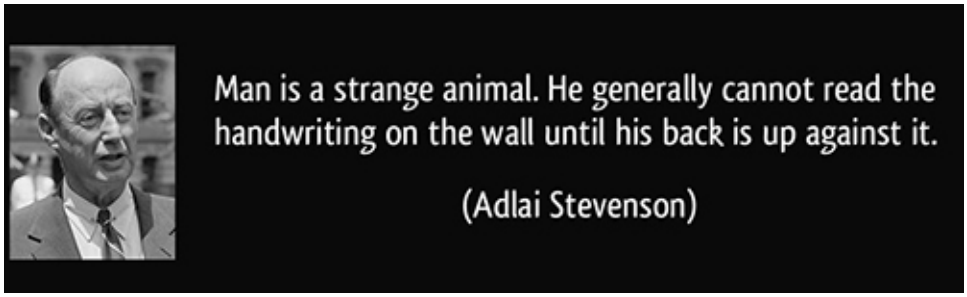
> VI. THE COURT'S FINDINGS AND CONCLUSIONS
>
> The court has personally conducted a thorough review of the record prior to the special master's appointment and the record of the proceedings conducted by the special master. The record before the court and the record developed by the special master amply supports his findings that UMC destroyed evidence by failing to identify, preserve, collect, process, and search multiple repositories of information relevant to the parties' claims and defenses.

UMC failed to preserve several different types of ESI, including an estimated 26,000 text messages and 38,000 documents from a shared drive "containing human resources, corporate compliance, employee grievance, payroll, and DOL investigation data." The documents lost include important policy and procedure manuals regarding meal breaks and compensation. Relevant ESI on laptops, desktops and local drives were not preserved until some 18 months into the litigation. UMC also failed to comply with multiple discovery orders, leading to the plaintiffs' motions for sanctions.

Judge Leen did *not* follow the recommendation of the Special Master to impose a sanction of default judgment in favor of 613 class members on the Fair Labor Standards Act claims. Instead, she imposed a *permissive* adverse inference jury instruction, along with monetary sanctions. These jury instructions can have a profound impact on the jury, but not as strong as a *mandatory* adverse inference instruction. The mandatory instruction almost always leads to a verdict against the spoliating party. The *permissive* kind of instruction imposed here still gives a defendant like UMC a chance. The sanctioned party can still prevail with a jury on the merits of the case, albeit a slim chance. Here is the specific language that Judge Leen suggested be used at trial with the jury:

> 2. UMC is sanctioned in the form of an instruction to the jury that the court has found UMC failed to comply with its legal duty to preserve discoverable information, failed to comply with its discovery obligations, and failed to comply with a number of the court's orders. The instruction will provide that these failures resulted in the loss or destruction of some ESI relevant to the parties' claims and defenses and responsive to plaintiffs' discovery requests, and that the jury may consider these findings with all other evidence in the case for whatever value it deems appropriate.

Careful study of the long opinion shows a very practical, albeit unstated reason for Judge Leen to make this concession. It made her order much harder to appeal; some would say appeal-proof. (After you put four years into something you want it to last.) That is because near the end of the process at one of the hearings Judge Leen was able to get *defendant's own attorney* to concede that an adverse inference jury instruction would be appropriate. You do not see that happen very often. But this attorney apparently saw the *writing on the wall* from the comments the judge was making and realized that accepting a permissive inference was the best they could hope for and certainly a lot better than default judgments for all 613 class members.



Here is Judge Leen's explanation of how this admission came about.

> During oral argument on its objections to the special master's R & R, counsel for UMC stated "I'm not even going to tell you that I don't think we shouldn't be sanctioned." (Hr'g Tr. 24:28-25:1, Oct. 21, 2014, ECF No. 229.) When asked what sanction he felt was appropriate based on the developed record, UMC's counsel suggested that an adverse inference jury instruction would be appropriate. (Tr. 25:4-10.)

Here we see a wise and experienced judge in action. Too bad Peggy Leen retires in 2019.

Judge Leen had good reason under the law to hesitate to enter default judgments on 613 claims, effectively ending the cases except to determine the amount of damages, all without any hearing on the *merits* of the claims. Entry of the lesser sanction of a permissive instruction was consistent with Judge Leen's analysis of Rule 37(b) on sanctions for violation of court orders.

> [T]he court cannot conclude that UMC's multiple discovery failures and failure to comply with the court's orders threatens to interfere with the rightful decision of this case on the merits.

The lesser sanction was also consistent with her analysis of 2015 revisions to Rule 37(e) on sanctions for ESI spoliation, Rule 1 on just-speedy-inexpensive, and Rule 26(b)(1) on proportionality. Here is Judge Leen's well-accepted analysis of 37(e):

> To summarize, the court may impose sanctions against UMC under the current version of Rule 37(e) only if it finds: (1) UMC failed to preserve ESI "that should have been preserved" in anticipation or conduct of litigation; (2) the information was lost because UMC failed to take reasonable steps to preserve it; (3) the ESI cannot be restored or replaced; and (4) the plaintiffs were prejudiced by the loss. If all of these prerequisites are met, the court may issue sanctions no greater than necessary to cure the prejudice caused by the loss. Only if the court finds UMC acted with intent to deprive may the court impose the most severe sanctions.

Judge Leen then applied the law to the facts.

> The court has found that UMC failed to preserve ESI that should have been preserved in anticipation of litigation, and throughout the course of this litigation. The court has also found that the information was lost because UMC failed to take reasonable steps to preserve it. Thousands of text messages on UMC Blackberry devices were lost and cannot be restored. Tens of thousands of files from the Q-Drive were lost and cannot be restored prior to December 2013. . . .
>
> However, the special master's extraordinary expertise and persistence resulted in restoration, remediation, and production of a great deal of relevant and discoverable ESI. The special master was able to direct restoration of the time tracking systems UMC failed to disclose until near the end of special master proceedings. Fortunately, Jackie Panzeri, UMC's payroll manager who described herself as a "pack rat" that "keeps documents forever" had a lot of documents on her personal drive and several archives full of emails she did not delete or modify. She was involved in the DOL investigation from the beginning and saved both documents collected and produced to the DOL and for this case. The court is also mindful that ESI is stored in multiple locations and that modified or lost data from the seven key custodians is likely to be found in other locations. . . .
>
> Although the court finds plaintiffs have been prejudiced by the loss of data from key repositories and custodians, the loss has not threatened to interfere with the rightful decision of the case on its merits given the large volume of ESI the special master was able to ensure that UMC produced. For these reasons, the court finds that lesser sanctions are appropriate, proportional, and no greater than necessary to cure the prejudice caused by the loss of ESI uncovered by the special master.

As you can see, *hope springs eternal*. Judge Leen's still thinks that the now lost ESI from the seven key custodians is *likely to be found in other locations.*

I doubt the Special Master Garrie would share the same optimism. He has already called defendant's conduct *a mockery of the orderly administration of justice. I*n his Report the Special Master said he has "*serious doubts that UMC can complete discovery in a defensible manner going forward without increased candor to the Court and their own counsel, and more competent technical assistance.'* Well, maybe they will

change. If not, and Judge Leen is wrong and the missing ESI is not found, then Judge Lee or her successor might reconsider and upgrade the sanction to a mandatory adverse inference. Special Master Garrie may yet get his way.

Defendant's Threshold Errors

The quotes below from *Small* summarize the key factual findings of defendants' threshold errors, the ones that lead to most of the others (emphasis added), much like a domino effect. To me these are the most important errors made and you should study Judge Leen's words here closely.

> D. UMC Executives Failed to Accept Responsibility for Ensuring that ESI was Preserved and Failed to Notify Key Custodians and IT Staff to Preserve, and Prevent Loss, or Destruction of Relevant, Responsive ESI
>
> The record amply supports the special master's findings that UMC had no policy for issuing a litigation hold, and that no such hold was issued for the first eight months of this litigation until after Mr. Espinoza was deposed on April 8, 2013, and was asked about UMC's response to plaintiff's August 6, 2012 preservation letter. The special master accurately found that UMC executives were unaware of their preservation duties, ignored them altogether, or at best addressed them "in the hallway in passing." . . .
>
> The special master's finding that UMC executives failed to accept responsibility for their legal duty to preserve is amply supported in the record. UMC executives and counsel failed to communicate with and provide adequate instructions to the department heads and IT personnel of repositories containing discoverable ESI to prevent the loss or destruction of potentially relevant ESI. . . .
>
> There is no evidence in the record, and UMC does not suggest there is any, that current or former counsel gave instructions to UMC to suspend business as usual to prevent the destruction, deletion or modification of ESI responsive to plaintiffs' discovery requests. . . .
>
> **It is also undisputed that UMC's prior and current counsel failed to conduct timely custodian interviews. Custodian interviews were not conducted until well into the special master proceedings when it became apparent they had not been done. The special master required the interviews to be conducted a second time because the initial custodian interviews conducted by counsel were inadequate.** . . .
>
> There is ample support in the record that UMC executives displayed a cavalier attitude about their preservation obligations addressing them in passing, and that UMC executives repeatedly took the position in declarations and testimony that responsibility for preservation was someone else's job. . . .
>
> **The special master correctly found that current and former counsel failed to conduct timely custodian interviews to identify individuals with discoverable information and key repositories of discoverable ESI.**

The record in this matter is very complex and voluminous. That is why the Special Master Report and the Order by Judge Leen are so lengthy; 123 pages for the order alone. Suffice it to say, if witness interviews of key custodians been conducted when they should have, shortly after suit was filed, a great deal of relevant evidence that ultimately was lost could have been saved. The Special Master's detailed findings make that obvious. The lost-files could have been identified and preserved unaltered. Lines of responsibility to comply with legal preservation obligations could have been clarified and enforced. Had these interviews been conducted, and the ESI found quickly, the relevant ESI could have been bulk-collected and the evidence saved from spoliation.

As it is, the actions and mistakes of defendant here have severely weakened their case. That's what can easily happen when a company has a cavalier attitude to compliance with their legal obligation to preserve potentially relevant ESI.

Eight Failed Challenges to the Special Master's Report

Judge Leen considered and rejected eight challenges to the Special Master's report that were raised by the defendant employer, UMC:

1. Competence and Impartiality of the Special Master, Daniel Garrie (http://www.legalexecutiveinstitute.com/author/daniel-garrie/).
2. UMC's Failure to Comply with the Court's Orders to Preserve and Produce ESI.
3. UMC's Failure Have a Preservation Policy or Litigation Hold Policy and Failure to Timely Implement One.
4. UMC's Executives Failure to Accept Responsibility for Ensuring that ESI was Preserved and Failure to Notify Key Custodians and IT Staff to Preserve, and Prevent Loss, or Destruction of Relevant, Responsive ESI.
5. UMC's Failure to Disclose the Existence of Relevant ESI Repositories, Including Multiple Timekeeping Systems and the Q-Drive Until Late in the Special Master Proceedings.
6. UMC Modified, Lost, Deleted and/or Destroyed ESI Responsive to Plaintiffs' Discovery Requests.
7. UMC's Failure to Comply with its Legal Duty to Preserve, Failure to Put in Place a Timely Litigation Hold, Failure to Comply with Multiple Court Orders to Preserve and Produce Responsive ESI, and Loss and Destruction of Responsive ESI (1) Necessitated the Appointment of a Special Master, (2) Caused Substantial Delay of these Proceedings, and (3) Caused Plaintiffs to Incur Needless Monetary Expenses.
8. The Special Master Correctly Concluded UMC Repeatedly Misrepresented the Completeness of its Production of Documents Produced to DOL; However, UMC Was Not Ordered to Produce Kronos Payroll Data in Spreadsheet Format.

Defendants failed in their challenges to the Special Master's findings, including the threshold challenge to Special Master Dan Garrie's competence. Ouch! Garrie is a Senior Managing Partner (http://www.lawandforensics.com/daniel-garrie/) of Law & Forensics (http://www.lawandforensics.com/). He has written numerous articles and books on law, technology and e-discovery. *See eg*. D. Garrie & Yoav Griver. *Dispute Resolution and E-Discovery*, Thomson Reuters (2nd ed. 2013). Garrie earned a Masters degree in computer science at Brandeis University before going on to law school. A challenge to his expertise was misplaced.

The challenge did not go over well with the supervising Judge who studied his work more closely than anyone. After *emphatically rejecting* the hospital arguments, Judge Peggy Leen stated:

> The court has conducted a de novo review of all of the special master proceedings and finds that he was professional and courteous, if occasionally frustrated by testimony displaying a lack of appreciation of UMC's legal duties to preserve and produce responsive ESI. He was repeatedly told by UMC executives and employees that they did not know about their duty to preserve, had not learned about their preservation obligations from counsel, did not know what a litigation hold was, and had not explored relevant repositories of information responsive to plaintiffs' discovery requests.

Bench Slap of Defendant's Attorneys

With a background like that it is not surprising that the Special Master uncovered so much evidence of incompetence and malfeasance in preserving evidence. Judge Leen held: (emphasis added)

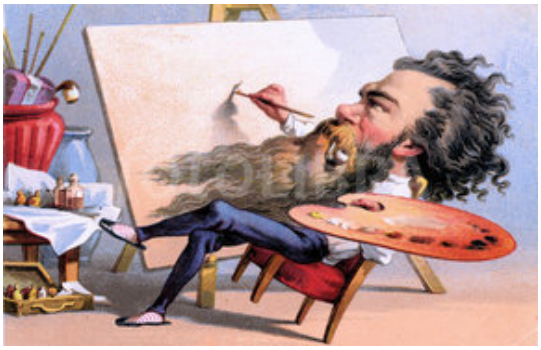
> UMC was on notice that its timekeeping, time systems, payroll policies, and procedures were relevant to this litigation. UMC also knew it was unable to document that employees were being compensated for actual time worked. Both UMC **and its former and current counsel failed** to comply with UMC's legal duty to suspend routine document retention/destruction policies to ensure the preservation of relevant documents. UMC failed to communicate the need to preserve relevant documents and ESI to employees in possession or likely to be in possession of discoverable information, or for that matter to communicate this duty even to "key players." UMC and its counsel failed to identify, locate, and maintain information relevant to specific, predictable, and identifiable claims involved in this litigation.

Note that Judge Leen goes out of her way to include the defendant ***and its lawyers*** in the blame, both its prior attorneys and its present attorneys. All of these attorneys failed in the "legal duty to suspend routine document retention/destruction policies to ensure the preservation of relevant documents." In situations of shared blame like this the attorneys involved are sometimes personally sanctioned along with the client, but this has not happen here. Judge Leen did make several sharp comments against the defendants lawyers, includi9ng this finding:

> UMC's current counsel blamed former counsel and their ESI consultants for the delay in producing responsive ESI. Counsel for UMC advised the court at the hearing on June 25, 2013, that the client did not have any real understanding of what MPP had done or what data had been collected. This representation turned out to be false. . . . Thus, the representation UMC's current counsel made to the court that the client did not have any real idea of what prior counsel had done regarding ESI collection was patently false. In the light most favorable to current counsel, they did not ask the right questions of the individuals involved in the initial collection. The people involved in the process— MPP, its vendors and consultants, and the IT personnel at UMC who did the collection of ESI from 26 custodians—were simply not asked until after the special master was appointed and made the appropriate inquiries.

You do not see comments like that very often. Basically the judge is saying you lied to me and I cannot trust you. Again, more *conscience shocking* conduct by these attorneys, well outside the norm of accepted behavior.

Importance and Art of Custodian Interviews



The interviews that eventually were taken under the Special Master's order and supervision show that critical evidence could have been saved from routine destruction, *if the interviews been done at the time the suit was filed, not years later*. The interviews would have ensured that preservation notices were properly given, understood and followed, and the right ESI was collected and effectively searched. *See William A. Gross Construction Associates, Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (custodian interviews to assist also in keyword search formulation).

It is important to note that the custodian interviews in *Small* had to be done **twice**. The attorneys botched the first attempt at witness interviews. They were ordered to do it again. I am not surprised. Many people underestimate the complexity and sophistication of interviews in cases like this. They also underestimate the wiliness of custodians and tendency of some of them to evade questions.

It is very difficult for most attorneys to conduct an interview on the subject of information storage, IT systems, company document storage systems, email, texts, other personal messaging, social media, personal computers, phones, other devices and software programs used. Questions on these subjects are very different from questions on the merits of a case. A good custodian interview requires special technical knowledge and skills, which, unfortunately, most lawyers still lack. Too bad, because witness interviews are so very important to big cases with complex, messy ESI systems.

Philip Favro (http://www.driven-inc.com/about/our-experts/), an expert consultant for Driven, Inc. (http://www.driven-inc.com/solutions/ediscovery/), makes this point well in his excellent article on *Small*:

> Fulsome custodian interviews are essential for ensuring that relevant electronically stored information (ESI) is preserved. Such interviews are characterized by exhaustive questioning on any number of topics including traditional and newer sources of ESI.
>
> Properly conducted, custodian interviews should provide counsel with a thorough understanding of the nature and types of relevant information at issue in the litigation, together with the sources where that information is located. If custodian interviews are neglected or deficient, parties are vulnerable to data loss and court sanctions. The *Small v. University Medical Center* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr) case is instructive on these issues.

Vegas Court Spotlights the Importance of Custodian Interviews with New ESI Sources (https://www.law.com/legaltechnews/2018/08/30/vegas-court-spotlights-the-importance-of-custodian-interviews-with-new-esi-sources/?cmp=share_twitter) (LegalTech News 8/30/18).

Phil's explanation of some of the facts behind the Special Master ordered redo of the interviews shows how difficult some custodian interviews can be, especially when they want to hide something from the lawyers:

> Once conducted, the interviews were deemed insufficient by the special master and (later on) the court. In its order, the court spotlighted some of the evasive answers that UMC's custodians provided. For example, UMC's director of human resources disclosed the existence of only one relevant timekeeping application despite having approved the use of other timekeeping systems for certain employees. UMC argued that its HR director was only obligated to disclose the timekeeping application he actually used:
>
> [The custodian] did not use those applications himself and therefore had no obligation to disclose these systems in custodian interviews ordered by the special master because *a "custodian interview is aimed at uncovering the applications, systems, programs, data with which the actual custodian interfaces."* (emphasis added).
>
> The court decried this limited notion of a custodian interview, observing that it failed to satisfy UMC's "legal obligation to identify, locate, maintain, and produce relevant information."

In *Small* they never did any custodian interviews until after the case blew up and a Special Master was appointed. Even when interviews were finally conducted by defense counsel, they did a poor job; they were not well-informed of the client IT systems and were not "tough enough" with the interviewees. They seemed to be easily deceived and accepted evasive, incomplete answers. You must cross-examine and be the *devils advocate* for effective interviews, especially when the custodian is evasive.

Favro recommends:

> Interviews should go beyond cursory questioning and focus instead on identifying all sources of relevant information. Nor should they be limited to safe topics like "where can relevant messages be found in your email account" or "where are relevant documents stored on your laptop." Interviews should now include questions regarding the existence of information exchanged through new communications media or stored in online locations . . .

There is an art to interviews like this. The witnesses have to be comfortable telling you the truth, the full truth, without fear of reprisals. Assurances of confidentiality and witness protection can be a good tongue loosener, but do not mislead them. Remind them who you represent, typically at the very beginning.

Trust, friendliness and rapport are important in interviews, but fear has its place too. I like to tell the witness up front how important it is for them to be fully truthful and candid. A short, but stern formal reminder can go a long way if delivered properly. Since interviews are usually not under oath this is especially important. Some formality is important as part of the *tongue-loosening process*. Moreover, interviews like this are typically done one-on-one with no court reporter and no written statement for the witness to read and sign at the end.

An interview is just two people talking, one asking all of the questions, preferably face-to-face and preferably in the witnesses office with their computer equipment at the ready to show you something, if need be.

To encourage full honesty and to help get at the truth I also sometimes inform a witness that they will likely be deposed and subject to intense cross-exam by opposing counsel. (I might possibly exaggerate the adversaries capabilities from time to time.) I point out how it will all be under oath and penalty of perjury. Then I start my role of the *devils advocate,* saying these are the kind of questions you will be asked, and then tear into them and make sure the story is straight and the memory not too patchy. *Hey, do not get mad at me for pressing on you; these are the kind of questions you can expect and we have to be prepared.* That works. Fear can be a powerful motivator of truth. So can good cross-exam. The carrot and stick approach is usually effective.

Another important guardian of truth is for the questioning attorneys to be able to look the witness in the eye and follow exactly what they are saying; full technical understanding of the ESI questions. Do not speak the language? Too technical? Then bring a translator, an expert. Do not allow the witness to speak over your head. They may well be *bs-ing* you. Nodding your head at everything said, even when you do not understand, is a natural lawyer tendency that you must fight against. Do not be afraid to ask stupid questions. When it comes to technical interviews of any kind I interrupt and ask questions all of the time. Much of the language used in tech and e-discovery is vague and subject to multiple meanings. You need to ask questions. Only a fool is afraid to ask questions for fear of seeming foolish.

Good interviews are a best practice to start e-discovery off right and protect clients from wasted expense and unnecessary risks. See the fine article on point by Kelly Twigger (http://esiattorneys.com/about-esi-attorneys/team/kelly-twigger/), *5 Things A Great Custodian Interview Can Do For Your Case And Your Budget* (https://abovethelaw.com/legal-innovation-center/2017/06/27/5-things-a-great-custodian-interview-can-do-for-your-case-and-your-budget/) (*Above The Law*, 6/27/17).

Proper custodian interviews require skill and training. They require the attorney or paralegal doing the interview to have a basic understanding of technology, communications software and social media. It can be challenging in some situations and even advanced practitioners need a good detailed outline to do it right. Make sure your law firm or law department has a good ESI custodian interview outline. I suggest having both a short and long form. These help even experienced lawyers to make sure they do not forget to ask something.

Expert consultants like Kelly Twigger (https://twitter.com/kellytwigger) of ESI Attorneys (http://esiattorneys.com/) can help you to prepare good outlines and other tools. They can also do the most challenging tasks for you, such as prepare custom Preservation Notices, conduct Custodian Interviews, supervise ESI Collection, attend the 26(f) conference and prepare an ESI discovery plan, and ultimately, document search, review and production. An e-discovery expert can make it far easier and less expensive to stay current with the many technical-legal issues in the field.

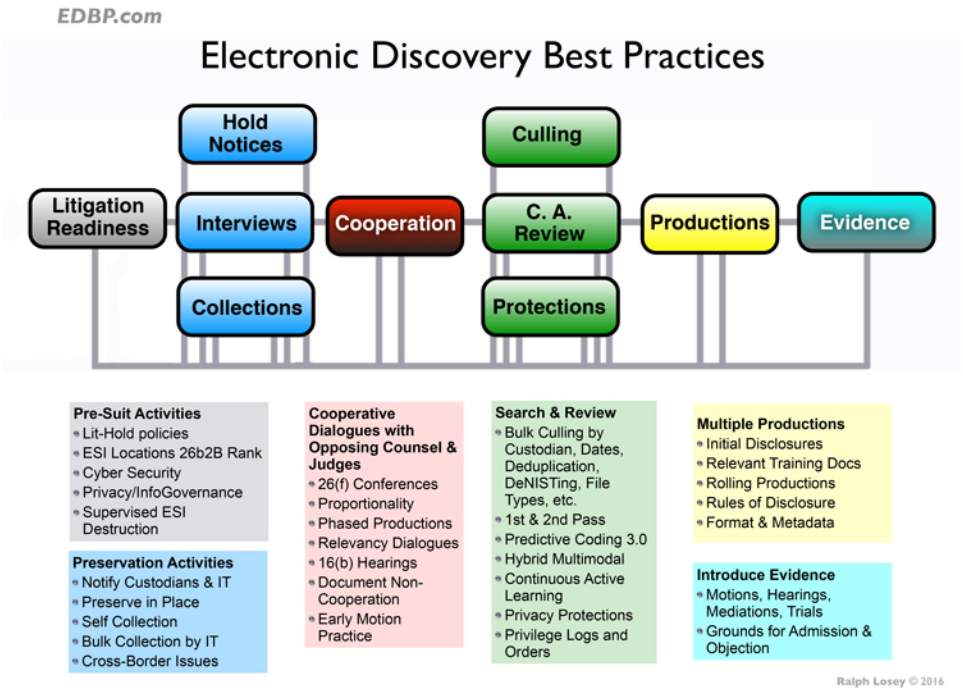
A custodian interview can provide a wealth of information to help lawyers to find and save important evidence, but only if done properly by skilled legal practitioners. Do not risk the judge ordering a redo. Make sure you do a proper interview of the key custodians as soon as possible

Conclusion

Small shows what can happen when you take a *cavalier attitude* towards ESI preservation and interviews. *Small v. University Medical Center* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr), Case No. 2:13-cv-0298-APG-PAL (https://scholar.google.com/scholar?scidkt=14902985800321649 61&as_sdt=2&hl=en), *Report and Recommendation and Final Findings of Fact and Conclusions of Law* (https://scholar.google.com/scholar_case?case=5434872561968729998&hl=en&as_sdt=6&as_vis=1&oi=scholarr) dated August 9, 2018. Preservation errors at the beginning of a case can easily cascade into serious negligence and ESI destruction. This often results in sanctions motions and *discovery about discovery.* That diverts everyone from the merits of the case. In *Small* the sanctions not only included a permissive inference jury instruction, but also monetary sanctions, amount yet to be determined. What happened to the defendant in federal court in Vegas in *Small* is something that you should *fear and loathe* ever happening to you.

Proper timely custodian interviews could have prevented the loss of data in *Small,* could have prevented any sanctions. We all know that what happens in Vegas does **not** stay in Vegas, at least not when discovery in a law suit is concerned. The truth will come out as it should. This is especially true in a case like *Small* with misconduct that ***shocks the conscience*** in a ***mockery of justice,*** as Special Master Dan Garrie put it back in 2014.

Early custodian Interviews are an important, well-accepted best-practice, especially in a large matter like *Small v. UMC*. Interviews are the third step in the ten-step best practices of Electronic Discovery shown below. *Electronic Discovery Best Practices (EDBP.com* (http://edbp.com)). They are *one of three* important activities that attorneys must perform in every law suit to preserve potential electronic evidence (shown in blue in the diagram below): hold notices, interviews and ESI collections.



(https://ralphlosey.files.wordpress.com/2016/05/edbp_detail_large.png)

See EDBP on Preservation (http://www.edbp.com/preservation/).

In a large firm like mine, which only does Labor and Employment law, you can use one of the specialists in e-discovery to assist in these tasks, at least until you become proficient on your own. Specialists in large firms are usually experienced attorneys that now limit their work to e-discovery. (I recommend against specializing too early, but some are able to do it effectively.) In my firm there is only one full-time specialist, me, but I have over fifty attorney liaisons to assist. They have special training in e-discovery and are the *go-to* e-discovery lawyers for their office (we have 50), but they spend most of their time in employment litigation and other services outside of e-discovery. Other large firms have more full-time e-discovery specialists, but fewer part-time specialists. I decided to try to spread out the knowledge.

One of the things a specialists do, full or part-time, is help to create and update good standard witness interview question outlines for use by other attorneys in the firm. For instance, I have both a long and short form that I recently updated. Your firm probably has something similar. If not, do it now. Better late than never.

If you are in a smaller firm and do not have a full-time specialist in your ranks, then you should consider retaining an outside specialist as co-counsel in larger e-discovery matters. They can help you to save on overall costs and, most importantly, prevent a disaster like *Small v. University Medical Center* from ever darkening your door.

This entry was posted on Sunday, September 16th, 2018 at 6:25 pm and is filed under AI Ethics, Evidence, Forensic Exam, Lawyers Duties, Review, Search, Spoliation/Sanctions. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

2 Responses to *The Importance of Witness Interviews: 'What Happens in Vegas Shouldn't Stay in Vegas'*

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September 17, 2018 at 8:11 am
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Daniel Small says:
October 7, 2018 at 6:13 pm
Great article!

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