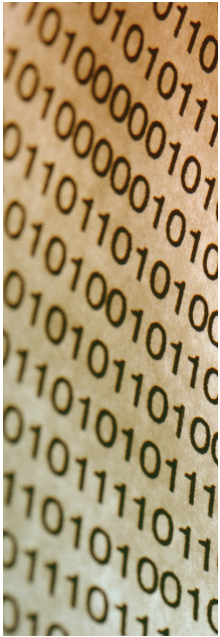


eDiscovery: The New Information Management Battleground

Developments in the Law and Best Practices



eDiscovery: The New Information Management Battleground

Developments in the Law and Best Practices

Introduction

The following case summaries illustrate some of the technical challenges presented by the new electronic discovery (eDiscovery) rules, and how to address them. The cases highlight how technology, along with policy review and familiarity with the changes in the Federal rules of Civil Procedure, can meet those challenges.

1. Need to properly search and document actions or run risk of the court reacting

3M Co. v. Kanbar

1.1 Overview

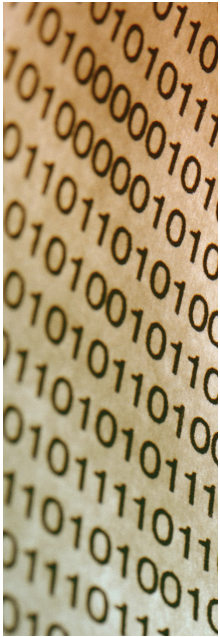
During a deposition, a defense witness mentioned an email message that the defense had not produced during discovery. This raised doubts as to whether the defendant had produced all information responsive to the case, as it had previously certified. Although the court did not order another search, it did require the defendant to certify again that all responsive documents had been found, and to describe the actions it had taken to ensure its search was complete. The court emphasized that, given the defense's failures during discovery, they had better be very sure that all documents had in fact been produced before they signed the new certification.

1.2 Case Study

In this case, the defendants did not have an effective records management system. They had little or no idea where or how responsive information was stored in their own systems. The defense was forced to rely upon manual searches by employees to try to find email messages and documents in order to respond to the plaintiff's discovery request. Despite the fact that the employees had already searched for responsive materials three times, they did not find everything, which led to the embarrassing revelation at a deposition. The court's displeasure was evident by its requirement that the defendants personally certify that all reasonable efforts had been made to find responsive materials. Given the defendants' reliance on manual searches, this was assuredly an unnerving prospect for those executives. If another responsive email were to turn up, it would mean violation of two certifications (including the original certification) plus a court order, exposing the defendants to the possibility of severe penalties.

1.3 Recommendations

A comprehensive records management solution with the right functionality would have permitted the attorneys to conduct the proper keyword searches. Employees should have documented what actions they had taken, and should have put their responsive materials in a segregated "legal hold" storage location. Companies need clear discovery policies and training, both of which are part of the solution. Employees must be trained to recognize when they have information relevant to a case. Training is also critical to an overall records management system, so that employees will categorize company information in the correct category, as well as know when to discard material not relevant to litigation or other company business.



eDiscovery: The New Information Management Battleground Developments in the Law and Best Practices

2. Preplanning can prevent “searching for a needle in a haystack”

MGP Ingredients, Inc. v. Mars, Inc.

2.1 Overview

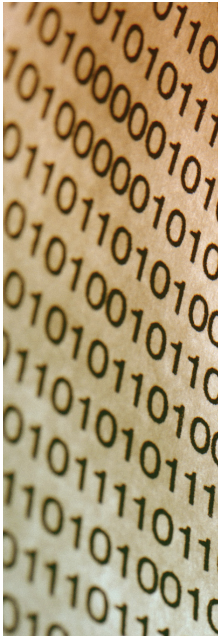
The plaintiff found itself in a dilemma when defendants produced over 48,000 documents in TIFF format (i.e. image files), which were stored as maintained by the producer’s custodians. The plaintiff complained that it was “faced with a 48,000-page haystack and no guidance where to look for a few needles.” The court had no sympathy for the plaintiff. It held that the defendant was under no obligation to organize or label its documents, produce an index, or match up the documents to particular requests. The court observed that the problem could have been prevented if the parties had conferred and come to an agreement on how the documents were to be produced.

2.2 Case Study

The problem for the plaintiff was that the order of the documents produced by the defendants had no meaning to the plaintiff. Another problem is that TIFF files are not searchable on their own. In many cases (apparently here, although not discussed by the court), they must be processed through optical character recognition software in order for the files to be searchable. The plaintiff was tripped up by a big “Or” in the Federal rules. Rule 34 states that documents can either be produced as they are stored in the ordinary course of business, or organized and labeled to correspond with the categories in the request. The defendants chose the former option, and the court found that they were not required to do any more than that. The plaintiff was stuck with a haystack of its own making.

2.3 Recommendations

This case offers a cautionary note for the corporate IT department, which is acting as the technical resource for its legal counsel. Merely asking for electronic data is not enough. Consideration should be given to the format in which that data will be produced. The court itself stated that the plaintiff could have avoided the situation by discussing the format of production with the defendants beforehand. They could have requested that the defendants produce the material in accordance with the order of the search request, and failing that, could have asked the court to enter an order mandating the form of production. In addition, the plaintiff could have asked for production in a different format than TIFF—production in the documents’ native format, for example. In addition to searchability, plaintiffs could get “metadata”—additional information about the documents such as file creation dates, last accessed dates, etc. As the defendants included hard-copy documents within their electronic production, the plaintiff could have asked that the production format of those documents be in searchable PDF format. In that way, even if the defendants made mistakes in classifying their documents, the plaintiffs would have had the ability to search through them to find meaningful documents.



eDiscovery: The New Information Management Battleground Developments in the Law and Best Practices

3. Defendant's casual attitude towards discovery leads court to appoint an outside vendor to conduct it

Wingnut Films, Ltd. v. Katja Motion Pictures Corp.

3.1 Overview

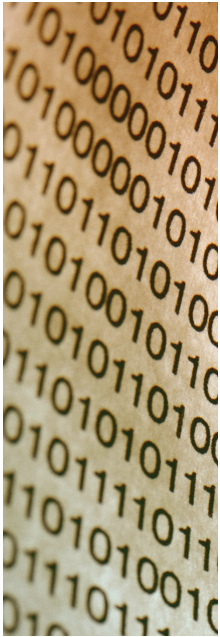
The defendant conducted a minimal search for electronic documents, clicking through a few folders on two servers. Only three of 11 employees who were asked for responsive information even bothered to search for relevant emails. Furthermore, the defendant took no steps to stop its automatic deletion policies, continuing to purge emails every 30 days and reuse email backup tapes every week, even after receiving eDiscovery requests.

3.2 Case Study

Not only did the defendant fail to undertake any meaningful searches of its electronic systems, counsel certified several times that all responsive documents had been produced. These certifications were made after the court had entered orders requiring the defendant to respond to the plaintiff's discovery requests. It was only after document custodians had been deposed that the truth about defendant's discovery failures came to light. As a result, the court appointed a third-party discovery vendor to conduct independent searches of the defendant's network and email servers, as well as the hard drives of key employees. The defendant was required to pay all costs and expenses of the vendor, as well as the plaintiff's attorney's fees and costs.

3.3 Recommendations

The case illustrates the Court's discretion in the face of a litigant's failure to take its discovery obligations seriously. Therefore, all parties need to take adequate steps to respond to discovery requests, including engaging in discussions between counsel and the IT department so that counsel can understand where all potentially responsive electronic documents are located. The party should also make sure that recycling of backup tapes of systems containing relevant data is suspended until information can be properly searched and preserved. It is better to incur the time and expense up-front, rather than paying someone else to do it, with little control over the results.



eDiscovery: The New Information Management Battleground Developments in the Law and Best Practices

4. Summary

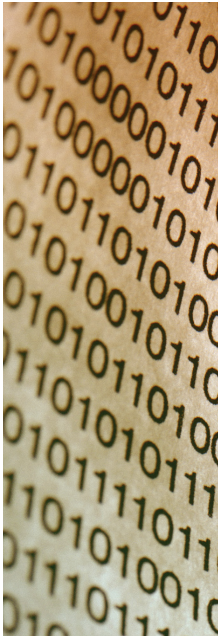
The eDiscovery amendments to the Federal Rules of Civil Procedure have spawned an extensive amount of litigation as the courts seek to apply those new rules to specific situations. For the most part, litigants who have kept up with the developments in the area and have taken steps to incorporate the new reality into their business environment, from both a technology and policy standpoint, have likely fared better in litigation. On the other hand, companies that fail to acknowledge this new reality run the risk of creating unnecessary hurdles for themselves in litigation. Given the fact that the vast majorities of documents being created today are electronic and may never be incorporated into hard copies, this risk is very real.

Some general observations can be made from the cases examined:

- **Failure to invest in new technology can put a company at risk.** The lack of a keyword search capability forced the defendant in 3M to rely upon manual searches to find its documents, with the result that some got through the cracks, and earned them a warning from the judge. This was undoubtedly the case in Wingnut as well, although the lackadaisical attitude of the defendant towards its discovery obligations was a greater contributor to the sanctions levied against it.
- **Familiarity with the Federal Rules amendments is essential.** Ignorance of the new amendments resulted in sanctions in Wingnut and left the plaintiff in MGP Ingredients with a 48,000-page “haystack.” As time goes on, courts will become increasingly less tolerant of those who refuse to comply with the rules.
- **Policies must be written or modified to conform to the new paradigm.** 3M had manually searched three times for potentially responsive information, yet did not find everything. Manual search is only one method that should be considered when unearthing potentially responsive information. With today’s advances in technology, policies and processes must be modified to utilize more advanced capabilities.

What should the company that is faced with a lawsuit do? The realities of the electronic information age require an immediate response:

- **Begin identifying potentially responsive electronic content now.** Who are the key players in the dispute? What types of electronic media are involved? The sooner a comprehensive source map of potentially responsive electronic data is compiled, the better off the company will be. Any medium is fair game, from the obvious (email, word processing documents, spreadsheets) to the not-so-obvious (personal digital assistants, cell phones, instant messaging). The IT department can play a critical role here.



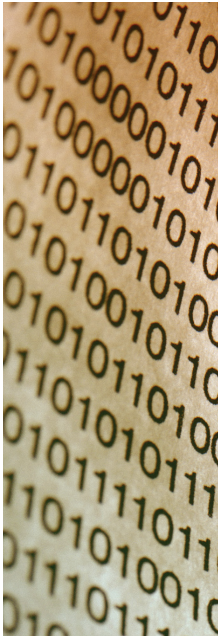
eDiscovery: The New Information Management Battleground Developments in the Law and Best Practices

- **Implement a “litigation hold.”** As soon as responsive material is identified, steps must be taken to preserve it. Automatic deletion processes that threaten the data must be disabled. Those involved must be warned not to dispose of any responsive material. In some cases, special “forensic” handling of the data or device may be advisable. Coordination with the IT department is essential in order to accomplish this. If your company uses backup tapes for archiving purposes (generally not advisable) instead of for disaster recovery purposes only, the backup tapes may become targets for discovery requests.
- **Coordinate with litigation counsel. Early involvement of litigation counsel is crucial.** They can advise as to whether you are taking the right steps concerning data preservation. They may also be able to reduce preservation burdens by negotiating with the other side (i.e. agree that backup tapes will not be sought). In any event, in the federal system, scheduling orders, including provisions for disclosure or discovery of electronically stored information, are issued soon after the complaint is served on the defendant. Thus, getting litigation counsel up to speed on the electronic data environment is important.

These actions are just the tip of the iceberg. For example, after the data is identified, it will need to be compiled and reviewed, and some ultimately will be produced to the other side. Many companies hire outside vendors to assist in this effort.

If not faced with an immediate lawsuit, companies can take steps to reduce the risk of error should litigation arise:

- **Identify all sources of electronic data.** Going through a “mapping of sources” exercise in an orderly fashion while not under the time pressure of litigation will increase the accuracy of the source map, while also giving management an idea of the magnitude of the electronic records management challenge.
- **Develop a retention strategy.** There is no reason for a company to retain information not related to the business, or business information for longer than business or legal considerations require (except if subject to a “litigation hold”). Large volumes of data can unnecessarily increase search and review costs, and the enterprise may be unnecessarily keeping old data that it will never again use.
- **Investigate technological solutions.** Archiving solutions can save money in the long run by centralizing business information. Deduplication technology can reduce costs by allowing retention of only one of many possible duplicate carbon copies or e-mail strings sent to many company recipients. The process of searching for responsive data is streamlined. Retention policies can be automatically enforced by identifying data for deletion after the retention period has expired (or by automatically deleting such data). Those same policies can be easily (and selectively) suspended in the event of a litigation hold. Finally, central storage of data also facilitates the review and production process once in litigation.



eDiscovery: The New Information Management Battleground Developments in the Law and Best Practices

- **Review electronic data policies.** Does the company have effective email, records management, or legal hold policies? Lack of standards for email, for example, could expose the company to liability for a hostile work environment if offensive emails are not prohibited. A properly promulgated legal hold policy can prepare employees for potential legal holds more effectively than a hastily issued one.

Again, these steps are only the beginning. They must be accompanied by high-level management commitment and support, an appropriate infrastructure (both company and technical), and effective training, auditing, enforcement, and improvement programs. Addressing the problems will lead to dividends down the road.

For general information only. Not a legal opinion or legal advice. For all questions regarding compliance with specific laws and regulations seek legal counsel. KCI shall have no liability for errors, omissions or inadequacies in the information contained herein or for interpretations thereof. The reader assumes sole responsibility for the selection of these materials to achieve its intended results. The opinions expressed herein are subject to change without notice.

Kahn Consulting Inc.
(847) 266-0722
info@KahnConsultingInc.com