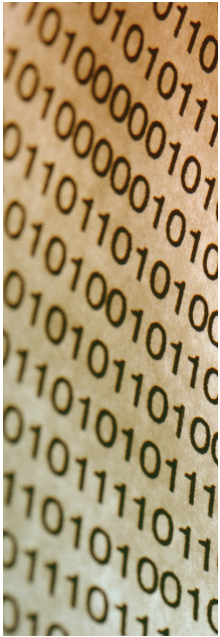


eDiscovery Challenges Facing Companies Today



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As electronic information volumes grew and mismanagement of it was ubiquitous, it was only a matter of time before electronic discovery (eDiscovery) would become an issue for companies involved in litigation.

eDiscovery costs have been continually spiraling out of control, and have been magnified by economic conditions in which companies with declining revenues nonetheless have to defend more expensive litigation. With the ever-growing volume of data that companies produce and store, and expanding technology environments in which information is parked, the exercise to unearth, secure, assess, review, and produce potentially relevant Electronically Stored Information (ESI) is becoming more complex.

According to IDC, the size of the eDiscovery industry is expected to reach \$21.8 billion this year.¹ Costs have soared because unstructured ESI possesses significant challenges for companies when they have to respond to litigation, audit, or investigation inquiries. With more employees using social networking tools to do their job and more data parked in “the cloud,” the mechanics of performing eDiscovery on environments like FaceBook, LinkedIn, Twitter, blogs, wikis, etc. will only add to the cost. When a company doesn’t own the environment its information is created and/or stored in, it can increase the effort and risk associated with producing information.

Companies must proactively manage their information to ensure they are prepared when a discovery request hits.

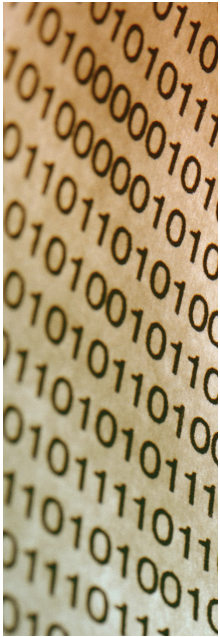
Companies that lack a means of organizing their information have and will continue to face higher costs of reviewing their electronic information when they are involved in a lawsuit. In some cases, ESI requests may be expeditiously addressed because the responding company’s filing or storage systems promote access. The more common reality, however, is that a company’s sudden ESI demands do not neatly line up with its information management practices. Companies must proactively manage their information to ensure they are prepared when a discovery request hits. When discovery hits, you want to have the right information available in a timely manner—but do you really?

Many companies face challenges in compiling the company’s data quickly enough to enable it, and to readily assess the merits of the case at an early stage. The inability to conduct early case assessment (ECA) can mean that the company may continue to incur more discovery expenses. To the extent it could assess the merits of a matter early on, it may promote earlier settlement before more costs have been incurred.

A company can also incur considerable costs in the discovery process because it cannot respond to legal or regulatory demands in a timely manner. As a result, the company can be assessed fines or other types of penalties. Many examples exist of organizations being sanctioned because of their inability to timely respond to discovery requests, both public and private. For example, in *ACORN v. County of Nassau*,² a local government was sanctioned as it claimed it did not have

¹ IDC, “Legal discovery and litigation support infrastructure market will reach \$21.8B in 2011, says IDC,” Tekrati, June 27, 2007, found at <http://software.tekrati.com/research/news.asp?id=9062>, last visited May 16, 2010.

² 2009 U.S. Dist. LEXIS 19459 (E.D.N.Y. Mar. 9, 2009).



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the ability to search for electronic information documents. Such excuses are no longer tolerated by the courts. It is expected that companies proactively manage their data, and have processes and technology in place so they can move quickly when litigation hits. Yet today, many companies fall short and fail to manage information as an asset from creation to disposal. The end result is that information tends to accumulate in a haphazard fashion, which complicates the eDiscovery process.

The costs of retaining information beyond its useful life can be large as well. An internal study by DuPont showed that, in responding to discovery requests over a three-year period, DuPont reviewed more than 75 million pages of text. It found that more than 50% of the documents that it reviewed were kept beyond their required retention period, and calculated that the cost of reviewing just those documents that had exceeded their retention periods was \$12 million.³

Companies need to have a holistic plan to encompass process, people, and technology.

The Supreme Court has recognized that companies have the right to destroy information they no longer need for legal, regulatory, or business purposes. In *Andersen v. U.S.*, the Court stated: “It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”⁴ That said, a company cannot simply go on a massive cleaning spree, engaging in the wholesale deletion of information without a strategy or a plan. The key is that companies must develop, implement, and maintain a records-retention schedule. This is the only legal way for companies to legitimately destroy information they no longer need for business, legal, or regulatory purposes.

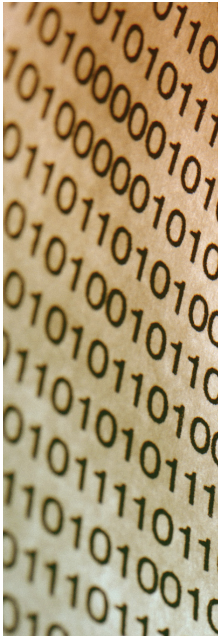
For large companies, managing information with the aid of technology may be the only way that they can effectively manage records through disposition. Such systems can help employees properly classify information as well manage information according to retention periods. When a customer has an inquiry or litigation happens, because information is better organized, it is easier to find and produce.

Companies need to have a holistic plan to encompass process, people, and technology. Gaps between the people, process, and technology (or within one of these areas) can cause significant issues. An example of a technology gap within the technology bucket was demonstrated in *Covad Communications Co. v. Revonet, Inc.*⁵ The defendant had originally produced paper documents instead of the requested native format. Its excuse for producing paper documents was that it did not have the ability to produce native documents any longer. While the court did not accept the defendant’s argument, what is clear is that information that exists may be producible, and may be in the same form as it was originally created.

³ DuPont Case Study: Attributes of an Effective Document Retention Program, cited in Redgrave Daley Ragan & Wagner, LLP, “Building an ROI Business Case for Email Archiving,”

⁴ 544 U.S. 696, 704 (2005).

⁵ 260 F.R.D. 5 (D.D.C. 2009).



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A strong and well-thought-out eDiscovery game plan directly impacts the company's bottom line. eDiscovery costs can be brought under the company's control, and allows it to get back to focusing on the matter at hand instead of the eDiscovery challenges. The ability to implement information management best practices allows the company to directly reduce storage as well as eDiscovery costs. Additionally, the company will be able to increase the ROI of the information assets it creates because it has the ability to more effectively utilize those assets. By having information at its employees' fingertips, and giving the employees the ability to easily find the information if they need it, the company maximizes the value of its information.

We know that when business happens, sometimes disputes follow. If and when litigation strikes, it is nice to know that you're prepared for discovery and can use more robust technology offerings to make your business "faster, better, cheaper" in normal business times.

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Kahn Consulting Inc.
P.O. Box 1045
Highland Park, IL 60035
P (847) 266-0722 F (847) 266-0734
info@KahnConsultingInc.com