

www.kmksc.com

Washington Building
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212
Telephone: 414-962-5110
Facsimile: 414-962-8725

When Your Electronic Information May Become Your Enemy

By

Robert L. Gegios and Stephen D. R. Taylor
of Kohner, Mann & Kailas, S.C.

Electronic discovery is now sought in nearly all business litigation, by both sides. It has been described as one of the leading legal issues facing businesses. Unfortunately, few understand what compliance requires in practice, and even fewer businesses are prepared to respond effectively.

In the past, furnishing discovery meant collating paper. Today information exists in places many of us might not think of, including scanners, printers, telephones, PDAs, voicemail and thumb drives. Cheap data storage has also removed incentives to dispose of records when they become commercially unnecessary. Much discoverable information is invisible to the average user. For example, many documents contain metadata that track details of users, comments, and changes made. Similarly, data compiled in databases may not appear identifiably in any final report, but is potentially discoverable, as is deleted information. Deletion generally does not destroy information without multiple overwriting.



Other information is difficult to access as a result of business decisions. Many businesses do not set up e-mail systems to support document management capabilities. Therefore, locating and recovering particular e-mails requires extensive and time-consuming screening of archived back-up tapes not conducive to searching for individual files. However, it is not acceptable to simply access files to determine relevance. Merely opening a file potentially destroys metadata. Professional forensic review of duplicated data is now standard, because it leaves metadata intact and supports means to establish that it remains in original form.

Courts are increasingly intolerant of incomplete, inaccurate or dilatory responses to recovery requests, and ignorance is not excused. A majority of sanctions requests in this area have been granted, especially for delay, non-production and erroneous claims that the information did not exist. Sanctions can change the outcome of a dispute, by excluding witnesses or pleadings, dismissal and default judgments, and monetary penalties calculated to impose real financial pain.

The best advice is to prepare in advance, before any litigation is anticipated if possible. Seek legal advice from a lawyer who has conducted and opposed electronic

discovery. Where litigation is not reasonably anticipated, it is possible to implement information destruction practices that would otherwise be deemed intentional destruction of evidence. Once on notice of litigation, relevant material must be preserved.

If the threat of legal action arises, what must be preserved is determined not by what is known to be pertinent, but by what is actually relevant. All possibly relevant activity should be suspended, including automatic functions. Make sure your technical experts work with counsel to establish an inventory of systems and devices employees use, and have used, and identify personnel likely to have involvement in different types of potential legal problem in advance. Advance knowledge of what systems and storage media individuals related to the legal matter have accessed will minimize disruption by limiting the scope of the preservation hold and speeding the return to normal.

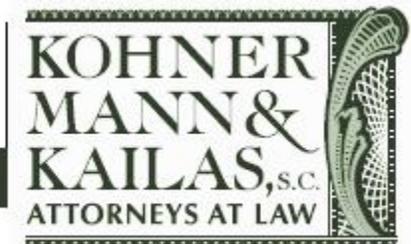
Planning for actual compliance requires management to work with IT personnel and counsel familiar with electronic discovery. Deciding how to preserve is a subject that requires careful attention in order to avoid charges of manipulation or destruction. Courts are increasingly intolerant even of delay in identifying the extent and sources of relevant information held. Through proper planning, companies can avoid sanctions and often may also be able to avert onerous and expensive forms of data retrieval.

The implications of electronic discovery can be very serious for the unprepared. Advance planning is by far the best form of risk and cost management. If legal action is in the offing, any misstep may be fatal not only to your budget, but also to the ability to present your case fully in court. In such circumstances, seek out a proven source of legal advice in this area without delay.

Reprinted as originally published as a special Supplement to Creditors' Edge.

KOHNER, MANN & KAILAS, S.C.
ATTORNEYS AT LAW

A Reputation for Success, A Tradition of Results



About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the normal course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

www.kmksc.com