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DISCOVERY OF COMPUTER STORED DOCUMENTS AND COMPUTER BASED LITIGATION SUPPORT SYSTEMS: WHY GIVE UP MORE THAN NECESSARY

I. INTRODUCTION

As chief counsel for Hardluck Corporation,[1] you just received a complaint claiming your corporation's product injured several individuals. The Hardluck Corporation has for years stored most of its documents on a main computer and on several personal computers used by different departments. The corporation also uses e-mail to communicate with its employees, and the employees use the e-mail system to communicate among themselves. In an attempt to understand Hardluck Corporation's position, you start gathering documents related to the complaint. In the process of gathering documents you discover some disturbing facts. Several documents are found that were kept three years beyond the time the government required the corporation to retain them. While innocent at the time Hardluck's employees wrote the documents, in the context of the pending litigation, they are troublesome. Several e-mail messages are also found that, when written by Hardluck's employees, were only gossip but are now harmful to the corporation's position in the pending litigation.

As preparation for litigation proceeds, documents are collected and entered into the legal department's litigation support system that you, as lead counsel, will use during the trial. You import some documents into the system in complete form while other documents are summarized. You have made several important decisions about the case and have chosen and arranged documents in keeping with those decisions. The first request for production of documents served by the plaintiff is broad enough to include the documents and e-mail messages that are damaging to the corporation's position. The plaintiffs are also seeking discovery of your litigation support system and the documents contained within the system.

1. Hardluck Corporation is a fictitious corporation for this hypothetical.

Because information stored on computers is generally discoverable,[2] can a corporation in Hardluck's position prevent unnecessary disclosure during the discovery process? Would a good faith record retention program prevent the unnecessary disclosure of potentially harmful documents? Will work product privilege protect in-house counsel's litigation support system?

A series of e-mail messages played an important role in a $150 million securities fraud case brought by the Siemens Corporation against ARCO.[3] E-mail messages found in the computer system of an ARCO subsidiary acquired by Siemens suggested that ARCO employees were concerned about flaws in one of the subsidiary's products.[4] One of the e-mail messages that proved damaging said, "the whole basis of our plan is almost invalid due to the fact that we have been operating under the wrong assumptions for ten years."[5] In a sexual harassment case, a "found" e-mail message virtually decided the outcome.[6] A woman's superior claimed that her termination was based on economic reasons.[7] The plaintiff found an e-mail message from the president of the corporation to the head of personnel instructing them to "get rid of the tight assed bitch."[8] The e-mail message found by the plaintiff forced the corporation to settle for $250,000.[9] Unnecessary disclosure is avoidable, provided that in-house counsel take advantage of legal methods to protect the corporation.[10]

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2. Ellen German Berndt, Comment, *Discovery of Computerized Information,* 12 COLUM. U. L. REV. 71, 78-9 (1982).

3. Matthew Goldstein, *Electronic Mail, Computer Messages Present Knotty Issues of Discovery,* N.Y. L.J., Feb. 8, 1994, at 1, 5.

4. *Id.*

5. *Id.*

6. Marianne Lavelle, *Digital Information Boom Worries Corporate Counsel,* NAT'L L.J., May 30, 1994, at B1.

7. *Id.* at B2.

8. Mitch Betts, *Ignore Archive Issues At Your Peril CIOs Who Neglect Records Management Risk Getting Clobbered in Court,* COMPUTERWORLD, MAR. 2, 1992, at 71.

9. *Id.*

10. While beyond the scope of this Comment, in-house counsel must also consider the attorney-client privilege as another tool available to prevent unnecessary disclosure. The attorney-client privilege protects confidential communication between the attorney and the client. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2017 (1994). The attorney-client privilege encourages frank and open conversation between the attorney and the client and allows for full disclosure to the attorney. Note, *Attorney-Client and Work Product Protection in a Utilitarian World,* 108 HARV. L. REV. 1697, 1699 (1995) [hereinafter *Utilitarian World*]. This full disclosure and free and open communication provides all the information necessary to represent the client fully. *Id.* The attorney-client privilege differs from work product immunity in that the attorney-client privilege applies to communication both before and after the start of litigation whereas work product immunity attaches only in anticipation of litigation. *Id.* The attorney-client absolute privilege also contrasts with the work product's "need and hardship" exception.

Id. The attorney-client privilege is more fragile than the work product immunity because the disclosure to a third party may destroy the attorney-client privilege whereas disclosure to a third party will not necessarily destroy the work product immunity. Colin Tapper, *Discovery in Modern Times: A Voyage Around the Common Law World*, 67 CHI.-KENT L. REV. 217, 262 (1991). An individual who consults with an attorney to obtain legal advice is considered a client for the purposes of the attorney-client privilege. 8 WRIGHT & MILLER, *supra*, § 2017. To claim the protection of the attorney-client privilege, the client must assert that: 1) he was or is a client, 2) the individual to whom he made the communication was in fact an attorney or the agent of an attorney, and 3) the client made the communication, in private, to the attorney to secure legal advice or assistance. *Id.*

The application of the privilege between an attorney and a corporation poses problems because the corporation is not an individual but a legal entity created by the law. Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981). The most important problem created by this situation is determining who is the client. 8 WRIGHT & MILLER, *supra*, § 2017. Courts use two methods to decide who in the corporation represents the corporate entity for the privilege. *Id.* The first of these methods, the "control group" method, determines who represents the corporate entity by establishing which "officers and agents . . . [are] responsible for the directing [of the company's] actions in response to legal advice." *Upjohn*, 449 U.S. at 391. The Supreme Court noted that both mid-level and lower-level employees can, while acting within the scope of their employment, create serious legal problems for the corporation. *Id.* These mid and lower-level employees also have information that the in-house counsel would need to advise the members of the "control group." *Id.* The Court, in *Upjohn*, rejected the control group method in favor of a more expansive application of the attorney-client privilege as the privilege relates to corporations. 449 U.S. at 395. The Court declined to establish a set of rules that would govern the privilege; instead, the Court adopted a case-by-case approach to decide who represents the corporation for purposes of the privilege. *Id.* This method is known as the "scope of employment" method. Stephen A. Saltzburg, *Corporate and related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 280 (1984). Commentators have suggested that the *Upjohn* decision departs from the traditional notion of attorney-client privilege by applying a work product doctrine analysis to determine privilege. *Id.* at 294. Saltzburg argues that the "control group" test is "closer to being right" than the "scope of employment" test. *Id.* at 294-95. The Court extends to employees other than those within the "control group" the ability to stand in the corporation's place when seeking legal advice from counsel if the communication is within the scope of employment. *Upjohn*, 449 U.S. at 394. The Court criticized the lower court's view of the privilege as failing to recognize that it "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. *See also* Saltzburg, *supra*, at 289-90.

The corporation may invoke the attorney-client privilege to protect both documents and e-mail messages stored within the corporation's computer. *Utilitarian World*, *supra* at 1699. The corporation must have produced the documents that it wishes to protect with the privilege to seek legal advice from in-house counsel. Zullig v. Kansas City Power & Light Co., No. Civ.A.87-2342, 1989 WL 7901 at *3 (D. Kan. Jan 17, 1989). The United States District Court for Kansas held in Zullig that the client "triggers" the privilege where the client is communicating with counsel to obtain legal advice and not where the legal advice may be an "outgrowth of the communication." *Id.* at *2. The corporation has the burden of proving that the privilege protects computer printouts. Colorado v. Schmidt-Tiago Construction Co., 108 F.R.D. 731, 734 (D. Colo. 1985). Conclusory statements are insufficient and the corporation must articulate the specific items objected to and the reasons for the objection. *Id.*

Corporations have come to rely upon the computer to perform many functions once performed manually. Among the most important functions that computers perform for the modern corporation are the storage and manipulation of documents.[11] Increasingly, corporations use e-mail to communicate with and among their employees, who save the messages on the computers on their desks.[12] Adding to the large number of documents stored and manipulated by corporate computers is the increasing use of computers by in-house corporate counsel.[13] Without proper management of documents and e-mail messages, the corporate computer becomes an easy target for an opponent searching for "smoking guns" during discovery.[14]

The number of in-house attorneys using computers, and the different ways they use them, is growing. More than seventy percent of corporate in-house counsel use computers.[15] Attorneys generally use computers for document preparation, document databases, litigation support systems, and e-mail.[16] A significant number (82.4%) of legal de-

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E-mail to or from in-house counsel may also fall within the privilege. In *X Corp. v. John Doe*, the court held that a former in-house counsel's e-mail was privileged where the attorney sent messages to various employees expressing his concern for prompt compliance with federal regulations and discussing the consequences of non-compliance. 816 F. Supp. 1086, 1090 (E.D. Va. 1993), *aff'd*, Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir. 1994).

11. Joey Frazier, *Electronic Sleuthing: John Jensen's Evidence Discovery Enterprise*, LAW. PC, Aug. 15, 1993, at 1. In many circumstances, the corporation will have computer files and no corresponding paper copies. *Id.* Frazier suggests three reasons why a corporation would maintain files only electronically: (1) there is no paper copy that an opponent could find during discovery, (2) if opposing counsel requests discovery of computer files the corporation has likely stored sensitive files in secured files no one can find, and (3) the nature of computer storage permits the corporation to easily delete documents. *Id.*

12. Heidi L. McNeil and Robert M. Kort, *Discovery of E-mail and Other Computerized Information*, ARIZ. ATT'Y, Apr., 1995, at 16. Surveys indicate that 90% of corporations employing 1,000 or more persons use e-mail to communicate with their employees. Amie M. Soden, *Protecting Your Corporation From E-mail Litigation; Privacy, Copyright Issues Should Be Addressed in Policy*, CORPORATE LEGAL TIMES, May 1995, at 19; *see also* Business Editors, *U.S. Bankers Earmark $20 Billion for Reengineering in 1997; According to New Ernst & Young/American Bankers Association Technology in Banking Report*, BUSINESS WIRE, Mar. 7, 1995, at 1 (stating that by 1997, 95% of banks will use e-mail).

13. Donald A. Swansen, *Support Staff Are Buying and Using Technology, Computers Represent Cultural Change*, CORPORATE LEGAL TIMES, July 1993, at 11.

14. Smoking guns are documents that significantly damage a party's position if discovered. *See generally*, Andrew Johnson-Laird, *Smoking Guns and Spinning Disks*, COMPUTER LAW., Aug. 1994, at 1.

15. Swanson, *supra* note 13, at 11 (discussing in-house counsel's use of computers).

16. *Id.* The most prevalent use of the computer by in-house counsel is in document preparation or drafting. Donald E. Brookhyser, *The Niche For Nerds*, NEV. LAW., May 1995, at 15. Seventy-four percent of legal department workstations are linked with the corporation's computer permitting access to the general database. Anne Stein, *How In-House Counsel Use Computers*, A.B.A. J., September 1993, at 42. The same survey found that sixty-eight percent of in-house counsel use e-mail. *Id.* The survey was sent to 1600

partments communicate with other departments or subsidiaries via the computer.[17] Of in-house counsel, 31.8%, use the computer to connect with their outside counsel[18] by data link, equipment that permits the transmission of data between two points. [19] The use of computers by attorneys has improved management of resources and turn around time in document production and manipulation.[20] However, this improvement in efficiency does not come without a price.

In-house counsel must manage the files generated by the increased use of the computer or risk that the computer will become a fertile ground for discovery.[21] Possible discovery requests include the production of information in databases, e-mail files, and litigation support systems.[22] The very gains in productivity realized by the computer create the increased possibility of unnecessary disclosure.[23]

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corporate in-house legal departments with 144 departments responding. *Id.* Following are the summary results of that survey:

Area of Law	% of In-house Attorneys with Workstations
Litigation	90%
Real Estate	88%
Securities	87%
Subsidiary Operations	60%
Labor and Employment	79%
Patent and Trademark	91%
General Corporate	76%
Tax	90%
Government Relations	90%
Industry Regulation	80%
Administrative Regulation	84%
Interpretation Enforcement	52%
Antitrust	69%
International Trade	76%
Environmental	42%
Other	36%
Total	74%

Id. (citing A.B.A. Survey of Automation in Corporate Legal Departments (1993)).

17. General Counsel Survey, *In-House Counsel Still Wary of Information Superhighway; Technology,* CORPORATE LEGAL TIMES, July 1995, at 35.

18. *Id.*

19. DONALD D. SPENCER, COMPUTER DICTIONARY 89 (Camelot Pub. Co. 1992).

20. Carol L. Schlein, *Lawyers as Managers of Automation,* 3 LEGAL MALPRACTICE REP. 31 (1992).

21. *See generally* Frazier, *supra* note 11; McNeil and Kort, *supra* note 12 for examples of documents that were adverse to a party's position because the party did not manage the storage of documents properly; Martha Middleton, *A Discovery: There May Be Gold In E-Mail,* NAT'L L.J., Sept. 20, 1993, at 1, 40.

22. *Id. See generally* Philip J. Schworer, *Problems Arising From the Creation of a Computer-based Litigation Support System,* 14 N. KY. L. REV. 263 (1987).

23. Johnson-Laird, *supra* note 14 (discussing discovery of documents stored in computer files).

Corporate counsel can take several steps to assist the corporation in the management of its business records and privilege to prevent unnecessary discovery. First, as background, this Comment discusses computer storage systems and terms associated with the storage and discovery of computer-based information. Second, this Comment addresses prevention of unnecessary disclosure of computer-stored documents by using a record retention program. Third, this Comment reviews the ethical considerations of in-house counsel's participation in document destruction using a valid record retention system. Finally, this Comment addresses in-house counsel's work product immunity as it applies to the corporation's computer-based litigation support system.

II. BACKGROUND

A basic understanding of how computers store information will assist in-house counsel in protecting the corporation from unnecessary discovery. In-house counsel must also become familiar with permissible discovery of computerized information to prevent unnecessary discovery. Confusion about the way computers store documents and the terms used to describe storing functions can prevent in-house counsel from effectively eliminating unnecessary disclosure.[24]

A. COMPUTERIZED STORAGE OF INFORMATION

Computers are essentially high capacity file cabinets.[25] Computers store information in databases which are a series of files grouped by some topic arrangement.[26] The computer's software provides it with the instructions necessary to manipulate these files and databases.[27] Pe-

24. Berndt, *supra* note 2, at 78 (suggesting that an understanding of the terms used in discussing computer storage would prevent confusion in discovery requests). Berndt relies on *Dunn v. Midwest Indemnity* to develop her list of terms and their definitions. *Id.* at 79. In *Dunn v. Midwest Indemnity* the court ordered the plaintiff to define the terms used in its discovery requests. 88 F.R.D. 191, 197 (S.D. Ohio 1980).

25. Barry Evan Friedman, Comment, *Computer Discovery in Federal Litigation: Playing by the Rules*, 69 GEO. L. J. 1465, 1467 (1981). This analogy only relates to the grouping of like documents into files. *Id.* at n.8. Information is stored in computers as a series of magnetic spots on tape or hard disk. *Id.*

26. *Id.* Computers use two principles of physics to store data: magnetism and light. Johnson-Laird, *supra* note 14. Magnetic storage, such as floppy disks, hard drives, and magnetic tapes record information by changes in positive or negative electronic charges. *Id.* Computers also store information by using light or laser beam, which burns pits into a smooth surface. *Id.* The computer then "reads" the information with a low power beam which reflects back from the pitted areas at a slower rate than the smooth areas of the disk. *Id.*

27. MYLES E. WALSH, UNDERSTANDING COMPUTERS, WHAT MANAGERS AND USERS NEED TO KNOW 95-96 (John Wiley & Sons 1985). Most users will come into contact with three basic types of software: operating software, data transfer software, and application

ripheral devices, such as tape drives, disk drives, video terminals, and printers permit the computer to communicate both internally and externally.[28] When the computer operator "saves" a file, the computer creates a new file on the media used for storage.[29] To remove files from computer storage, the computer operator uses the computer's software to delete the file.

Many individuals mistakenly believe that deleting a file permanently erases that file.[30] A computer does not erase files; the computer only marks a file as no longer needed, and makes the space immediately available for storing new files. [31] The computer erases the information only when the computer over-writes the file with another file. [32] These unerased or incompletely over-written files present an opportunity for opponents to find otherwise undiscoverable information.

Sending e-mail is the electronic equivalent of mailing a letter

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software. *Id.* Operating software controls how the different components of the computer interact with each other and with application software. *Id.* at 96-97. The data transfer software functions act as an interface between application software and a computer's peripherals. *Id.* at 129-32. This software permits the computer to write information onto the computer's storage media. *Id.* at 133. Application software is the most familiar to the average computer user. *Id.* at 193-94. Its function best describes application software, such as word processing programs, accounting packages, spreadsheets, games, or databases. *Id.* at 194.

28. RICHARD A. HENLE & BORIS W. KUVSHINOFF, DESKTOP COMPUTERS IN PERSPECTIVE 473 (Oxford Univ. Press 1992). Peripherals fall into five categories: mass storage, video display and interface, input devices, output devices, and special peripherals. *Id.* Mass storage such as disk drives supplement the computer's memory capabilities. *Id.* The computer operator views what is happening through the video display and interfaces. *Id.* Keyboards, mice, and joysticks, are the traditional types of input devices most operators are familiar with. *Id.* Output devices permit the operator to review the results of computer operations. *Id.* Voice synthesis devices are the most common special peripherals used by the modern computer. *Id.* at 593-94.

29. SPENCER, supra note 19, at 341; Johnson-Laird, *supra* note 14, at 10. Johnson-Laird identified three types of backup or duplicate files: deliberate backup, inadvertent backup, and off-site. *Id.* at 9-10. The purpose of deliberate backup files is to preserve information that the corporation would lose in the event of a computer failure. *Id.* at 9. Deliberate backup files are produced at a set, periodic schedule, such as once a week. *Id.* at 9-10. Inadvertent copies are made by individuals, on a random basis, to preserve their own work. Johnson-Laird, *supra* note 14, at 10. The inadvertent backup is usually not produced on a specific schedule. *Id.* Off-site backup guards against such disasters as fire and floods. *Id.* at 11. The corporation may store backup of its files with companies that specialize in providing off-site storage. *Id.* at 11.

30. Johnson-Laird, *supra* note 14, at 11 (discussing the recovery of "erased" files).

31. *Id.* Both undelete and unformat programs can recover files that the computer operator deleted or disks the operator formatted. *Id.* at 17.

32. *Id.* An inexpensive program that wipes unused files will erase the individual file. *Id.* Optimization programs will also erase unwanted files. *Id.* At least one firm, Electronic Evidence Discovery, Inc. ("EED"), specializes in searching out file remnants and recovering these files. Frazier, *supra* note 11, at 3.

through the U.S. mail.[33] Employees transmit e-mail messages between themselves through the corporation's computer system, which in turn quickly accumulates large files of messages. [34] Employees fill these innocent looking messages with real and potential danger for the corporation. [35] Sexual harassment in the work place has surfaced as a major problem area in corporate e-mail.[36] When litigation becomes a reality, e-mail is not the only area in-house counsel must protect from unnecessary discovery.

B. Business Records Systems

Business record systems contain the traditional form of records stored by a corporation,[37] such as accounting, administrative, transactional, and internal and external memoranda.[38] Internal or external

33. McNeil & Kort, *supra* note 12, at 16 (discussing problems of e-mail and discovery). *But see* Brian G. Gilpin, Comment, *Attorney Advertising and Solicitation on the Internet: Complying with Ethics Regulations and Netiquette*, 13 J. Marshall J. Computer & Info. L. 697, 719-21 (1995) (describing the differences between e-mail and the traditional letter).

34. Conrad Blickenstorfer, *Where does all the E-mail Go?*, Computerworld, July 22, 1991, at 25. The rapid accumulation of e-mail documents has advantages people will not readily give up. *Id.* E-mail messages can help reconstruct past events that would otherwise require the memory of the individuals involved. *Id.*

35. Soden, *supra* note 12, at 19.

36. Soden, *supra* note 12, at 19. Besides sexual harassment problems, corporations face problems with violation of privacy and copyright violation. *Id.* The Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2000 (1986), provides that messages sent on a company's e-mail system are private if the system is accessible from outside the company. Blickenstorfer, *supra* note 34, at 25. If the corporation's e-mail system is for internal use only, the messages are not private. *Id.*

37. John T. Soma & Steven G. Austin, *A Practical Guide to Discovering Computerized Files in Complex Litigation,* 11 Rev. Litig., 501, 506 (Summer 1992). Soma and Austin refer to business records as new media. *Id.* New media is information stored on computers that the corporation once stored on paper or film. *Id.*

Soma and Austin also identify two additional categories of computerized information. *Id.* at 507-08. These two additional categories are legal research systems and litigation support systems (discussed elsewhere in this Comment). *Id.* Legal research systems are databases from which a researcher can retrieve case law and other legal materials. *Id.* The typical legal research systems are Westlaw and Lexis. *Id.*

38. Accounting systems usually include such items as accounts receivable, accounts payable, general ledger, and tax records. Dr. Robert A. Rademacher & Dr. Harry L. Gibson, An Introduction to Computers and Information Systems 16-17 (1983). Administrative records include payroll, corporate policies and procedures, and customer relationship policies. *Id.* Transactional records detail customer sales, supplier purchases, and other purchases and sales. *Id.*

Rademacher and Gibson describe three classes of computer business applications: transaction processing, functional applications, and decision support. *Id.* Clerical and bookkeeping are the most common transaction processing functions. *Id.* Examples cited include:

- Payroll
- Accounts Payable

memoranda may also include e-mail communication.[39] Two particular types of records will cause unnecessary disclosure if not properly managed: 1) production files, and 2) backups retained for historical purposes or to satisfy government requirements.[40]

Production backups are duplicate files created to prevent the loss of work-in-progress if there is a computer failure.[41] Employees create these duplicate files either on personal computers or on the corporation's centralized server.[42] The corporation's employees produce these backups either on a timed basis or randomly "as needed."[43] Whether the computer times the backup of the documents or the computer operators backup files as needed, the computer saves the random backup copies in

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- Billings
- General Ledger
- Label Generation
- Credit Card Accounting
- Mailing Lists
- Tax Accounting
- Utility Billing

Id. Corporations control resources or assets using functional applications. *Id.* Functional applications cited by Rademacher and Gibson include:

- Order Processing
- Inventory Control
- Labor Distribution
- Warehouse Control
- Production Scheduling
- Asset Depreciation
- Sales Analysis

Id. Decision support systems usually manipulate data from several departments and include:

- Simulation Models
- Forecasting
- Financial Planning Models
- Cash Flow Analysis
- Material Requirements Planning
- Machine Scheduling
- Statistical analysis

Id.

39. McNeil & Kort, *supra* note 12, at 16. Information or memos transmitted via e-mail may include informal messages. *Id.* Some informal messages probably contain objectional material that would not normally appear in a more formal inter-company communication. *Id.* at 18.

40. DONALD S. SKUPSKY, RECORDKEEPING REQUIREMENTS 2-10 (1991).

41. Johnson-Laird, *supra* note 14, at 10. In case of a computer failure, any work not saved onto storage media is lost. *Id.* Without a stored copy of ongoing work, the individual will have to redo the work.

42. *Id.* Smaller firms that do not have a centralized server upon which to save documents are limited to saving documents on individual computers. *Id.*

43. *Id.* *See* HENLE & KUVSHINOFF, *supra* note 28 for a discussion the different types of peripherals and their uses.

a disorganized manner.[44] Computer operators rarely categorize the files under directories, which makes keeping track of the backup files difficult.[45] Random backup files frequently contain early drafts of documents, strategic plans, and product designs.[46] Some of these early drafts may contain information which does not reflect the corporation's true or final position, but are discoverable nonetheless.

Historical backup or archival storage[47] records are kept for reasons other than insurance against computer failure. The archived documents represent information the corporation has an interest in maintaining for future reference. [48] For example, certain government regulatory schemes require corporations to retain records for certain periods of time.[49] The government record retention requirements vary from thirty days to permanent retention.[50] The corporation, for cost reasons or because the corporation realizes that it no longer requires certain data, will

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44. McNeil & Kort, *supra* note 12, at 18 (discussing reasons computerized information is disorganized).

45. *Id.* A directory is a partition of a storage media intended to contain documents of similar content. SPENCER, *supra* note 19, at 107. The computer operator can also create subdirectories within directories in which the computer will store individual files. *Id.*

46. Ken Shear, *Electronic Evidence It's Not "Cutting Edge" Any More. Disregard it at Your Peril,* LAW. PC, August 1, 1994, at 2. E-mail is the most dangerous because individuals express themselves more fully on what they perceive as a private medium. *Id.*

47. Archival storage is a process of storing programs and data on auxiliary media for long term retention. SPENCER, *supra* note 19, at 12.

48. Other non-business institutions such as libraries and schools archive information for permitting access to accumulated knowledge. JAMES V. VERGARI & VIRGINIA V. SHUE, FUNDAMENTALS OF COMPUTER-HIGH TECHNOLOGY LAW 38-40 (1991). The commercial databases present a similar purpose for archiving. *Id.* at 38. Such firms as Dow Jones News Retrieval, Newsnet, CompuServe, Westlaw, and Lexis provide permanently archived information accessible by subscription to the respective services. *Id.*

Some professionals involved in archiving data on computers are concerned that as computer systems change, the ability to read old files could be lost. *Id.* Computer formats have changed eight times since 1952, making data stored on prior formats unreadable. *Id.* Vergari and Shue suggest that a program of constant reformatting of archived data to the most current format will solve the problem. *Id.*

49. *See generally* GUIDE TO RECORD RETENTION REQUIREMENTS IN THE CODE OF FEDERAL REGULATIONS (Fed. Reg. Nat'l Archives and Rec. Admin. 1994) (detailing federal record retention requirements).

50. Record retention requirements vary with statutory enactments. Below, the author has listed a sample of the required length of record retention by CFR statute title. *Id.* The author offers these retention schedules only as a guide. Many retention schedules have varying triggering events, therefore, the reader should consult the appropriate CFR Title for specific guidance. OFFICE OF THE FEDERAL REGISTER NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, GOING TO RECORD RETENTION REQUIREMENTS (rev. as of Jan. 1, 1994).

LENGTH OF RECORD RETENTION

STATUTE	<1 YEARS	1	2	3	4	5	6	7	10-40
7 CFR Agriculture	X	X	X	X	X	X			
8 CFR Aliens			X	X					
9 CFR Animals and Animal Products	X		X	X					
10 CFR Energy		X		X		X			
11 CFR Federal Elections				X					
12 CFR Banks and Banking		X	X	X		X			X
13 CFR Business Credit and Assistance				X			X		X
14 CFR Aeronautics and Space	X	X	X	X	X				
15 CFR Commerce and Foreign Trade		X	X	X		X			
16 CFR Commercial Practices		X	X	X	X				
17 CFR Commodity and Securities Exchange		X	X	X		X	X		
18 CFR Conservation of Power and Water Resources		X							
19 CFR Customs Duties		X	X	X		X			
20 CFR Employee Benefits		X		X		X			
21 CFR Food and Drugs	X	X	X	X	X	X			
22 CFR Foreign Relations				X					
23 CFR Highways				X		X			
24 CFR Housing and Urban Development			X	X					
25 CFR Indians				X		X			
26 CFR Internal Revenue				X	X	X	X	X	
27 CFR Alcohol, Tobacco Products and Firearms			X	X	X				
28 CFR Justice Administration						X			
29 CFR Labor	X	X	X	X	X	X	X		X
30 CFR Mineral Resources	X	X	X	X		X	X		
31 CFR Money and Finance: Treasury				X	X		X		
32 CFR National Defense				X					
33 CFR Navigation and Navigable Waters	X	X	X	X	X				
34 CFR Education				X		X			
36 CFR Parks, Forests and Public Property				X					
37 CFR Patents, Trademarks and Copyrights				X					
38 CFR Pensions, Bonuses, and Veteran's Relief				X					
39 CFR Postal Service		X		X					
40 CFR Public Contracts and Property Management		X	X	X				X	
42 CFR Public Health			X	X		X	X		
43 CFR Public Lands: Interior		X		X			X	X	
44 CFR Emergency Management and Assistance			X	X					X

destroy the archived files.[51] Management of the archived records and production backup files, which includes destruction of documents, involves both legal and technical issues. The existence of both legal and technical issues requires that in-house counsel and information systems departments be involved in the management of the archival system.

C. Litigation Support Systems

Litigation support systems are computer databases that permit the attorney or in-house counsel to quickly access litigation-related documents.[52] Conceptually, litigation support systems are not unlike note-

45 CFR Public Welfare				X					
46 CFR Shipping	X					X		X	
47 CFR Telecommunications		X	X	X		X		X	
48 CFR Federal Acquisition Regulations		X		X	X	X	X		
49 CFR Transportation	X	X	X	X		X			
50 CFR Wildlife and Fisheries		X	X	X		X			

OTHER VARIOUS RECORD RETENTION PERIODS

10 CFR Energy
- •As long as the containers are in use for the purpose indicated
- •Until Nuclear Regulatory Commission authorizes destruction
- •Until license is terminated

12 CFR Bank and Banking
- •As long as the bank continues to use security devices

14 CFR Aeronautics and Space
- •For the duration of the operation under the DAS authorization
- •Continuously while engaged in providing air transportation
- •Permanent

21 CFR Food and Drugs
- •For a period of time that exceeds the shelf life and expected use of the product

24 CFR Housing and Urban Development
- •For a period as prescribed by the commissioner

30 CFR Mineral Resources
- •Until rope is retired from service

41 CFR Public Contracts and Property Management
- •During performance of the contract
- •Indefinitely

47 CFR Telecommunications
- •Indefinitely

48 CFR Federal Acquisition Regulations
- •Until facilities are disposed of

Id.

51. Record management is the retention and destruction of records on a scheduled basis. Spencer, *supra* note 19, at 325. The retention and destruction of records have legal implications for corporations that become involved in litigation. Betts, *supra* note 8, at 71. Failing to destroy documents that the corporation no longer requires could lead to discovery of these documents in subsequent litigation. *Id.* The court, however, could impose sanctions for destroying documents when litigation becomes foreseeable. *Id.*

52. Soma & Austin, *supra* note 37, at 508.

books and indices used by the attorney manually organizing for trial.[53] The computer, however, offers speed and accuracy not found in manual systems.[54] The litigation support system consists of the hardware (such as disk drives and printers) and software that permit the attorney to store and manipulate documents related to litigation.[55] These systems may present tremendous discovery problems for in-house counsel.

D. Discovery of Computer Stored Data

In 1970, the Supreme Court amended the Federal Rules of Civil Procedure to clarify the issue of discoverability of information stored in computers.[56] As computerized record keeping methods replace less accurate manual methods, the courts look favorably upon the discovery of information stored in computers. [57] Courts are quick to require disclosure of computer stored information because of the accuracy and reasonable cost of production of the requested information.[58]

The circumstances and forms of production required by the courts for the disclosure of computer-based information take many forms.[59] Even when the respondent has produced the information sought in the form of a print-out, the courts have required the respondent to produce the computer media on which it stores the information.[60] This media

53. Edward F. Sherman and Stephen O. Kinnard, *The Development, Discovery, and Use of Computer Support Systems in Achieving Efficiency in Litigation,* 79 Colum. L. Rev. 267, 268-69 (1979).

54. *Id.* at 269. The computerized litigation support system also offers flexibility in that the attorney can search for documents under names, titles, or key words. *Id.*

55. Schworer, *supra* note 22, at 263. Traditionally, attorneys used litigation support systems only in complex litigation. *Id.* The author suggests that the reduced cost of hardware and software plus the increased capacity of desktop computers permits the use of these systems for less complex litigation. *Id.*

56. Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (D. Utah 1985). Fed. R. Civ. P. 34 (1993) reads in part:

> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other *data compilations* from which information can be obtained, translated, if necessary, by respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; . . . .

(Emphasis added by author).

57. *Bills*, 108 F.R.D. at 461.

58. Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (W.D. Va. 1972).

59. *See generally* Berndt, *supra* note 2 (discussing cases involving the discovery of computer based information).

60. Nat'l Union Elec. Corp., v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1257, 1262 (E.D. Penn. 1980) (holding that producing a machine- readable copy of the requested information is no different from producing a photo-copy of a document); *Adams*, 54 F.R.D.

storage includes magnetic tape or hard or floppy disks. [61] Not only may the court compel the respondent to produce the required information, the plaintiff may also gain access to the code book used to produce the database.[62] The code book contains a set of instructions detailing the way the data is presented.[63] Further, required production could include not only the code book but also the user's manual which describes how to use software, hardware, or the system[64] and documents or source information used in preparing the database.[65] If courts do not require production of the media used to store the database, they may require that the respondent process information or produce reports as required by the opposing party.[66] Once the respondent produces the computer files, the court may require the respondent to disclose any refinements or updates

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at 222. In *Adams,* the plaintiff claimed it needed the computer cards or tapes along with W-2 print-outs to determine statistically where discriminatory practices had occurred. *Id.* at 221. The plaintiffs also claimed that the computer was more reliable and less expensive than human labor in producing the desired statistical study. *Id.* The defendants claimed that the plaintiff already had the computer printouts; therefore, producing the punch cards or tapes was repetitive. *Id.* The *Adams* court held, in interpreting the notes of the advisory committee, that when the respondent is the only party who can make the data usable, the court may require the respondent to do so. *Id.* In *Fauteck v. Montgomery Ward & Co.*, the defendant claimed that the assembly of a database required legal judgement and therefore the legal judgment protected the database. 91 F.R.D. 393, 398 (N.D. Ill. 1980). The defendant's expert was to use the database as a basis for export testimony. *Id.* The court held that the plaintiff would eventually discover the database under FED. R. CIV. P. Rule 26(b)(4) (1993). *Id.* The *Fauteck* court, however, ordered immediate disclosure to advance the litigation without prejudice to the defendant. *Id.*

61. *See supra* note 26 and accompanying text (discussing the differences between magnetic tape, hard or floppy disks, and how the computer stores data on different media).

62. Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 650 (W.D. Ky. 1987). The respondent, E.I. du Pont, provided the Equal Employment Opportunity Commission with information sought during discovery. *Id.* The Commission encoded the information onto a computer disk and du Pont sought to discover the Commission's disk and the code required to read the disk. *Id.* The court granted du Pont discovery of the Commission's database, codebooks, user's manual, and the documents used to prepare the database. *Id.* at 651. The court also ordered that du Pont not only pay the expense of the discovery but also a "fair portion of the fees and expenses incurred" by the Commission in the preparation of the database. *Id.*

63. Codes also set forth rules of data conversion detailing the method of converting from one representation to another. SPENCER, *supra* note 19, at 53

64. *Id.* at 410.

65. *Williams*, 19 F.R.D. at 650. Du Pont argued that duplication of the database was required to cross-examine the Commission witness effectively. *Id.* Du Pont claimed that it would require key punching 3189 employee personnel records, "thirty two years of collective bargaining agreements, six sets of responses to interrogatories, and requests to produce and two sets of admissions into du Pont's computer." *Id.* at 650 n.2.

66. Williams v. Owens-Illinois, Inc., 665 F.2d 918, 932-33 (9th Cir. 1982), *cert. denied,* Owens-Illinois, Inc. v. Williams, 459 U.S. 971 (1982). The court did not require the respondent to turn over the database because the respondent had already supplied the punch cards. *Id.*

made to the data storage.[67] The court may even require the respondent to permit his opponent to inspect and copy computerized files at the respondent's place of business.[68] While many in-house counsel find discovery burdensome, failure to disclose required information may prove fatal to the corporation's position.

Failing to provide information requested, absent a recognized privilege, can lead to court-imposed sanctions. For example, in *Jankins v. TDC Management Corporation*, TDC failed to turn over financial records, tax returns, and computer disks, which delayed the start of trial on two occasions.[69] The *Jankins* trial court enforced the magistrate's order excluding certain evidence as a sanction for failure to obey discovery orders.[70] The court also imposed attorney's fees and expenses related to compelling discovery for $70,699.56.[71]

III. ANALYSIS

A. Preventing Unnecessary Disclosure with a Record Retention System

By developing a coherent record retention program, in-house counsel can help the corporation improve its ability to handle information efficiently.[72] By removing unnecessary records from storage, the corporation will avoid filing errors and increase retrieval speed of needed documents.[73] Even beyond the increase in storage efficiency, a managed record retention system prevents unnecessary disclosure of information and ensures that documents which should exist are available for discovery.[74] The record retention system also reduces the legal risks from

67. Daewoo Elec. Co., Ltd., v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986) (instructing the government not only to produce the reels of computer tape but the distillation of the data).

68. Doyle v. Hoyle, No. C.I.V. 94-244-SD, 1995 WL 113933, at *6-7 (D. N.H. 1995) (requiring the defendant to permit on-site inspection or to file objections within 10 days).

69. 21 F.3d 436, 444 (D.C. Cir. 1994) (holding that the defendant demonstrated a "pattern of delay and obfuscation" in resisting discovery).

70. *Id.* The *Jankins* court barred the TDC from introducing evidence to refute Jankins contention that he was: (1) employed by the defendant during the period in question, (2) that the defendant could pay Jankins, and (3) that Jankins suffered whatever damages Jankins could prove. *Id.*

71. *Id.*

72. Skupsky, supra note 40, at 23.

73. *Id.*

74. *Id.* Not only are documents available for discovery by the opponent, but in-house counsel can quickly locate documents needed to defend the corporation's position. *Id.* at 24. The ability to quickly locate documents reduces the cost of retrieving documents for litigation. *Id.*

poorly drafted, erroneous, and misleading documents.[75]

Failing to develop a record retention program can lead to unnecessary disclosure. During civil litigation and a Chapter 11 proceeding,[76] the court required that Johns Manville disclose several documents the corporation could have legally destroyed but became "smoking guns."[77] Among the sixteen million documents that Manville assembled were memoranda suggesting Manville "knew or should have known" of the dangers of asbestos. [78] In-house counsel must prevent documents, no longer required by government retention statutes or corporation needs, from harming the corporation's legal position.[79]

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75. John M. Fedders & Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5, 13 (1980). Fedders and Guttenplan offer the following four advantages of a written document retention program:

- [t]he elimination of the onerous expense of storage of irrelevant and obsolete documents;
- a reduction in the burden and cost of retrieval of documents in response to business requests, government investigations, or litigation;
- a substantial reduction of legal risks flowing from documents, particularly those which are hastily drafted, erroneous, or misleading; and
- the avoidance of an adverse inference from the nonproduction of documents in litigation.

Id.

Fedders and Guttenplan also suggest the following six disadvantages of a written document retention program:

- the expense of establishing and administering a program including the commitment of human and capital resources needed to assure compliance;
- the inability to prove a fact affirmatively because documents have been destroyed;
- a diminished flexibility of response to formal and informal requests for documents;
- the adverse inferences arising form incomplete compliance with the program;
- the adverse inferences arising from selective destruction outside the boundaries of the program (selective destruction appearing less corrupt without a program); and
- other adverse legal effects, including the discoverability of the program.

Id.

76. Under Chapter 11 of the Bankruptcy Law, the court reorganizes a corporation with the intent to keep the debtor corporation in business. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 387 (3rd ed. 1983). Under Chapter 11, the parties create a plan to repay a corporation's creditors while surviving as a reorganized company. *Id.*

77. *Id.* Smoking guns are documents that seriously and adversely effect the corporation's position during litigation. Johnson-Laird, *supra* note 14, at 19.

78. SKUPSKY, *supra* note 40, at 6. Manville did have a record retention program but failed to manage the program properly. *Id.* Under a court order and at its expense, Manville must maintain a warehouse to store the 16 million records. *Id.* at 7.

79. Documents that are harmful to the corporation if retained include documents created as a part of the process of self-evaluation. Corporations have many reasons to engage in the practice of self-evaluation. While the government requires corporate compliance with many regulations, corporate self-evaluation provides a means to check compliance with the law. John Calvin Conway, *Self-Evaluation Privilege and Corporate Compliance*

Sound business judgement and legal requirements must dictate the structure of the record retention plan.[80] The record retention system must satisfy the corporation's need for a cost effective, easy to access system, while satisfying legal requirements.[81] The development of a record retention program, administered in good faith, permits the destruction of unnecessary documents.[82]

A corporation that destroys documents outside some valid record retention program risks severe sanctions.[83] The Eighth Circuit, in *Lewy v. Remington Arms*, developed three factors to determine the validity of a record retention policy. [84] The first factor to consider is whether the record retention policy was reasonable given the totality of the circumstances.[85] Second, a court must determine if some party has filed a lawsuit concerning the documents, and consider the frequency and severity of the legal issues concerning the documents.[86] Third, the court must determine if a corporation instituted the record retention policy in good faith.[87] The courts view document destruction made outside a valid record retention program with suspicion.[88] Courts are especially suspicious

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Audits, 68 S. CAL. L. REV. 621, 622 (1995). Senior managers and directors are not always aware of whether the corporation is complying with government regulations. *Id.* at 625. A wrong doer is likely to actively attempt to conceal their acts. *Id.* The self-evaluation or compliance audit assists senior management in ferreting out activity that increases corporate liability. *Id.*

80. SKUPSKY, *supra* note 40, at 35.

81. *Id.* The corporation would retain between eighty percent and ninety percent of records required by government regulation even if the regulation did not exist. *Id.* at 34.

82. *See, e.g.*, Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 485-86 (S.D. Fla. 1984) (suggesting in dictum that the destruction of documents under a bona fide record retention program would provide a valid justification for failing to produce documents during discovery).

83. *Id.* at 489. The court entered a finding of liability as a sanction for destruction of documents related to the litigation. *Id.* While Piper Aircraft claimed that the destruction of documents was pursuant to a record retention program, no evidence was presented that substantiated Piper's claim that its employees strictly complied with the program. *Id.* at 485.

84. 836 F.2d 1104, 1112 (8th Cir. 1988). The issue on appeal was whether jury instruction given by the trial court was appropriate. *Id.* at 1111. The jury instruction was "[i]f a party fails to produce evidence which is under his control and reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not." *Id.*

85. *Lewy*, 836 F.2d at 1112. The court opined that a three-year record retention program was probably sufficient for documents such as "appointment book, or telephone messages." *Id.* The court, however, felt that a three-year record retention program was insufficient for customer's complaints. *Id.*

86. *Id.*

87. *Lewy*, 836 F.2d at 1112. The court described bad faith as the institution of a record retention program with the intent to limit disclosure of damaging documents. *Id.*

88. W. Russell Welsh & Andrew C. Marquardt, *Spoilage of Evidence*, 23-WTR Brief 9, 36 (Winter 1994). To avoid suspicion of destruction to prevent the disclosure of damaging

when the corporation destroys only damaging documents.[89] While the plaintiff will have difficulty proving that the defendant destroyed a damaging document, the courts may determine that the corporation used their record retention system's routine destruction to destroy damaging documents.[90]

Once litigation has commenced or is even *anticipated*, destruction of documents should cease, regardless of valid record retention policies.[91] Penalties for the destruction of evidence can be substantial. In *Carlucci v. Piper Aircraft*, for example, the court rendered a finding of liability for intentional destruction of discoverable documents.[92] Furthermore, a policy of keeping employees ignorant of discovery requests will not shield a corporation from sanctions if one of its employees destroys relevant documents.[93] In *TP Orthodontics v. Professional Positioners*, the court imposed sanctions for the destruction of records violating the defendant's own record retention policy. [94] To prevent these problems associated with the destruction of documents, in-house counsel must establish a legally sufficient record retention program.

A record retention program for computerized data must contain several components.[95] First, the corporation must determine what files ex-

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information, Welsh and Marquardt suggest that the individual memorialize the reasons for destruction. *Id.* The safer and prudent course, however, is to establish a record retention system.

89. *Id.*

90. *Id.*

91. *Lewy*, 836 F.2d at 1112 (holding that once a corporation knew or should have known that documents will become relevant in the future, the corporation should preserve the documents); W.M. Thompson Co. v. Gen. Corp., Inc., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (holding that a litigant must maintain records it knew or should have known were relevant, which the opponent will likely request during discovery, or are the subject of a pending discovery request); *see In re* "Agent Orange" Prod. Liab. Litig., 98 F.R.D. 558, 559 (E.D. N.Y. 1983) (ruling that three depositions to determine whether documents were destroyed pursuant to a record retention program were relevant to the litigation), *rev'd on other grounds*, 635 F.2d 987 (2nd Cir. 1980), *cert. denied*, Chapman v. Dow Chemical Company, 454 U.S. 1128 (1981); Duff v. Marathon Petroleum Co., No. 91-C-7992, 1993 WL 388380 at *1 (N.D. Ill. 1993) (holding that the plaintiff is entitled to discovery of record retention policies).

92. 102 F.R.D. at 489.

93. Nat'l Assoc. of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557-58 (N.D. Cal. 1987).

94. No. 72-C-697, 1990 WL 268846 at *19, 22 (E.D. Wis. 1990).

95. Skupsky lists eight components necessary for a legally sufficient record retention system. *See supra* note 40, at 113-16. The components that Skupsky lists include the following:

- Systematically develop the records retention program.
- Address all your records in the record retention schedules, including reproductions.
- Address all media in the records retention schedules, including microfilm and machine-readable computer records.

ist and where the records are kept.[96] The corporation must also decide which media or combinations of media are appropriate for the storage of information.[97] A committee consisting of attorneys, computer experts, operational department heads, and individuals designated to manage the system should assist in-house counsel in the development and implementation of the system.[98] Because of the legal issues involved, counsel must develop the record retention schedule for each of the document categories.[99] The retention period developed by in-house counsel must take into account the requirements of the corporation, governmental requirements, historical value of the documents, and any research value of the documents.[100] In-house counsel should set the corporation's record retention period based on the *longest* period suggested by these require-

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- Obtain written approvals for the records retention schedules and the program procedures.
- Systematically destroy records when permitted by the records retention program.
- Control and manage the operation of the records retention program.
- Stop destroying records, even when permitted by the records retention programs, when litigation, government investigation, or audit is pending or imminent.
- Maintain documentation supporting the development and implementation of the records retention program, including records retention schedules, procedures, changes in procedures, approval, legal research, and listing of records destroyed.

Id.

Shear has suggested the following four steps or "tasks" specifically relating to the management of computer stored information:

1. Profiling the company's computer systems to determine how they work in an operational context. This profile needs to include a review of the hardware and software in use, an inventory of the electronic media available, such as computer tapes and disks, and an analysis of the accumulated or stored information.
2. Creating an electronic information database that indexes electronic media and details the file sets contained in that media.
3. Developing and implementing policies and procedures regarding information creation and retention.
4. Periodic review and audit of information system.

Shear, *supra* note 46, at 4.

96. SKUPSKY, *supra* note 40, at 120; Shear, *supra* note 46, at 4; YOUR BUSINESS RECORDS A SIMPLIFIED GUIDE TO WHAT RECORDS YOU MUST KEEP AND HOW LONG YOU MUST KEEP THEM 29 (Prentice-Hall, Inc. 1981) [hereinafter YOUR BUSINESS RECORDS].

97. SKUPSKY, *supra* note 40, at 119. The corporation should use a specific form for each type of document for this survey. YOUR BUSINESS RECORDS, *supra* note 96, at 29. These forms will assist in the collection of information on the corporation's documents and provide written documentation of the system development. *Id.*

98. SKUPSKY, *supra* note 40, at 119; Shear, *supra* note 46 at 4; YOUR BUSINESS RECORDS, *supra* note 96, at 29.

99. In-house counsel must assume responsibility for the record retention schedule because of the legal issues involved in the destruction of documents. *See supra* note 91 for legal requirements of document destruction.

100. SKUPSKY, *supra* note 40, at 121.

ments.[101] Once the corporation develops the retention program, counsel must publish this program to all who are involved in the creation, storage, and destruction of documents.[102]

After the corporation has developed and communicated the record retention system to those affected, the corporation must destroy records on a consistent basis pursuant to the plan.[103] To ensure consistency, the corporation should destroy records as a regular course of business; for example, on the last day of every month. [104] In-house counsel and information services must address two problems that arise regarding destruction of documents. These two problems are: the one time destruction of a document outside the record retention system, and the need to "wipe" [105] computer storage clean of deleted files.

Without a formal record retention program (or for documents stored outside an existing program), a corporation may choose to destroy particular documents selectively. The courts usually view the selective destruction of a document with something less than complete trust.[106] When a record retention program exists, the records selectively destroyed are usually those records that the program does not cover.[107] The corporation must memorialize the selective destruction of docu-

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101. *Id.* at 121-22. Skupsky presents a table for use in determining record retention periods. *Id.* Given the hypothetical of a document falling under the retention requirements of CFR Title 15 (*see supra* note 50) of five years, a document value to the corporation of three years, historical document value of one year, and no research document value, the table would appear as follows:

User/Operational Value:	3 yrs.
Legal Value:	CY+5 yrs.
Research Value:	0 yrs.
Historical Value:	1 yr.
Longest Period:	CY+5 yrs.

Where CY = current year.

Id. The corporation would then retain the document for the current year plus five years.

102. YOUR BUSINESS RECORDS, *supra* note 96, at 29; SKUPSKY, *supra* note 40 at 122. The process of developing the record retention system requires that in-house counsel maintain a complete record of the development and implementation of the system. Maintaining a complete record of development will provide in-house counsel with support to defend against a charge of bad faith. *See generally Lewy*, 836 F.2d at 1112 (describing three factors used to determine the validity of a record retention system).

103. SKUPSKY, *supra* note 40, at 115.

104. *Id.* The frequency of destruction will depend on the volume of records and the effort involved in collecting and destroying the documents. In-house counsel should note, however, that a document sitting in storage waiting for destruction at the end of the year is discoverable. *Id.*

105. *See supra* note 32 suggesting need to "wipe" computer files to prevent discovery of "deleted" files.

106. Welsh & Marquardt, *supra* note 88, at 36.

107. SKUPSKY, *supra* note 40, at 127. These records may include old records created before the existence of a record retention program. *Id.* These records may also include records of one time events such as mergers, defunct subsidiaries, etc. *Id.*

ments to avoid suspicion that the corporation destroyed the documents for inappropriate reasons. [108] The more the selective destruction of documents routinely parallels the retention program, the less a court is likely to view the destruction with suspicion.[109]

The information systems department must involve itself in the destruction of documents stored on the corporation's computer because of the technical issues involved. When the corporation deletes files from computer storage pursuant to a valid record retention system, the corporation may find that the files are still discoverable. Computers do not "erase" files; the computer only flags files as available for over-writing. [110] The computer operator can completely "erase" files by using a program that "wipes" the file clean.[111]

B. In-House Counsel's Ethical Considerations Regarding Document Destruction Within a Record Retention Program

While the routine destruction of documents pursuant to a legally sufficient and structured record retention program is permissible,[112] in-house counsel's involvement in the document destruction is not without ethical considerations. In-house counsel's involvement in the development and maintenance of the record retention program and counsel's necessary approval for destruction of documents requires that counsel consider the ethical implications.[113] The Model Code of Professional Responsibility, Model Rules of Professional Conduct and Ethical Considerations address problems relating to the destruction of documents. The following Model Code, Model Rules and Ethical Considerations proscribe the parameters of ethical conduct.

> DR 7-102 (A)(3): In his representation of a client, a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law

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108. Welsh & Marquardt, *supra* note 88, at 36 (noting court suspicion of selectively destroying of documents).

109. *Id.*

110. Johnson-Laird, *supra* note 14, at 1. Files that the computer has completely over-written no longer exist and are not recoverable. *Id.* The problem arises when the computer has not over-written files. *Id.* The portions of the files not over-written are discoverable. *Id.*

111. *Id. See also supra* note 32 for the methods of "wiping" a computer file.

112. *Carlucci*, 102 F.R.D. at 485-86 (suggesting in dictum that justification exists for failing to produce documents destroyed within a bona fide record retention program).

113. Ricardo G. Cedillo & David Lopez, *Document Destruction in Business Litigation From a Practitioner's Point-of View: The Ethical Rules vs. Practical Realities*, 20 St. Mary's L.J. 637, 638 (1989); Jamie S. Gorelick, Stephen Marzen, & Lawrence Solum, Destruction of Evidence 250 (Wiley Law Pub. 1989) (discussing ethical problems associated with the destruction of evidence).

> to reveal.[114]
>
> DR 7-109(A): A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.[115]
>
> EC 7-27: Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.[116]
>
> MR 3.4(a): A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value . . . a lawyer shall not counsel or assist another person to do any such acts.[117]
>
> MR 3.4(d): A lawyer shall not . . . in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . .[118]

Current ethical considerations provide that in-house counsel must violate the law before he subjects himself to ethical violations and possible professional sanctions.[119] If the destruction of documents is *not* illegal, in-house counsel may advise the corporation to destroy documents pursuant to the record retention program.[120]

The issue of legality defines the parameters of permissible destruction of documents within the Model Code, Model Rules, and Ethical Considerations.[121] Commentators suggest that the concept of "legality" found in the ethics codes and rules apply only to criminal acts.[122] Although this may appear to exclude discovery issues, obstruction of justice statutes provide the necessary element of "illegality" to bring improper destruction of documents within the boundaries of a criminal

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114. Cedillo & Lopez, *supra* note 113, at 640; THOMAS D. MORGAN & RONALD D. ROTUNDA, 1994 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 210 (Foundation Press, Inc. 1994).

115. Cedillo & Lopez, *supra* note 113, at 640; MORGAN & ROTUNDA, *supra* note 114, at 216.

116. Cedillo & Lopez, *supra* note 113, at 640; MORGAN & ROTUNDA, *supra* note 114, at 205-06.

117. Cedillo & Lopez, *supra* note 113, at 640-41; MORGAN & ROTUNDA, *supra* note 114, at 66.

118. Cedillo & Lopez, *supra* note 113, at 641; MORGAN & ROTUNDA, *supra* note 114, at 66.

119. Cedillo & Lopez, *supra* note 113, at 641.

120. *Id.* at 639; *see also* GORELICK, et al., *supra* note 113, at 250 (noting that some commentators suggest that destruction of evidence is unethical only if the destruction is illegal); Wayne F. Reinke, *Limiting the Scope of Discovery: The Use of Protective Orders and Document Retention Programs in Patent Litigation,* 2 ALB. L.J. SCI. & TECH. 175, 201 (1992) (stating that an attorney may not advise his client to destroy evidence if the destruction "amounts to a criminal offense"); Welsh & Marquardt, *supra* note 88, at 38 (noting that if destroying of evidence is illegal the destruction violates the MODEL CODE).

121. Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence,* 36 EMORY L.J. 1085, 1126 (1987).

122. *Id.* (citing Beckstrom, *Destruction of Documents with Federal Antitrust Significance,* 61 NW. U.L. REV. 687, 688 n.2 (1966)).

act.[123] Thus, the court will impose criminal liability only if the destruction of documents occurs when the party clearly foresees litigation or the litigation was ongoing.[124]

The designation "clearly foreseeable," according to one commentator, is limited to a specific controversy between parties.[125] Consequently, the term "clearly foreseeable" excludes those controversies that are merely possibilities.[126] If a claimant has revealed to the corporation his intent to file a claim, the litigation is "clearly foreseeable." There are situations, however, where a manifestation of the intent to file a claim is not necessary.[127] Examples include mass disasters, such as airplane crashes because they are open and notorious and litigation is "clearly foreseeable."[128] Therefore, in-house counsel may advise the corporation to destroy and participate in the destruction of documents if litigation is not clearly foreseeable or on-going.[129]

C. In-House Counsel's Work Product and the Litigation Support System

When litigation is imminent or underway, counsel can protect his trial preparation with the work product privilege.[130] The trial preparation method that counsel chooses will determine the level of protection.

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123. *Id. See also* Welsh & Marquardt, *supra* note 88, at 38. The Federal obstruction of justice statute that creates a criminal offense for interference with the administration of justice is 18 U.S.C. § 1503 (1996). Solum & Marzen, *supra* note 121 at 1108. This section is a general obstruction of justice statute that "punishes 'whoever corruptly or by threats or force . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, impede, the due administration of justice.'" *Id.* (citing 18 U.S.C. § 1503).

124. *Id. See also* Welsh & Marquardt, *supra* note 88, at 38 (noting that criminal liability for destruction of evidence attaches once legal proceedings are clearly foreseeable or ongoing).

125. Fedders & Guttenplan, *supra* note 75, at 60-1.

126. *Id.* at 61.

127. *Id.*

128. *Id.*

129. Cedillo & Lopez, *supra* note 113 at 645 (quoting G. Hazard & W. Hodes, The Law Of Lawyering: A Handbook on the Model Rules of Professional Conduct 372 (1988 Supp.))

> If a client has foolishly kept documents on hand that will hurt his cause if litigation later ensues, it is obviously in his interest to destroy them. If it is not criminal to do so, a lawyer may counsel the client accordingly. And if a lawyer can so counsel a client, the basic principle of client loyalty suggests that he should . . . .

Id.

130. *Utilitarian World*, *supra* note 10, at 1698. The court affords a greater level of protection to work product that contains the mental impressions of the attorney. *Id.* at 1698-99. Work product that does not contain the mental impressions of the attorney is discoverable with a showing by the opponent of substantial need. *Id.* at 1699.

1. *Work Product Privilege*

The work product privilege protects an attorney's mental impressions and legal conclusions.[131] Courts protect mental impressions, opinions, and legal conclusions when they are documents or tangible things and are prepared in anticipation of litigation.[132] Courts usually consider materials protected under a work product privilege as either "ordinary work product" or "opinion work product." [133] The courts protect documents prepared for litigation without the mental impressions, opinions, and legal conclusions under ordinary work product.[134] Ordinary work product receives only limited protection, and is discoverable upon a plaintiff's showing of substantial need.[135] On the other hand, documents that contain the impressions, opinions, and legal theories of an attorney are opinion work product.[136] The courts afford opinion work product

131. *In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir. 1988). The Eighth Circuit held that the computer tapes in question were ordinary work product. *Id.* The computer tape was prepared in anticipation of litigation. *Id.* The preparation reflected the attorney's mental impressions of what information was relevant to the litigation. *Id.* The question of protection was moot, however, as the court ruled that Chrysler had waived its privilege. *Id.*

For an interesting discussion of waiver of work product and attorney client privilege, *see* Data Gen. Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556 (D. Mass. 1991), *aff'd*, 36 F.3d 1147 (1994). In the discussion, the court critiques the "three paths" courts follow to decide if a party waived privilege. *Id.* at 558-59. The "three paths" as the court described them, citing Judge Collings are:

> (1) [A] strict accountability test, whereby any disclosure constitutes a waiver; (2) a rule that non-intentional disclosure is never a waiver because for a waiver of a protection to occur, the party must have intentionally given up the protection; (3) an intermediate approach finding a waiver based upon whether the precautions taken by a party to insure that protected material is not produced were reasonable.

Id.

132. Shipes v. Bic Corp., 154 F.R.D. 301, 305 n.1 (M.D. Ga. 1994), citing FED. R. CIV. P. 26(b)(3) (1993), which reads in pertinent part:

> Trial Preparation: Materials. Subject to provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. . . .only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation . . . .

133. Soma & Austin, *supra* note 37, at 505.

134. *Id. See also* General Counsel Survey, *supra* note 17.

135. Soma & Austin, *supra* note 37, at 505.

136. *Id.*

nearly absolute privilege.[137] While recognizing the different level of protection afforded opinion work product, as opposed to ordinary work product, the Supreme Court has refused to provide opinion work product with an unqualified absolute privilege.[138]

2. *Protecting Litigation Support Systems From Unnecessary Disclosure*

A common situation involving in-house counsel protecting documents through the work product privilege is the prohibition against requests for discovery of counsel's litigation support system.[139] A litigation support system is nothing more than a computer program which sorts information entered into the system. [140] Due to its speed, the computer can quickly and accurately sort all documents entered into a litigation support system.[141]

Two basic design methods are used to create a litigation support system: the full text method and the index method.[142] The full text method requires creating a database which incorporates the full text of relevant documents.[143] The stored documents are then retrieved using key terms such as names, words, or dates.[144] This method of creating a litigation support system offers several advantages. For example, the full text

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137. *Id.* For an interesting discussion of the principles underlying work product immunity, *see* Fed. Trade Comm'n v. Grolier Inc., 462 U.S. 19 (1983)

138. 8 WRIGHT & MILLER, *supra* note 10, § 2026.

139. JAMES L. STENGEL & ANDREW M. CALAMARI, COMPLEX LITIGATION 4-11 (P.L.I. 1994).

140. WILLIAM W. SCHWARZER, LYNN H. PASAHOW, & JAMES B. LEWIS, CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE, SECOND 6-56 (Prentice Hall Law & Business 1994).

141. *Id.* Although the cost of sorting is insignificant, the cost of creating a litigation support system is substantial. *Id.*

142. A number of commentators have identified additional methods. *See* STENGEL & CALAMARI, *supra* note 139, at 4-7 (discussing an integrated system); Soma & Austin, *supra* note 37, at 510 (discussing a hybrid system); RICHARD L. ROBBINS, THE AUTOMATED LAW FIRM: A COMPLETE GUIDE TO SOFTWARE AND SYSTEMS, SECOND 10-6-7 (Aspen Law & Business 1995 Supp.) (discussing *Summation,* a brand of litigation support software which uses the "integrated" approach).

One of the premises of this Comment, however, is that work product protection privilege is determined by the imposition of the attorney's impression and opinions onto the requested documents. The primary methods, full text and the index method, present the two extremes of protection, non-protection and protection, respectively. Any system that falls between these extremes presents varying degrees of protection. In order to obtain the full extent of protection, however, one must have an understanding of the protection provided by the full text and index methods.

143. STENGEL & CALAMARI, *supra* note 139, at 4-3.

144. SCHWARZER, et al., *supra* note 140, at 6-57. Robbins suggests a useful software package, Folio Views, for building a full text system. *Supra* note 142, at 10-4. Stengel & Calamari offer DiscoveryZX, Cat-Links and Xy Index as full text software packages. *Supra*

method provides the attorney with the actual text of the document.[145] The system also permits the attorney to delay selecting documents until the parties determine the issues in the litigation.[146] Furthermore, the full text method is less expensive than the index method; the full text method does not require legal decisions, and law clerks or paralegals can enter the text of documents into the system.[147]

The index method is distinguishable from the full text method by the lack of a full text of the relevant documents within the litigation support system. Under the index method, the attorney creates summaries of relevant documents.[148] The attorney files the summaries under any number of fields.[149] The index method also allows classification by subject criteria such as claims or defenses.[150] The attorney can add to the file a brief summary of the document or deposition. [151] Because counsel summarizes the relevant documents, much of this work requires subjec-

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note 139, at 4-4. The following considerations Robbin's suggests when looking for a full text retrieval system:

- Will the system accept OCR input documents and those from court reports and firm word processing?
- Does the system allow proper annotation of the text to highlight legal issues and fact points and to make the language consistent and searchable?
- How rapidly does the system carry out a search on a long (say 300-page) document?
- Is the proximity search adequate for your needs? Can you logically delimit the search?
- Are wildcard, synonym, sounds like, fuzzy searches available, such as looking for "negligent" when you want to find "negligent, negligence, and negligently?"
- How is the result presented? Are the words searched shown with accompanying text, be it two lines or four lines, and can the display be adjusted?
- Are reports useful to you?
- Is linking available so you can easily connect to other data on the same issue? Can you readily return to the "home" search?

ROBBINS, *supra* note 142, at 10-5.

145. STENGEL & CALAMARI, *supra* note 139, at 4-4.

146. Haley J. Fromholz, *Discovery, Evidence, Confidentiality, and Security Problems Associated with the Use of Computer-Based Litigation Support Systems*, 1977 WASH. U. L.Q. 445, 459 (1977).

147. The two most prevalent methods of entering full text into the system are to retype the documents or by optical scanning. Robert C. Cook & Scott Reed, *Discovery of Computerized Litigation Support Systems*, 33 TRIAL LAW GUIDE 38, 39 (Callaghan 1989). The retyping or scanning of documents does not require attorney impressions or opinion and are therefore not likely protected by work product privilege.

148. *Id.*

149. ROBBINS, *supra* note 142, at 10-5. Robbins identifies a number of fields under which the attorney could store the summary. *Id.* These fields include: "document number, data, data received, copy of original, sender, receiver, signer, persons mentioned in the document, copied to, subject matter, issues related to in trial, source of documents, whether admitted, exhibit number, work product, witnesses who can testify to, and privileged or not." *Id.*

150. STENGEL & CALAMARI, *supra* note 139, at 4-6.

151. *Id.*

tive legal judgments which may qualify as mental impressions, opinion, or legal conclusions under the work product privilege.[152] Since the summaries contain the impressions, thoughts, and legal theories of the attorney, the summaries are opinion work product and are subject to the greatest protection.[153] In contrast, the full text method does not contain the impressions, thoughts, and legal theories of the attorney and therefore receives only ordinary work product protection.[154] The major drawback of the index system is the cost of the preparation of summaries.[155]

In-house counsel must consider the issue of discoverability in deciding which of the two methods to use in creating a litigation support system. The courts will use two factors in deciding the issue of discoverability of a litigation support system:[156] (1) the extent of the attorney's involvement in the preparation of a litigation support system and (2) whether the attorney will use the system at trial.[157] The courts will protect legal support systems the counsel creates in anticipation of litigation.[158] Courts will generally not require the production of documents from a litigation support system unless there is a showing of substantial need by the opponent or counsel intends to use the documents as evidence at trial. [159] Federal Rule of Civil Procedure 34, however, re-

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152. *Id.*

153. Cook & Reed, *supra* note 147, at 46.

154. *Id.*

155. SCHWARGER, et al., *supra* note 140, at 6-57. The cost will depend on both the amount of information and time spent analyzing the documents entered into the system. *Id.* If the summaries require making subjective judgment concerning legal issues, an attorney must prepare the summaries. STENGEL & CALAMARI, *supra* note 139, at 4-6.

Robbins identifies *Zyindex, Magellan,* and *Sonar* as good examples of index systems. *Supra* note 142, at 10-4. Robbins also suggests the following in evaluating an index system:

- Will the system work on a portable computer that can be taken to court?
- Are multi field searches possible, and can results be filtered or ranged(e.g., look for Issue A, from Source B, in Data Range C)?
- Is the full range of search logic available "and, not, or"?
- Is the method of building the search statement easy, and does it show how the words will affect the items? Product?
- Can the search statement be edited easily and saved for later use?
- Is the search method easy to use? Query by example, for example, allows you to enter in the proper field, (i.e., date), the date you are searching for, or a date range.
- Are the number of hits listed so the statement can be revised?
- Will the system tell you how many documents match the search criteria?
- Can you immediately retrieve all or select information about any or all hits?
- Will the system improve the efficiency of law practice by reducing cost, increasing speed and accuracy, or permitting leveraging to lower cost producers?

Id. at 10-6.

156. Cook & Reed, *supra* note 147 at 40.

157. *Id.*

158. STENGEL & CALAMARI, *supra* note 139, at 4-10.

159. MANUAL FOR COMPLEX LITIGATION, SECOND § 21.446, at 60 n.79 (1994).

quires the disclosure of "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form." [160] Thus, a document's mere presence within a litigation support system will not of itself protect the document. [161] The most effective protection in-house counsel can provide for work product is for the litigation support system to contain counsel's impressions and opinions.[162] The more strategy, impressions, and attorney opinion in-house counsel infuses into the database, the more likely the courts will bar discovery.[163]

In *IBM Peripherals EDP Devices Antitrust Litigation,* the court refused to compel disclosure of a litigation support system prepared by IBM's attorneys.[164] The district court found that the materials contained within the litigation support system were prepared solely for the litigation, and that documents contained within the system were available elsewhere.[165] The District Court also found the litigation support system contained the "mental impressions, theories, and thought processes" of the attorney.[166] The court held that to permit the plaintiff's access to the litigation support system would impinge on IBM's right to organize and prepare for trial as it believed appropriate.[167]

The index method of creating a litigation support system provides maximum protection. Because the attorney creates the index system using his impressions and opinions, opinion work product will protect the system.[168] Full text systems, because impressions and opinions of counsel are absent, are open to discovery upon a showing of need by opposing counsel.[169] Simply parking documents in a litigation support system will subject the documents to discovery under Federal Rule of Civil Procedure 34.[170]

A few courts, however, have found absolute opinion privilege for documents based on the principle that the *very selection* of documents reveals the attorney's trial strategy.[171] The Third Circuit Court held in *Sporck v. Peil* that "the selection and compilation of documents by coun-

160. Cook & Reed, *supra* note 147 at 44 (quoting FED. R. CIV. P. 34 (1993)).

161. Richard M. Long, Comment, *The Discovery and Use of Computerized Information: An Examination of Current Approaches,* 13 PEPP. L. REV. 405, 410 (1986).

162. Cook & Reed, *supra* note 147, at 46.

163. *Id.*

164. 5 Computer L. Serv. Rep. 878 (N.D. Cal 1975).

165. *Id.* at 879.

166. *Id.*

167. *IBM Peripherals,* 5 Computer L. Serv. Rep. at 879.

168. STENGEL & CALAMARI, *supra* note 139, at 4-11.

169. *Id.*

170. Scott Paper Co. v. Ceilcote Co., 103 F.R.D. 591, 594 (D. Me. 1984)

171. STENGEL & CALAMARI, *supra* note 139, at 4-11.

sel" in preparing for depositions fell into the opinion work product.[172] While this may provide an additional measure of protection against unnecessary disclosure, other courts have not accepted the Third Circuit's position. [173]

IV. CONCLUSION

The increased use of computers requires that in-house counsel be aware of the advantage and efficiency of the computer and the potential for unnecessary disclosure. Counsel must develop and implement a record retention program that protects the corporation from unnecessary disclosure. In-house counsel must ensure that the corporation destroys

172. 759 F.2d 312, 316 (3rd Cir. 1985). In *Sporck*, counsel conceded that the individual documents were not privileged. *Id.* at 313. Defense counsel had selected the documents for Sporck in preparation for depositions. *Id.* Defense counsel claimed that the documents reflected his legal opinion as to what was relevant to the plaintiff's claims and possible defenses. *Id.*

173. *See also* Parry v. Highlight Indus., Inc., 125 F.R.D. 449, 452-53 (W.D. Mich. 1989) (citing *Sporck*, and holding that any slight factual content the documents have is outweighed by the interest in maintaining the privacy in the attorney's thought processes); Am. Floral Servs., Inc. v. Florist's Transworld Delivery Assoc., 107 F.R.D. 258, 261 (N.D. Ill. 1985) (holding that any forced disclosure of the documents would reveal the attorney's judgement of what is and is not important in the case); Shelton v. Am. Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986) (citing the attorney's selection of documents, based on her professional judgment as reflecting her theories and thought processes and is therefore protected work product); Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F.Supp 329, 332 (C.D. Cal. 1992) (remanding to magistrate judge for explanation of what information was used and his analysis in denying the application of the *Sporck* rule); Washington Bancorporation v. Said, 145 F.R.D. 274, 279 (D.C. 1992) (distinguishing *Sporck* in that the index at issue did not reveal attorney opinion but otherwise support the proposition of the *Sporck* decision). *But see In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1018 (1st Cir. 1988) (suggesting the reasoning in *Sporck* is flawed for assuming that the selection process alone was sufficient to "cloak" the documents in opinion work product); Gould Inc. v. Mitsui Mining & Smelting Co., Ltd., 825 F.2d 676, 680 (2nd Cir. 1987) (holding that application of the *Sporck* exception is inequitable is the documents are not otherwise available or are beyond reasonable access to the opponent); *In re* Shell Oil Refinery, 125 F.R.D. 132, 134 (E.D. La. 1989) (distinguishing *Sporck* in that the theory of the case is not likely disclosed by the knowledge of which 65,000 documents of 660,000 documents were chosen for copying); Bohannon v. Honda Motor Co. Ltd., 127 F.R.D. 536, 539 (D. Kan. 1989) (suggesting that the reasoning in *Sporck* is flawed in its theory that the revealing of documents in and of itself reveals attorney opinion); United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 699 (S.D. Fla. 1990) (holding the risk that the deponent would reveal mental impressions is remote).

Reviewing of privileged documents before testifying may waive their privilege. *Parry*, 125 F.R.D. at 452. Three factors are relevant in determining if a party waives the privilege, are: "whether witness 'coaching' may have occurred; whether the documents reviewed constitute 'factual' or 'opinion' work product; and whether the request constitutes a fishing expedition.'" *Id.*

computer files and other records when permitted by a valid record retention system.

Simply "erasing" a document does not prevent the disclosure of the document. The computer does not remove the "erased" file, it merely marks the space as available for use.[174] How the law treats these "erased" but still existing files is not settled.[175] The issues courts have not resolved concerning these "erased" files include: (1) are parties required to produce electronic records that they had intended to delete, (2) how much effort must parties exert in resurrecting "erased" files, and (3) must a party retain a technical expert to resurrect the "erased" files and who will pay for this technical help.[176] Until courts resolve these issues, the individuals responsible for maintaining the computer files must ensure that the computer files scheduled for destruction are completely destroyed.

Corporate counsel's participation in the destruction of documents under a valid record retention program is ethical so long as destruction is not a violation of the law. In-house counsel may not, within the limits of the law, destroy documents that have relevance to on-going or pending litigation even under a valid record retention program. As such, the corporation must cease destruction of documents when litigation has commenced or is imminent.

Finally, once litigation is imminent or has commenced, counsel should prepare its litigation support system mindful of the need to prevent unnecessary disclosure. Counsel should prepare the litigation support system, whenever possible, using the index system. As the authors of an attorney's guide devoted to the subject of litigation support systems have stated, "[i]f the top three factors in the real estate business are 'location, location, and location,' then the top four steps to help ensure work product protection for litigation support systems are 'attorney involvement, attorney involvement, attorney involvement, and attorney involvement.'"[177] In-house counsel's responsibility to the corporation requires that counsel protect the corporation from unnecessary disclosure of damaging documents. Counsel must also manage the destruction of documents to protect both himself and the corporation from charges of unethical conduct. In-house counsel's obligation to the corporation also requires that litigation support systems be constructed to take full ad-

174. *See supra* note 32 (stating how deleted or "erased" files are recovered).

175. Jean Marie R. Pechette, *Electronic Records are Discoverable in Litigation,* NAT'L L.J., June 27, 1994, at C8.

176. *Id.*

177. RONALD W. STAUDT & JAMES I. KEANE, LITIGATION SUPPORT SYSTEMS AN ATTORNEY'S GUIDE § 9:18 (2nd Ed. 1994)

vantage of work product privilege to protect the corporation from unnecessary disclosure.

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