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Valparaiso University Law Review

Volume 17
Number 2 Fall 1982

pp.281-307

Fall 1982

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Stephen J. Krigbaum

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Recommended Citation

Stephen J. Krigbaum, *Computerized Litigation Support Systems and the Attorney Work Product Doctrine: The Need for Court Support Against Discovery*, 17 Val. U. L. Rev. 281 (1982).

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COMPUTERIZED LITIGATION SUPPORT SYSTEMS AND THE ATTORNEY WORK PRODUCT DOCTRINE: THE NEED FOR COURT SUPPORT AGAINST DISCOVERY

INTRODUCTION

With the increase in recent years of complex litigation involving sophisticated theories of liability and thousands of documents,¹ computerized litigation support systems have become nearly indispensable to the trial lawyer.² Such systems are designed to manage large quantities of information that accumulate during complex litigation.³ They allow counsel quickly and efficiently to identify and retrieve documents out of voluminous files.⁴ These systems far surpass the mere storage function of file cabinets.⁵ To be effective, they require substantial in-

1. See, e.g., Sherman & Kinnard, *The Development, Discovery, and Use of Computer Support Systems in Achieving Efficiency in Litigation*, 79 COLUM. L. REV. 267 n.2 (1979) [hereinafter Sherman & Kinnard]; see also MANUAL FOR COMPLEX LITIGATION, § 22 (West 1977) (defining types of potentially complex cases).

2. It has been estimated that for any case involving more than 10,000 documents, a computerized litigation support system is desirable to ensure the economical and accurate storage, evaluation and retrieval of information. See Granelli, *Computers Can Aid Any Practice, Experts Say*, 4 NAT'L L.J. 8 (1978).

3. Although computer support systems were first created for antitrust cases because of the unmanageable mass of documents involved, they are likely to be useful in any number of complex cases. See *supra* note 1.

4. The advantage of a computer is its speed and nearly faultless memory. For example, a medium size computer can review a file containing 100 million alpha-numeric characters of information, searching for a particular element of information in five or ten minutes. After the computer has completed this review, the results of the review can be produced on a printout, in a form usable by the lawyer, at the rate of up to 1,000 lines of alpha-numeric characters per minute. Further, if properly instructed to search a file indexed on a computer, the computer, unlike a person, will remember to look at all of the documents whose index the computer is reviewing. The computer will not forget to look at certain documents, because, while it was once aware of them, they have been moved to a different file cabinet or left in the lawyer's briefcase.

Olson & Goodrich, *Litigation Support Systems—Present Status and Future Use*, 11 FORUM 832 (1976) [hereinafter Olson & Goodrich].

5. For a detailed explanation of the advantages of computer litigation support systems over manual support systems, see, e.g., Rust & Rome, *The Combination of a Manual and an Automated Approach to Trial Preparation*, 11 FORUM 810 (1976) [hereinafter Rust & Rome].

vestments of time and money⁶ and the professional collaboration of attorneys and computer experts.⁷

Although computerized litigation support systems (hereafter computer support systems) depend largely on attorney-technician collaboration, the attorneys' contribution is more significant. Unlike traditional manual filing systems, the professional skills of attorneys are essential to an efficient computerized system.⁸ Consequently, much of the attorneys' trial preparation efforts are directly related to the creation of such computerized systems.

Since a significant part of the attorneys' trial preparation efforts is spent with the computer, the attorneys can persuasively argue that the information in the computer support system and the retrieval apparatus should be protected from unlimited discovery based on the "attorney work product" doctrine.⁹ Conversely, an opponent may convincingly argue an inability to prepare for trial without the discovery and use of the support system. This possibility may arise in the context of complex litigation when an opponent is without his own computer support system and without any other effective access to the enormous quantity of documents typically involved.¹⁰ These competing interests bring two policies into conflict: protection of the independent efforts of each attorney from discovery; and giving parties equal access to information for trial preparation. The work product doctrine

6. See, e.g., Olson & Goodrich, *supra* note 4, at 846-48.

The initial fee of a computer consultant for creating or adapting a computer program to perform the desired functions usually starts at about \$2,500 and can go into the tens of thousands depending on the complexity of the program. Additional costs may include a set fee per thousand characters entered into the database; a fee for each page processed; monthly license fees for the software programs; monthly rental fees for the terminal equipment hardware; computer disc storage costs; charges for use of the computer; and telecommunications costs if the terminal on which data is being punched in or being retrieved is not at the site of the computer.

Sherman & Kinnard, *supra* note 1, at 269 n.8.

7. See *infra* notes 59, 65, 66.

8. *Id.*

9. In 1945 the United States Court of Appeals for the Third Circuit used the term "work product of the lawyer" to refer to information or materials collected by an attorney in anticipation of litigation. *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945), *aff'd on other grounds*, 329 U.S. 495 (1947). The Supreme Court subsequently approved the term. 329 U.S. at 511. See also *infra* notes 31-38 and accompanying text.

10. See *infra* notes 73-86 and accompanying text.

represents an attempt to reconcile these competing policies.¹¹ Presently, the degree of protection given to computer support systems based on the work product doctrine is unclear.¹²

This note explores the application of the work product doctrine to the discovery of a computer support system. An examination is first made of the conflicting policies facing a judge when a party attempts to discover an opponent's computer support system.¹³ Next, the components of such systems are examined to demonstrate how the components reflect attorney work product.¹⁴ The succeeding sections discuss the extent to which courts should protect these systems based on two classifications of the work product doctrine: ordinary work product and opinion work product.¹⁵ This discussion suggests

11. The work product doctrine represents an attempt to reconcile the basic conflict between the purpose of discovery and the adversary model. See generally *Hickman v. Taylor*, 329 U.S. 495 (1947); see also Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978).

12. There is little case law dealing with the application of the work product doctrine to computer support systems. To date, the following cases have involved the application of the doctrine to computer support systems. First, in *Traylor v. Marine Corp.*, 328 F. Supp. 382 (E.D. Wis. 1970), the plaintiff filed interrogatories seeking to discover the contents of the defendant's computer support system. When the defendants objected to the interrogatories, the plaintiff filed a motion to compel discovery. The case was settled, however, before the motion was decided. *Sherman & Kinnard*, *supra* note 1, at 282 n.63. Second, in *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 5 Comp. L. Serv. 878 (N.D. Cal. 1975), discovery of a computer support system was denied based on the notion of work product; however, the decision includes no citations of authorities or analysis. Finally, in *National Union Electric Corp. v. Matsushita Electric Industrial Co., Ltd.*, 31 Fed. R. Serv. 2d (Callaghan) 414 (E.D. Pa. 1980), the court was under the impression that the defendants sought to discover the plaintiff's computer support system. So viewed, the system would have been protected from discovery under a work product notion. *Id.* at 417. However, the court stated that its original impression was mistaken, and allowed discovery based on estoppel. *Id.*

"At least one seminar article has been written on the subject, but no attempt has been made at a definitive analysis" of the application of the work product to computer support systems. Emerson, *Legal Information Systems: Future Trends Identified*, LEGAL AUTOMATION NEWS, Jan. 1982, at 4, col 4 [hereinafter Emerson]. Due to the lack of case law and analysis by commentators, attorneys are uncertain about the application of the work product doctrine. Although no party has yet been allowed to discover an opponent's computer support system, a frequently expressed reluctance of counsel to use such systems is their possible discoverability by opponents. Olson & Goodrich, *supra* note 4, at 852. In part, this note attempts to clarify the legal issues involved when a party attempts to discover an opponent's support system.

13. See *infra* notes 31-39 and accompanying text.

14. See *infra* notes 42-72 and accompanying text.

15. See *infra* notes 73-161 and accompanying text.

that computer support systems should be given broad protection from discovery.

COMPUTER SUPPORT SYSTEMS AND THE WORK PRODUCT DOCTRINE: RAISING THE ISSUE

Traditionally, litigation materials have been organized with manual support systems. For example, in simple cases where one attorney can read all relevant documents, a single piece of paper may be used to organize trial materials.¹⁶ This paper may indicate which documents will be used to defend or support certain contentions in pending litigation. In more involved cases, more efficient manual methods are used to organize trial materials such as trial notebooks, tab locators or edge-notched cards.¹⁷ In some complex cases, however, the sheer volume of the documents involved may require the use of a computer support system to organize trial materials.¹⁸ Not surprisingly, computerized systems have a significant impact on the way these volumes of documents are managed.

Computer-based litigation support systems are conceptually similar to manual support systems.¹⁹ A computer support system is simply a record of potentially relevant information developed in anticipation of litigation and stored in a computer.²⁰ The computer allows

16. Williams, *Protection from Discovery of Information Contained in a Litigation Support System*, in *USE OF COMPUTERS IN LITIGATION* 191 (J. Young, M. Kris and H. Trainor eds. 1979) [hereinafter Williams].

17. For example, an edged notched card is made of heavy paper. It has numbers around its perimeter. Each card represents one document. Each document is given an identification number which is typed on the card along with other useful information such as the name of the author and a short summary of the contents. Next, a coding structure is developed that corresponds to the numbered holes that surround the card. The hole that corresponds to each applicable code is then clipped. The cards are then stored so that when a long needle is passed through a deck of them, the needle lifts the deck and the cards that have been clipped at the relevant hole fall out. In this manner all of the deck and the corresponding relevant documents may be selected from voluminous files. See Madden, *Information Management in Complex Litigation*, in *USE OF COMPUTERS IN LITIGATION* 117, 122 (J. Young, M. Kris and H. Trainor eds. 1979) [hereinafter Madden].

18. When the number of documents involved in a case becomes large, the problem of posting the index references in the proper books of cards becomes substantial. Further, when manual methods are used in large cases, even though an index has been created, there is no easy way to select cross-related documents without expending massive amounts of time. See Rust & Rome, *supra* note 5, at 812.

19. In one case, an in-house team of 150 people worked for over two years to create a computer support system at a cost of over 1.5 million dollars. Madden, *supra* note 17, at 117.

20. Olson & Goodrich, *supra* note 4, at 833.

lawyers quickly and efficiently to identify needed documents so that they may be retrieved out of voluminous files.²¹ In a computerized system the computer, tapes, discs, programs and computer memory replace the file cabinets, tab locators and documents used in manual systems. The computer-maintained record of documents is referred to as the database.²² These systems surpass the capabilities of manual support systems in all stages of litigation.²³

Computer support systems are particularly useful during the discovery phase of litigation.²⁴ In a few minutes the computer can generate a list of potentially relevant documents in preparation for depositions or for answering interrogatories.²⁵ When the manual methods of trial organization are used, there is no easy way to select documents out of voluminous files without expending considerable amounts of time.²⁶ The mass of documents typically involved in complex litigation and the computer's ability to manage it make such systems more useful than manual systems for quick and efficient trial preparation.

Since computer systems can efficiently manage complex masses of documents, a discovering party may want, or need, to use an opponent's computerized system to prepare for trial instead of using a manual method of preparation.²⁷ Consider, for example, the following hypothetical. During the discovery phase in an antitrust action, the defendant converts all business records, including pricing announce-

21. The term computer retrieval refers to the process of instructing the computer to search the information stored on the computer database, applying certain criteria, and to furnish a printout of other output presenting or listing the information or documents on the database which satisfy the evidence. See Olson & Goodrich, *supra* note 4, at 839. There are a number of methods employed within a litigation support system to provide the attorney with the needed information from a computer database. These methods include retrieval by printed directories, printed context indexes and conditional searches. For a detailed examination of the retrieval process, see Vovakis, *Litigation File Management: Preparation for Trial*, 11 FORUM 820, 824-26.

22. Olson & Goodrich, *supra* note 4, at 833.

23. See Rust & Rome, *supra* note 5 for a detailed examination of the advantages of computer support systems over manual systems.

24. See Olson & Goodrich, *supra* note 4, at 858.

25. For example, assume that a set of 150 interrogatories has been answered by 50 defendants. Once all responses are in the database, a "by response" printout can significantly reduce the time required to evaluate the adequacy of each of the 7,500 responses, prepare a motion to compel further answers, or determine what information is available for analysis. *Id.*

26. See *supra* note 18.

27. See *infra* notes 73-86 and accompanying text for an analysis of a party's potential "need" for an opponent's computer support system.

ments, from its Midwest marketing department into the database of a computer support system. The plaintiff has alleged that the defendant maintains its market position by lowering prices below cost (predatory pricing), and needs documentary support for the allegation. The plaintiff asks for all pricing announcements from the defendant's Midwest marketing department. The defendant responds by producing one million documents, while only one hundred of them indicate predatory pricing.

In the above situation, it may take the plaintiff months and a substantial investment of money to manually sift through the voluminous material to find the needed documents.²⁸ If the plaintiff could discover the defendant's computer support system and the material contained within, however, it may take only minutes to identify the needed documents.²⁹ Consequently, because of the mass of documents involved in the case, the use of the defendant's computer support system would be invaluable to the plaintiffs' trial preparation efforts. However, the system is the result of the defendant's own trial preparation efforts or "work product," and deserves some protection from discovery.³⁰

The work product doctrine represents an attempt to reconcile the basic conflict between the purpose of discovery³¹ and the adversary model.³² A too widely defined work product immunity may thwart

28. See *supra* note 18. The 1980 amendment to Fed. R. Civ. P. 33(c) requires an owning party to provide "sufficient detail to permit the interrogating party to identify the individual documents from which the answers can be obtained." *Id.* This amendment prevents the owning party from a mechanical discovery response of "look at all my documents" which may do the discovering party little good in actually finding the relevant documents. However, even if "sufficient detail" is provided, the response may still produce an enormous mass of documents.

29. See *supra* notes 4, 5.

30. See *infra* notes 42-73 and accompanying text for an examination of how computer support systems reflect work product.

31. The policy of liberal discovery reflects the desire to narrow the disputed issues and to disclose to the parties all relevant information within anyone's possession. Further, it reduces the chance that either party will be surprised at trial, and increases the likelihood that the merits of a party's claim or defense, rather than the skill of one attorney in developing his case, will control the result. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); see also WRIGHT, LAW OF FEDERAL COURTS, § 81, at 398 (3d Ed. 1976).

32. Use of an adversary system to redress civil grievances means that parties independently initiate and carry forward the litigation, investigate the occurrence at issue, and present their case to the court. See JAMES & HAZARD, CIVIL PROCEDURE, § 1.2, at 4-5 (2d ed. 1977). The strength of the adversary system as an effective means of eliciting truth and justice lies in the force with which the contending parties pursue their self-interest, thereby generating a truthful verdict. See *Gardner v. Florida*,

the aims of discovery.³³ Conversely, a too narrowly defined immunity might lead to a situation where lawyers keep everything in their heads or fail to prepare adequately for trial knowing that they would have to turn over their trial preparation materials to opponents.³⁴ The work product immunity in particular instances may be either qualified or nearly absolute.

Courts give ordinary work product less protection than opinion work product. "Ordinary work product," which consists of documents prepared for litigation purposes,³⁵ is given only qualified immunity. It may be discovered if the proponent can demonstrate substantial need for the materials, and that their equivalent is not available through other means without undue hardship.³⁶ "Opinion work product" consists of documents containing the subjective thoughts of a party's lawyer or other representative.³⁷ It is given nearly absolute immunity from discovery.³⁸ It is not clear, however, to what extent computer support systems are protected from discovery as either ordinary or opinion work product.³⁹ Thus, it is necessary to examine the possible applications of the work product doctrine to a computer support system in terms of both ordinary and opinion work product. The initial question concerns their protection as ordinary work product.

APPLICABILITY OF ORDINARY WORK PRODUCT PROTECTION TO COMPUTER SUPPORT SYSTEMS

Courts have considerable discretion in allowing the discovery of ordinary work product.⁴⁰ Few cases have considered the issue of protecting a computer support system as ordinary work product, and it

422 U.S. 225, 230-31 (1975); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The fundamental element of this system is bilateral preparation. *Id.* For the system to produce the expected benefits, each lawyer must assemble and cull his own information and then prepare his own case. Anything that impairs a lawyer's independent preparation restrains the party's self-interest and thus reduces the friction between the parties that helps produce the truth. See *Hickman v. Taylor*, 329 U.S. 495, 510, 511 (1947).

33. See Note, *Protection of Opinion Work Product Under The Federal Rules of Civil Procedure*, *supra* note 11, at 335.

34. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); see also Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 493 (1968).

35. See *infra* notes 42-45 and accompanying text.

36. See Fed. R. Civ. P. 26(b)(3).

37. See *infra* notes 108-114 and accompanying text.

38. See *infra* notes 134-160 and accompanying text.

39. See *supra* note 12.

40. The decisions which interpret Fed. R. Civ. P. 26(b)(3) are not consistent. The determination of whether to allow the discovery of ordinary work product material

is not clear from these decisions under what circumstances they will be protected.⁴¹ Consequently, a detailed examination of the ordinary work product rule and how it might be applied to prevent the discovery of information stored in a computer support system is necessary. Further, in order to understand the application of the rule, it is helpful to consider the different components of computer support systems and how they reflect work product.

Qualifying for Ordinary Work Product Protection

Federal Rule of Civil Procedure 26(b)(3) gives trial preparation material a qualified immunity from discovery.⁴² In order to come within the qualified immunity under this rule, three criteria must be satisfied. First, the material must be either documents or tangible things. Second, the material must be prepared in anticipation of litigation. Finally, the material must be prepared either by a party or that party's representative.⁴³

Work product may also be protected even if the subject matter of the discovery request is information other than the contents of documents and tangible things. When the subject matter sought comes within the policy of the work product doctrine, it will also be protected.⁴⁴ Thus, if a request relates to intangibles such as the manner of preparation, strategy, appraisals of witnesses of a case, or other activities of the attorneys, it is protected from discovery.⁴⁵

Courts recognize that computer support systems qualify for protection as a form of work product.⁴⁶ These decisions, however, do not

most often rest on a court's balancing of the competing interests of liberal discovery and protection of the adversary model. See, e.g., WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2025, at 214 (West 1970). See also Note, *Discovery of Attorney's Work Product*, 12 GONZ. L. REV. 284, 289 (1977).

41. See *supra* note 12.

42. FED. R. CIV. P. 26(b)(3).

43. See WRIGHT & MILLER, *supra* note 40, § 2024, at 196, 197.

44. The protection afforded to attorney work product, although currently dealt with by statute, is a protection of the common law also. The court in *Hickman v. Taylor*, 329 U.S. 495 (1947), stated that work product results from the assembling and sifting of information as reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." (emphasis added) *Id.* at 511. Thus, when the subject matter that is sought comes within the general policy of the work product doctrine enunciated in *Hickman*, it is protected from discovery. See, e.g., MOORE 4 FEDERAL PRACTICE, § 26.64[4], at 26-452 (2d ed. 1976); Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, *supra* note 11, at 346 n.75.

45. *Id.*

46. See *supra* note 12.

specify how computer support systems reflect work product. Consequently, it will be helpful to examine how such systems reflect work product in light of the general policy of protecting work product and the specifications of rule 26(b)(3). The initial question concerns their classification as documents and tangible things.

The materials protected by rule 26(b)(3) are documents and tangible things,⁴⁷ while the components of a computer support system are both tangible and intangible. At the heart of the system is the computer database. It contains the computer-readable representation of documents with which users access and identify the actual documents.⁴⁸ The computer-readable representation of documents is made up of electronic impulses stored on magnetic tapes or discs.⁴⁹ As such, the database does not appear to fit the "documents and tangible things" requirement of rule 26(b)(3). However, this problem was resolved by the 1970 amendment to rule 34 which governs the discovery of documents and things. The rule provides that documents include "data compilations from which information can be obtained. . . ."⁵⁰ Consequently, the database of a computer support system qualifies as documents and tangible things under rule 26(b)(3).

The second requirement of rule 26(b)(3) requires that the material must be prepared in anticipation of litigation to qualify as work product.⁵¹ A computer database, however, may contain information such as business records, letters and documents which predate the lawsuit, and were not prepared in anticipation of litigation.⁵² The documents that predate the lawsuit are subject to normal discovery.⁵³ However, the computerized record of those documents qualify as a form of protected work product. To demonstrate this, the different methods of converting the documents into the computer database must be examined.

One method of converting documents into a computer database is the "index" method.⁵⁴ When the index method is used, a set of

47. FED. R. CIV. P. 26(b)(3).

48. See Olson & Goodrich, *supra* note 4, at 833.

49. See Sherman & Kinnard, *supra* note 1, at 272.

50. FED. R. CIV. P. 34(a). FED. R. CIV. P. 45, directed at production of "books, papers, documents or tangible things," would also permit discovery of computer records.

51. FED. R. CIV. P. 26(b)(3).

52. See Sherman & Kinnard, *supra* note 1, at 275.

53. See *infra* note 76.

54. See, e.g., Halverson, *Use of Computer for Manipulating Information: A Trial Lawyer's Guide to Document Storage and Retrieval*, USE OF COMPUTERS IN LITIGATION, 83, 87 (J. Young, M. Kris and H. Trainor eds. 1979) [hereinafter Halverson].

classifications or index topics is developed in advance of any computer input. Only the index topics applicable to a particular document are eventually converted into the database.⁵⁵ To the extent that these indexed words differ from the documents themselves, regardless of the date of the documents, they would necessarily have been prepared in anticipation of litigation as required by rule 26(b)(3).⁵⁶

Another widely used method of converting documents into the database of a computer support system is the "full text" method. The full text method, as its name implies, requires the conversion of all the words of a document into the database.⁵⁷ As such, the database resembles an electronic file cabinet for documents which retain their original contents and were not prepared in anticipation of litigation. Although the full text of documents in the database of a computer support system does not appear to qualify for work product protection based on rule 26(b)(3), it should be entitled to protection under the general policy of protecting work product.

Materials can be protected by the work product doctrine if the material resulted from the training, skill and knowledge of a lawyer.⁵⁸ The professional skills of a lawyer are needed to create a full text database. When a full text database is created, all available documents are not converted into the database. Instead, only relevant or important documents are eventually converted into the database. This is accomplished by pre-screening all documents before any computer input. Cost and capacity limitations of computer support systems require careful selection of documents to maximize the effectiveness of such systems. This selection process must be performed by attorneys or other personnel under the detailed instructions of attorneys.⁵⁹

55. When documents are indexed into a computer support system, a manual index form is first prepared which contains blanks for logging certain salient descriptions or terms. Further, the form may have space to note comments, supply names, and record observations of the particular document. The completed form is then entered into the computer's memory where they remain accessible to answer almost any conceivable inquiry, limited only to the extent of the data indexed. *See Rust & Rome, supra* note 5, at 110.

56. *See Sherman & Kinnard, supra* note 1, at 273.

57. *See Rust & Rome, supra* note 5, at 109.

58. *United States v. Anderson*, 34 F.R.D. 518, 521 (D.C. Colo. 1963); *see also supra* note 44.

59. *Olson & Goodrich, supra* note 4, at 856, 857. At the document screening phase in creating a computer support system, the attorneys indicate on a special logging sheet the type of facts and the degree of detail that should be processed into the computer. Once documents are screened, the selected documents are processed into the computer. *See, e.g., Halverson, supra* note 54, at 87.

Only attorneys can appreciate the relevance or importance of documents to particular issues in a lawsuit.⁶⁰ Consider, for example, an attorney defending against a four-count complaint. The attorney believes that only one count has any merit and the other three will be dismissed early by summary judgment. The attorney's professional judgment may dictate that the documents which related to the insubstantial counts be left out of the computer database. Converting them into a sophisticated computer system would waste the client's money and diminish the effectiveness of the system.⁶¹ Thus, although the full text of documents in a computer database may not be considered "prepared in anticipation of litigation" as required by rule 26(b)(3), there are strong policy reasons for protecting the database from discovery based on the general work product doctrine since the database results from the professional skills of the attorneys working on the case.⁶² There are additional reasons for considering a full text database protected as a form of work product.

Although the information in a computer database may only be the unaltered contents of documents which predate the lawsuit, retrieval of this information is only possible through the computer, its programs and retrieval manuals.⁶³ In other words, a critical element of retrieval is the computer system design expressly created in anticipation of litigation.⁶⁴ The electronic impulses in the computer database are meaningless without the computer, its programs, and retrieval directories designed to convert them into usable form. Additionally, computer support systems require substantial investments

60. Olson & Goodrich, *supra* note 4, at 856.

61. See, e.g., Madden, *supra* note 17.

62. See *supra* note 59 and accompanying text. This proposition poses conceptual problems. Although the individual computerized records of the documents may not be considered as prepared in anticipation of litigation, these records are accessible only by exposing the intangible gathering process of the attorneys. This gathering process reflects the professional judgment of the attorneys. Hence, the individual computerized records appear to be protected by the work product doctrine enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947).

63. See Sherman & Kinnard, *supra* note 1, at 273.

64. The design of a computer support system includes: 1) a general analysis of what the lawsuit concerns; 2) the initial framework for the factual and legal contentions involved; 3) the types of documents and other information that will be obtained; 4) the general categories of data the attorney wants stored in the database, such as factual contentions, areas of damage and authors and recipients of correspondence; 5) what the attorney wishes to do with each category of data; 6) the decisional and computational steps necessary to generate each desired output. Sherman & Kinnard, *supra* note 1, at 273 n.20; see generally Prendergast, *The Use of Data Processing in Litigation*, 17 JURIMETRICS J. 227, 234-35 (1977); see also *supra* note 21.

of time and money by a litigant and counsel.⁶⁵ This economic investment, buttressed by the policy behind the work product doctrine of not granting a "free ride" to an opposing party, argues persuasively for considering a full text database of a computer support system as material protected by the work product doctrine.⁶⁶

The third requirement to qualify a computer support system as work product material pursuant to rule 26(b)(3) is that it be prepared by a party or that party's representative.⁶⁷ The task of creating a computer support system may require the collaboration of the litigant, attorneys, computer experts, paralegals and other non-lawyers.⁶⁸ Prior to the adoption of rule 26(b)(3) some courts held that the work product doctrine was based on the unique place of the attorney in the adversary system and refused to extend protection to materials prepared by non-lawyers.⁶⁹ The present rule, however, considers as work product, materials prepared in anticipation of litigation by any representative of a party, not only the attorney.⁷⁰ Consequently, it is not significant that non-lawyers participate in creating a computer support system.⁷¹ Since computer support systems qualify as work product material based on both the general policy of protecting work product and rule 26(b)(3),⁷² it is necessary to examine whether a party can make a sufficient showing of necessity to overcome the qualified immunity afforded ordinary work product.

Discovering Ordinary Work Product—The Necessity Test

Although computer support systems are protected from unlimited

65. See also *supra* note 4 (demonstrating cost). It takes a substantial investment of money and months or even years to create a computer support system. See *supra* note 19. The text or indexes of the mass of documents must be converted into machine readable form. Such conversion ordinarily can only be accomplished by manually keying the documents into machine readable form. In other words, documents or indexes must be typed by hand at a keyboard. The cost of the personnel performing this function represents the single largest expense in designing the system. See, e.g., Olson & Goodrich, *supra* note 4, at 847, 850.

66. See *supra* notes 32, 44; Sherman & Kinnard, *supra* note 1, at 273.

67. FED. R. CIV. P. 26(b)(3).

68. See, e.g., Olson & Goodrich, *supra* note 4, at 837-47.

69. See WRIGHT & MILLER, *supra* note 40, § 2024, at 205 n.28.

70. The Advisory Committee note to FED. R. CIV. P. 26(b)(3) says in part: "Subdivision (b)(3) reflects the trend of cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation by or for a party or *any* representative acting on his behalf." (emphasis added). *Id.*

71. WILLIAMS, *supra* note 16, at 195.

72. See National Union Electric Corp. v. Matsushita Electric Ind. Co., Ltd., 31

discovery as ordinary work product, these systems may still be discovered if the proponent can make a sufficient showing of necessity. The requirement of showing necessity reflects the concern of the adversary model that "each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that each side should not automatically have the benefit of the detailed preparatory work of the other side."⁷³ Although no court has yet allowed a party to discover an opponent's computer support system, it is appropriate to examine the criteria courts have used in other situations to determine whether the necessity test has been met.

Rule 26(b)(3) defines the necessity test. It gives ordinary work product material a qualified immunity from discovery. The rule permits discovery of ordinary work product if the discovering party can demonstrate "substantial need" for the material and "that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁷⁴ The discovering party has the burden of satisfying the test.⁷⁵

The decisions interpreting the necessity test of rule 26(b)(3) are not consistent. This is because the guidelines of "substantial need" and "undue hardship" are not specific.⁷⁶ Most courts⁷⁷ focus on the

Fed. R. Serv. 2d (Callaghan) 414, 417 (E.D. Pa. 1980); In *Re IBM Peripherals EDP Devices Antitrust Litigation*, 5 Comp. L. Serv. 878, 879 (N.D. Cal. 1975).

73. FED. R. CIV. P. 26(b)(3), *Advisory Comm. Notes* (1970); see also *United States v. A.T. & T.*, 642 F.2d 1285 (D.C. Cir. 1980).

74. FED. R. CIV. P. 26(b)(3).

75. MOORE, *supra* note 44, § 26.64[2], at 26-414.

76. WRIGHT & MILLER, *supra* note 40, § 2025 at 214.

77. Some courts focus on the substantial need or importance of the ordinary work product material to the discovering party as a reason for allowing discovery. See MOORE, *supra* note 44, § 26.64[3], at 26-420 n.7. An example of the "importance" of work product material to a discovering party is when the material is wholly in the control of an opponent and is directly related to the subject matter of the suit. See *Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc.*, 81 F.R.D. 8 (N.D. Ill. 1978). In *Wheeling*, the court determined that the methodology and rationale used by a plaintiff in calculating damages was protected as work product material. However, the court ordered its discovery since the defendant could not properly analyze the damage claim without knowledge of the rationale used in arriving at the damage figure.

Although an opponent's computer support system and the computerized record of documents are wholly in control of the opponent, the documents themselves may be available through normal discovery. The conversion of documents into the database of a computer support system does not prevent a party from obtaining the documents themselves. See *In Re IBM Peripherals EDP Devices Antitrust Litigation*, 5 Comp. L. Serv. 878, 879 (N.D. Cal. 1975). Even if the documents are in the possession of an opponent, FED. R. CIV. P. 34 specifically permits discovery of information which is

second part of the test—undue hardship—as a reason for allowing discovery of ordinary work product material.⁷⁸

A pivotal consideration in assessing undue hardship may be the greatly increased cost of the discovering party's trial preparation efforts, if discovery is denied.⁷⁹ A discovering party's trial preparation costs may increase dramatically if discovery of an opponent's computer support system is denied. This may arise in the context of complex litigation. For example, the discovering party may have to either manually review thousands of documents or create its own computer support system to prepare for trial. Because of the high cost required to create a computer support system or to manually review an enormous quantity of material to prepare for trial,⁸⁰ non-production of an opponent's system may create substantial economic waste. The greatly increased cost which results from non-production of an opponent's computer support system may satisfy the undue hardship test.⁸¹

Related to the increased expense from non-production is the financial ability of the discovering party to obtain the needed material. At least one court has held that the financial distress of a discovering party is a factor in determining whether the hardship on the party is "undue."⁸² Financial distress is likely to be the most compelling claim to justify access to an opponent's computer support system. Such systems are beyond the financial ability of many litigants. For example, an allegedly injured indigent plaintiff in a complex case may not have the resources to finance the sifting of voluminous materials or

in the "custody" of an opponent. *Id.* Since the ultimate goal of a discovering party is to obtain the documents, a discovery request for the computerized record of documents is insufficient to establish their "importance" unless the documents themselves are unavailable. *See Williams, supra* note 16, at 191. An assertion by the opponent that discovery of the system would be merely useful to him has never been held to satisfy the substantial need requirement of rule 26(b)(3). *See WRIGHT & MILLER, supra* note 40, § 2025, at 225, 226. *See also Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 558 (2d Cir. 1967).

78. *See, e.g., WRIGHT & MILLER, supra* note 40, § 2025, at 225. *See also MOORE, supra* note 44, § 26.64[3], at 26-421.

79. *See Sherman & Kinnard, supra* note 1, at 281; *see WRIGHT & MILLER, note 40 supra*, § 2025, at 215, 216. *See also Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (W.D. Ark. 1953). In *Durkin* the court held that the greatly increased expense that non-production would cause justified production.

80. *See supra* note 6. Much of the cost of a computer support system goes for such mechanical acts as indexing the documents and key punching the text into the database. These costs must be incurred before the system can operate. *Id.*

81. *See Sherman & Kinnard, supra* note 1, at 279-82.

82. *Naylor v. Isthmian S.S. Co.*, 10 F.R.D. 128 (D.C.N.Y. 1950); *see WRIGHT & MILLER, supra* note 40, § 2025 at 216, n.74.

to create a computer support system.⁸³ If the needed material is already on the opponent's computer system, the financial hardship on the plaintiff would be reduced considerably if the plaintiff could use that system to identify the needed documents.⁸⁴ To date, the financial ability of the discovering party to obtain the needed material has not been an issue when discovery of such systems is sought. This is because their use has been restricted largely to complex litigation in which the parties are corporate or commercial institutions.⁸⁵ But as computer support systems become more widely used in such areas as common disasters, product liability and class action, courts may have to address this question.⁸⁶ Financial inability to create a computer support system may satisfy the undue hardship test.

Justification for Broad Discovery Protection

The concerns over the hardships of cost and financial distress are compelling factors in determining whether to allow discovery of a computer support system. However, rule 26(b)(3) requires that the policy against invading an attorney's course of trial preparation be considered before allowing discovery.⁸⁷ In cases not involving computer support systems, concerns over cost⁸⁸ and financial distress⁸⁹ have been rejected in favor of protecting the attorneys' course of preparation. Based on this underlying policy, the court in *In Re IBM Peripherals EDP Antitrust Litigation*⁹⁰ protected a litigant's computer support system from discovery. An examination of this decision and the policies

83. See *supra* note 80. An argument against this proposition is that parties, no matter how poor, can often obtain credit based on their litigation prospects or on the assumption of certain litigation costs by their attorney. See Sherman & Kinnard, *supra* note 1, at 284 n.74, 75.

84. The cost of retrieving data out of an existing system is considerably less than creating a system. One commentator states that the cost of one retrieval out of a population of 5,000 documents is about \$30 to \$40, while the cost of creating a system can go into the millions. See Olson & Goodrich, *supra* note 4, at 850, 851.

85. See Sherman & Kinnard, *supra* note 1, at 282.

86. See *supra* note 3.

87. See *supra* notes 40, 73 and accompanying text.

88. *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976) (cost of taking deposition insufficient to meet the undue hardship requirement for production of work product material); *Berger v. Central Vermont R. Co.*, 8 F.R.D. 419 (D.C. Mass. 1948) (cost of taking deposition insufficient for requiring production of a statement to opponent's attorney).

89. *Lester v. Isbrandtsen Co.*, 10 F.R.D. 338 (D.C. Tex. 1950) (production not required even though moving party had no funds with which to conduct an investigation); see also WRIGHT & MILLER, *supra* note 40, § 2025, at 216.

90. 5 Comp. L. Serv. 878 (N.D. Cal. 1975).

behind it is appropriate to demonstrate the importance of protecting such systems from discovery.

The *IBM Peripherals* case provides a good example of the conflict between liberal discovery and the adversary model when a party attempts to discover an opponent's computer support system. The plaintiffs in the case sought an order entitling them to use IBM's computer support system to identify documents according to certain index terms. Plaintiff's counsel argued that the computerized system would facilitate retrieval of documents so that an "enormous quantity of material could be simplified with more speed."⁹¹ The plaintiff's alternative was a manual review of "several million pages of documents."⁹² This review process would require at least six months to complete.⁹³ Counsel for the defendant, IBM, contended that the plaintiffs could demand any relevant IBM document to prepare for trial. IBM's counsel further stressed that the plaintiffs were seeking a "free ride" on its trial preparation, and that the plaintiffs were at liberty to create their own support system if desired.⁹⁴ The court, in its discretion, refused to compel production.

In a brief decision, the *IBM Peripherals* court found that, "IBM's computer support system and the material contained within [was] prepared solely for litigation. . . ."⁹⁵ Although the court did not cite to rule 26(b)(3), it is apparent that the court was protecting IBM's work product. Despite the increased cost resulting from non-production of IBM's system, the court held that the plaintiffs failed to establish undue hardship.⁹⁶ The court reasoned that allowing discovery would impinge on IBM's course of trial preparation.⁹⁷ Although the decision may seem unsympathetic to the plaintiff's cause,⁹⁸ the logic and reasoning of the *IBM Peripherals* court is sound and represents an appropriate application of the work product doctrine. The general policy against invading the privacy of an attorney's course of trial prepara-

91. TRANSCRIPT OF HEARING, (Jan. 24, 1975) at 21, 28.

92. IBM's Memorandum of Points and Authorities, at 19-20.

93. *Id.*

94. TRANSCRIPT OF HEARING, *supra* note 91, at 41, 42.

95. In Re IBM Peripherals EDP Devices Antitrust Litigation, 5 Comp. L. Serv. 878, 880 (N.D. Cal. 1975).

96. *Id.* at 879.

97. *Id.*

98. See *Stovall v. Gulf & South Am. S.S. Co.*, 30 F.R.D. 152 (S.D. Tex. 1961). "[S]ympathetic, humanitarian impulses are no substitute for a cogent showing of 'good cause.'" *Id.* at 155 (refusing discovery to injured plaintiff not able to conduct an investigation).

tion was a concern of the Supreme Court in the landmark case of *Hickman v. Taylor*.⁹⁹

The Court in *Hickman* was concerned that the discovery of work product without good cause would lead to less efficiency in litigation, because, knowing that his work product would be turned over to an opponent, an attorney might refrain from written preparation.¹⁰⁰ In the context of complex litigation in today's "computer age," the concern of the *Hickman* court has a new implication. A too narrowly defined work product rule might lead to a situation where lawyers fail to utilize computer support systems knowing that they would have to turn these systems over to their adversaries.

If discovery of computer support systems is allowed based on the hardships of expense or financial distress, there is a high probability of less overall efficiency in preparation for complex litigation.¹⁰¹ Allowing discovery of computer support systems could discourage lawyers from investing in these modern devices which can speed litigation and make trial preparation more efficient than was possible before they were available.¹⁰² Unlike basic investigation into the facts of a case, the creation of a computer support system is optional. Its use has been analogized to such economic investments as increasing the paralegal staff or assigning another lawyer to the case.¹⁰³ Arguably, if parties are not given broad work product protection for their computer support systems, they would be less likely to create them.¹⁰⁴

99. 329 U.S. 495 (1947). *Hickman* was an action for damages against the owners of a tugboat that sank, brought by the representative of one of the deceased crew members. The plaintiff directed a series of interrogatories to the tug owners, one of which requested the defendants to attach copies of any written statements of the surviving crew members concerning the accident to reveal any oral statements of the crew members transcribed by defendant's counsel. Defendants declined to answer the interrogatories, claiming that the information was privileged.

The district court ordered the tug owners and their counsel to answer the interrogatory and, when they refused, found them guilty of contempt. 4 F.R.D. 479 (E.D. Pa. 1945). The United States Court of Appeals for the Third Circuit reversed, 153 F.2d 212 (3d Cir. 1945), and the Supreme Court affirmed the Third Circuit Court.

100. *Hickman*, 329 U.S. at 511.

101. Although denying discovery in a particular case may thwart the aims of liberal discovery, see *supra* notes 77-84, the stare decisis effect of a decision which allows discovery of a computer support system could have a significantly greater effect on inefficiency in complex litigation. See *infra* note 105.

102. Williams, *supra* note 16, at 196.

103. See Olson & Goodrich, *supra* note 4, at 853.

104. *Id.* at 852 (stating that a frequently expressed reluctance of trial counsel to create a computer support system is its possible discovery by opponents).

Instead, less efficient manual systems may be used.¹⁰⁵ This possibility would diminish the efficiency of trials and diminish a lawyer's ability to represent his clients—concerns of the *Hickman* court.¹⁰⁶ Consequently, the benefits to the judicial system from the use of computers in litigation strongly favors broad work product protection for computer support systems.¹⁰⁷

APPLICABILITY OF OPINION WORK PRODUCT PROTECTION TO COMPUTER SUPPORT SYSTEMS

Even if the necessity test of rule 26(b)(3) which allows the discovery of ordinary work product could be satisfied, a computer support system may still be protected from discovery if the mental impressions of the owning party's attorneys would be disclosed. Trial preparation material, which includes the mental impressions of an attorney, is referred to as opinion work product.¹⁰⁸ Opinion work pro-

105. See *supra* notes 4, 5. The possibility of a shift from computerized to manual support systems is particularly apparent in cases in which relatively few documents are involved. In this range, computerized systems are optional methods of organizing trial materials. As such, attorneys may forego the more efficient option of an expensive computerized system in favor of less expensive, less efficient manual systems. The possibility of having to give an opponent a "free ride" by allowing the opponent to use their optional computerized system may contribute to discouraging their use when relatively few documents are involved. See Olson & Goodrich, *supra* note 4, at 852.

In the most complex cases in which millions of documents are involved, potential liability for malpractice provides an incentive to use computer support systems. In this range, these systems become more of a requirement than an option. The possibility of discovery, however, may contribute to a less efficient computerized system even in the most complex cases. Attorneys may use the higher protection afforded to opinion work product as a sword and not a shield. See *infra* notes 118, 119 and accompanying text. In an attempt to make their systems discovery proof, attorneys may index documents into the computer system according to subjective criteria only. For an example of subjective indexing, see *infra* note 119 and accompanying text. The more subjective the indexes are, the more likely such indexes could disclose the mental impressions of attorneys if discovered. Olson & Goodrich, *supra* note 4 at 854. Consequently, subjective systems will be given more protection than basically objective systems. Although subjective systems may be invaluable, an *exclusively* subjective system may be less useful at some future date in the litigation when the attorney's perceptions of the case and strategies have changed. Further, a subjectively indexed system is both expensive and unwieldy. *Id.* This possibility will contribute to inefficiency in trials, a concern of the court in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If the benefits of a versatile retrieval system are desired, objective index terms are essential. Sherman & Kinnard, *supra* note 1, at 287 n.91.

106. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); see also Williams, *supra* note 16, at 196.

107. See Williams, *supra* note 16, at 196, n.7.

108. See, e.g., *In re Murphy, Inc.*, 560 F.2d 326, 335 (8th Cir. 1977).

duct is given greater protection than ordinary work product.¹⁰⁹ Opinion work product can be equated with an attorney's strategy,¹¹⁰ including intended lines of proof,¹¹¹ cross examination plans¹¹² and inferences drawn from witness interviews.¹¹³ Opinion work product also encompasses an attorney's evaluation of the strengths and weaknesses of a case.¹¹⁴ This section explores the possibility that computer support systems can be protected from discovery under the opinion work product rule.

Qualifying for Opinion Work Product Protection

In order to understand the application of the opinion work product rule, it is helpful to consider how discovery of computer support systems may disclose attorneys' mental impressions. There are two aspects of computer support systems which suggest that discovery could disclose opinion work product. The first concerns the manner in which the attorneys index or abstract documents into the database of a computer.¹¹⁵ The second concerns the selection of documents for inclusion in such systems.¹¹⁶

One method for converting documents into the database of a computer support system requires only that an index or abstract of the documents be converted into the database.¹¹⁷ This method of document input often requires the application of an attorney's judgment or thought processes in the indexing or abstracting, and may therefore disclose opinion work product if discovered.¹¹⁸ For example, if documents are indexed according to their relevance to particular issues or to the attorney's subjective evaluation of their credibility or importance, the opponent could learn about the attorney's impressions or strategies if the computerized record of the documents is discovered.¹¹⁹ Similarly, if a document is abstracted into the database,

109. See *infra* notes 138-40 and accompanying text.

110. See Cooper, *The Work Product of the Rulemakers*, 53 MINN. L. REV. 1269, 1300 (1969).

111. See JAMES & HAZARD, *supra* note 32, § 6.10, at 198 (2d ed. 1977).

112. See Cooper, *supra* note 110, at 1296.

113. See *Hickman v. Taylor*, 329 U.S. 495, 510, 512 (1947).

114. See JAMES & HAZARD, *supra* note 32, at 198.

115. See *infra* notes 117-120 and accompanying text.

116. See *infra* notes 125-133 and accompanying text.

117. See Sherman & Kinnard, *supra* note 1, at 286.

118. *Id.*

119. The range of possible subjective indexes is limited only by the creativity of the attorneys working on the case. Further, it is not significant that non-attorneys may be involved in creating the index. The 1970 amendments to rule 26(b)(3) resolved

the attorney's subjective evaluation and interpretation of the document might be revealed from what was left in or taken out of the document.¹²⁰ In *Montrose Chemical Corp. v. Train*,¹²¹ the court confronted the issue of whether indexes and factual summaries prepared for use in litigation were entitled to protection.

In *Montrose*, disclosure of indexes and factual summaries was sought pursuant to the Freedom of Information Act and not the Federal Rules of Civil Procedure.¹²² Nonetheless, the court held that disclosure of factual summaries which had been prepared to assist an administrator in making a complex decision, would be an "improper probing of the mental processes behind a decision of an agency."¹²³ The rationale of the decision is analogous to situations where indexes and summaries are input into the database of a computer support system.¹²⁴ Consequently, if documents are subjectively indexed or abstracted into a computer support system, the computerized record of the documents should be protected from discovery as opinion work product.

The second aspect of a computer support system which suggests that its discovery could disclose opinion work product concerns the attorneys' selection of documents for inclusion into the computer database. All available documents are not converted into the database.¹²⁵ Instead, only relevant or important documents are eventually

the dispute over whether opinion work product related to attorneys by extending protection against disclosure of impressions and theories "[to] an attorney or other representative of a party." FED. R. CIV. P. 26(b)(3).

120. See Sherman & Kinnard, *supra* note 1, at 286. It is typical for an index or abstract of information contained in a computerized data file to contain opinion work product. They are normally developed with the attorney's participation so that the words and word combinations contained within will adequately express the issues and facts he expects will be significant in the case. See Fromholz, *Discovery, Evidence, Confidentiality, and Security Problems Associated with the use of Computer-Based Litigation Support Systems*, 3 WASH. U.L.Q. 445 (1977). However, the crucial question is not whether a lawyer helped shape the system, but whether discovery would actually reveal subjective mental impressions of a party or its representative if discovery is allowed. Accordingly, if only *objective* index terms such as names of sender, dates, names of individuals are used, they do not appear to be protected as opinion work product. See Sherman & Kinnard, *supra* note 1, at 286.

121. 491 F.2d 63 (D.C. Cir. 1974).

122. The case arose in the context of a request for information under the Freedom of Information Act, 5 U.S.C. § 552 (1970). The court interpreted exemption (5) of the Act as protecting the "deliberative process" in any agency decision making, using a standard analogous to the opinion work product rule of FED. R. CIV. P. 26(b)(3). *Montrose*, 491 F.2d at 68.

123. *Id.*

124. See *supra* note 120.

125. See Halverson, *supra* note 54, at 87.

converted into the database. This is accomplished by pre-screening all documents before any input.¹²⁶ Cost and capacity limitations of a computerized system require careful selection of documents to maximize the effectiveness of such systems.¹²⁷ The subjective selection process is performed by attorneys or under their close supervision. This process often requires the application of an attorney's judgment or thought processes. Seemingly, the computerized record of the selected documents should be protected from discovery as opinion work product.¹²⁸

The court in *IBM Peripherals*¹²⁹ confronted this issue of whether the selection by attorneys of documents for inclusion in a computer support system reflects opinion work product.¹³⁰ IBM's attorneys argued that its computer support system should be protected from discovery because its selection process involved "an analysis by lawyers and people trained by lawyers" that each document was important to some issues in the case.¹³¹ The court, agreeing with IBM, held that, "the trial support system created by IBM's counsel reflects their mental impressions, theories and thought processes."¹³² Further, the court stated that it was "not satisfied that information contained in the system [could] be segregated from such lawyer's mental impressions and theories," and denied the discovery request.¹³³ Consequently, this decision demonstrates that discovery of a computerized record of documents screened from a larger number may disclose the mental impressions of attorneys, and thus deserves protection from discovery as opinion work product.

Justifying Nearly Absolute Opinion Work Product Protection

Although IBM's system was not discovered, the case left unanswered an important question concerning the extent to which opinion work product that is inexorably intertwined with factual

126. *Id.*

127. *Id.*

128. The attorneys must make the initial decisions as to significance and relevance. The computer can correlate or order information according to predetermined parameters, but the computer cannot formulate its own guidelines as to importance. See Prendergast, *The Use of Data Processing in Litigation*, 10 *LOY. L.A.L. REV.* 285, 290 (1977); see Cooper, *supra* note 110, at 1283. See Sherman & Kinnard, *supra* note 1, at 289.

129. 5 *Comp. Law. Serv.* 878 (N.D. Cal. 1975).

130. *Id.*

131. TRANSCRIPT OF HEARING, *supra* note 91, at 49.

132. In *Re IBM Peripherals EDP Devices Antitrust Litigation*, 5 *Comp. Law. Serv.* 878, 879 (N.D. Cal. 1975).

133. *Id.*

material in a computerized system is protected from discovery. This issue is still unresolved. This section examines this issue and suggests that computer support systems should be given nearly absolute immunity when discovery of such systems would disclose the mental impressions of attorneys. In order to understand this interpretation of the opinion work product rule, it is helpful to consider the history and purpose of the rule.

In *Hickman v. Taylor*,¹³⁴ the Supreme Court addressed the tension between liberal discovery and the adversary model that arises when a party seeks the opinion work product of an opponent. The Court stated that, "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into . . . the mental impressions of an attorney."¹³⁵ The Court allowed for intrusions into an attorney's mental impressions only in a "rare situation."¹³⁶ This protection afforded opinion work product was roughly codified in the 1970 amendments to rule 26(b)(3). The 1970 amendment simply states that, "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 litigation."¹³⁷ The rule does not specify how much protection opinion work product should receive. Accordingly, courts have disagreed as to what the "court shall protect" standard means.

The disagreement concerning the interpretation of the 1970 amendment to rule 26(B)(3) is extensive. Some courts have viewed the rule as requiring absolute immunity from discovery.¹³⁸ Some have balanced the amount of opinion work product contained in the information against a party's need for the information before allowing discovery.¹³⁹ Others grant strict protection except in limited circumstances.¹⁴⁰ In order to determine the degree of protection that computer support systems should be given based on the opinion product rule, these interpretations are examined against the competing policies of liberal discovery and the adversary model.

Several courts have held that opinion work product is to be af-

134. 329 U.S. 495 (1947). See also *supra* note 99.

135. *Id.* at 510.

136. *Id.* at 513.

137. FED. R. CIV. P. 26(b)(3).

138. See *infra* note 141 and accompanying text (courts applying absolute immunity).

139. See *infra* note 149 and accompanying text (courts applying a balancing test).

140. See *infra* note 156 and accompanying text (courts granting strict protection).

forded absolute immunity from discovery.¹⁴¹ The history of rule 26(b)(3), however, demonstrates that a judicial interpretation of the rule which mandates absolute immunity for opinion work product is improper.¹⁴² A 1946 amendment was proposed to rule 30(b) that would have established absolute immunity for opinion work product. Part of the proposed amendment provided: "The court shall not order the production . . . of any writing that reflects an attorney's mental impressions. . . ."¹⁴³ This amendment was not adopted. The 1970 amendment only requires that "courts shall protect" against disclosure of opinion work product.¹⁴⁴ Thus, the use of "shall protect" instead of "shall not order the production of" implies that courts should exercise increased vigilance with opinion work product but not protect it from discovery absolutely.¹⁴⁵

The Supreme Court's decision in *Hickman v. Taylor* also demonstrates that absolute immunity from discovery of opinion work product is improper.¹⁴⁶ In *Hickman*, the Court acknowledged that discovery would be proper in a "rare situation."¹⁴⁷ Hence, the history of rule 26(b)(3) and an examination of the *Hickman* case demonstrate that absolute immunity for opinion work product is improper.¹⁴⁸

In contrast to absolute protection, some courts use a balancing approach when considering the discovery of opinion work product.¹⁴⁹ These courts vary the burden that the discovering party must meet based upon the amount of opinion work involved. The discovering party must demonstrate a greater need for the materials as the quantity of opinion work product increases.¹⁵⁰ Using this approach does not satisfy the concerns of *Hickman v. Taylor* because it vests a large amount of discretion in the trial judge.¹⁵¹ Although discretion is not

141. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974); *Duffy v. United States* 473 F.2d 840 (8th Cir. 1973); *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976).

142. *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 338 (1978) [hereinafter *Protection of Work Product*].

143. *Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433 (1946).

144. FED. R. CIV. P. 26(b)(3).

145. See *Protection of Work Product*, *supra* note 142, at 338-39.

146. *Id.* at 339.

147. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947).

148. *Protection of Work Product*, *supra* note 142, at 338-39.

149. See, e.g., *ITT Corp. v. United Telephone Co.*, 60 F.R.D. 177 (M.D. Fla. 1973).

150. *Id.*

151. See *Protection of Work Product*, *supra* note 142, at 344.

in itself harmful,¹⁵² courts that adopt this approach have not articulated a standard to guide the judge's discretion.¹⁵³ Consequently, lawyers may have difficulty ascertaining whether their mental impressions will be discovered.¹⁵⁴ This uncertainty may inhibit lawyers from incorporating their mental impressions into the database of a computer support system.¹⁵⁵ This impairs the goals of the adversary system.

Accordingly, a number of courts have established strict immunity to the discovery of opinion work product with the possibility of rare exceptions.¹⁵⁶ These courts allow discovery where intent to prove fraud, bad faith or a crime could be established only by discovery of the attorney's opinion work product.¹⁵⁷ This approach also allows for the discovery of opinion work product when the activities or mental impressions of a party's attorney are at issue.¹⁵⁸ Allowing the discovery of opinion work product under these circumstances furthers the ultimate goal of the judicial system for eliciting truth and furthering justice,¹⁵⁹ and corresponds to the "rare situation" exception enunciated in *Hickman v. Taylor*.¹⁶⁰

This standard, strict immunity with rare exceptions, should apply to the discovery of a computer support system. When a court determines that the facts and the opinion work product cannot be separated, but a party seeks only the factual material, courts should deny discovery unless this exception applies. Ruling otherwise would allow opinion work product to be discovered in some cases not within the narrow exceptions. Knowing that their opinion work product could be discovered, lawyers may refrain from incorporating their mental impressions into a computer support system. This would result in a

152. Trial judges have considerable discretion in discovery matters. See WRIGHT & MILLER, *supra* note 40, § 81, at 404.

153. See *Protection of Work Product*, *supra* note 142, at 344-45.

154. *Id.*

155. See *supra* notes 117-127 and accompanying text.

156. See, e.g., In re: Sealed Case, 676 F.2d 793 (1982) (D.C. Cir. 1982); Handgards Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); SEC v. National Student Marketing Corp., 18 Fed. R. Serv. 2d (Callaghan) 1302 (D.D.C. 1974).

157. *Id.*

158. See, e.g., Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976).

159. See generally *Protection of Work Product*, *supra* note 142, at 341-44.

160. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947); see *Protection of Work Product*, *supra* note 142, at 343. In determining the degree of protection afforded to opinion work product, the Supreme Court, in the most recent case dealing with the issue merely stated that, "We do not decide the issue at this time." *Upjohn Co. v. United States*, 101 S. Ct. 677, 688 (1981).

less efficient system, injuring the interests of the client and thwarting the policies discussed in *Hickman v. Taylor*.¹⁶¹ However, these concerns over the disclosure of opinion work product would be suppressed if the facts in a computer database could be effectively segregated from such mental impressions.

Court Appointed Computer Experts—an Aid to the Court

One option available to courts when factual material is intertwined with the attorneys' mental impressions in a computer database is the use of court-appointed computer experts to convey needed facts. Court-appointed experts may be valuable to a judge overseeing discovery when discovery of the database of a computerized support system is at issue.¹⁶² Rule 53 of the Federal Rules of Civil Procedure permits courts to appoint special masters in any action, ". . . upon a showing that some exceptional condition requires it."¹⁶³ This rule is broad enough to allow the appointment of experts.¹⁶⁴ Further, the complexities of a computerized litigation support system may satisfy the "exceptional condition" requirement. This proposition finds support in the *Manual for Complex Litigation*.¹⁶⁵ The *Manual* recommends the use of court-appointed experts as an aid to the discovery of computerized information.¹⁶⁶ Hence, an expert may be invaluable to the trier of facts and to the discovering party where the factual material and the mental impressions of attorneys are intertwined in the database of a computer support system.

If a party can satisfy the two-prong necessity test for the discovery of ordinary work product,¹⁶⁷ both the policies of liberal discovery and promotion of the adversary system would be accommodated if needed information is conveyed without disclosing the mental impressions of the attorneys. Simply turning over a computer sup-

161. Although an exclusively subjective indexed computer support system may be both expensive and unwieldy, see *supra* note 102, there are many advantages from using some subjectivity in indexing documents. For examples of these benefits, see *Rust & Rome, supra* note 5, at 813, 814.

162. For an able, complete, and current analysis of the law pertaining to court-appointed experts, see *Hart v. Community School Board of Brooklyn, New York School District*, 383 F. Supp. 699, 762-64 (E.D.N.Y. 1974).

163. FED. R. CIV. P. 53.

164. *Hart v. Community School Board of Brooklyn, New York School District*, 383 F. Supp. 699, 764 (E.D.N.Y. 1974).

165. *MANUAL FOR COMPLEX LITIGATION* (West 1977). The *MANUAL* is a collection of procedures which are "recommended" for use in complex litigation. *Id.* at XIX.

166. *Id.*, § 3.40 and 130.

167. See *supra* notes 73-78 and accompanying text.

port system and its retrieval apparatus to the discovering party may disclose the attorneys' mental impressions.¹⁶⁸ However, a court-appointed computer expert may be able to review all requested information, and submit an abstract or report to the court. The report would not disclose the mental impressions of the attorneys who designed the system, yet would convey needed information to the proponent. Although courts should avoid this alternative since ordinary work product would be disclosed,¹⁶⁹ compensation for the expert and retrieval costs could be paid by the discovering party.¹⁷⁰ Shifting the cost to the discovering party could take some of the sting out of allowing discovery. Cost-shifting prevents the discoverer from getting a "free ride" on the opponent's trial preparation.

CONCLUSION

The use of computer litigation support system by trial lawyers should be enthusiastically encouraged by the courts. This may be the "computer age;" however, many lawyers in defense or pursuit of corporations in litigation recognize that it is also the "paper age."¹⁷¹ Corporations generate large volumes of documents. The computer has become an indispensable tool for dealing with such volumes. Thus, the benefits to the judicial system from the use of computers in litigation strongly favors avoidance of any interpretation of rule 26(b)(3) which permits discovery of a litigant's computer support system and the material contained within. Allowing an opponent to discover such systems would not only give the opponent a free ride on the adversary's trial preparation, but, in some circumstances, would disclose to the opponent the adversary's subjective evaluation of the case. Consequently, permitting discovery could be a considerable factor in discouraging the use of such systems.¹⁷²

168. See *supra* notes 117-28 and accompanying text.

169. See *supra* notes 87-107 and accompanying text. This alternative would be most useful when the discovering party can demonstrate "substantial need" for the ordinary work product material. That is, an inability to obtain the needed information from any other source than the opponent's computerized record of those documents. See *supra* note 77.

170. A judge's power under rule 26 to issue protective orders limiting discovery to "specified terms and conditions," FED. R. CIV. P. 26(c), could provide sufficient authority to order cost-shifting as a condition of discovering an opponent's system. See *Sherman & Kinnard, supra* note 1, at 295.

171. See *Emerson, supra* note 12, at 5.

172. Many clients of the vendors of computer support systems weigh very heavily into the equation of whether to automate, the risk of discoverability. Consequently, many support systems are simply not being built because of the uncertainty of discovery. Due to this uncertainty, it is suggested that an attorney considering the

In the next few years there is a potential for a major swing in the use of computer support systems to smaller cases, perhaps to those involving as few as 2,000 documents.¹⁷³ This possibility is partially dependent on court support against discovery.¹⁷⁴ If court support is received, the computer industry will more than likely respond by developing systems that are not only smaller and cheaper, but more easily understood by lawyers.¹⁷⁵ These developments may allow smaller cases to enjoy the efficiencies of computer support systems now realized in only complex cases.¹⁷⁶

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use of an automated support system request from the court a protective order under FED. R. CIV. P. 26(c) insuring that his system will not be discovered. The advantage of the protective order is that a determination of discoverability is made *before* the expense and risk of discovery is incurred. Until the law in this area is settled, the use of a protective order is a suggested approach to dealing with the problem of discovery.

173. See Emerson, *supra* note 12.

174. See Williams, *supra* note 16, at 196.

175. *Id.*

176. Emerson, *supra* note 12.

