

Chapter 7 - Managing Litigation Information Using Technology

Are Your Database and Images Discoverable by Opposing Counsel?

Are Your Database and Images Discoverable by Opposing Counsel? It has long been thought that the document coding and imaging of your documents are protected under an attorney work product privilege. However, this belief is coming under attack as courts consider the discoverability of databases and images.

Opponents argue for the discoverability of bibliographic databases to assist them in managing and controlling their material discovered from opposing counsel. The owner of the database will argue that the database and images are the result of an attorney's mental impressions, conclusions, opinions and legal theories. To argue such a position, it is imperative that you take certain steps at the outset to protect your computerized data. For example:

- *Build a selective database.* If you choose to image and create a bibliographic index of all the documents in a case, then it is difficult to argue that any attorney's theories are wrapped up in the complete computerization of the case materials. On the other hand, if attorneys will consciously select documents that fit into your theories of the case and have those documents only databased and imaged, then there is a much stronger argument that they should be protected. If you turn over the computerized information, the other side will know exactly your theory of the case. Judges do not generally understand databases and images, but look upon them as clerical tasks and do not see the problem of turning over data to the opposing party. However, if it becomes an intimate part of your work product, then a judge will be less likely to force you to disclose your data.
- *Enter into an agreement to share the cost of a database and imaging at the beginning of the case.* If you take the initiative at the outset to work out an arrangement to share the costs of a database and images, then it is more difficult for the opposing party to plead undue burden or expense to the judge.
- *Review existing case law.* Decisions are handed down on a daily basis regarding the protection of databases. These will have a significant effect on how one sets up their database and imaging projects.