

## Appendix E: Legal Issues Affecting Electronic Records Management

### *DISCLAIMER:*

*This is a summary tool. It is not intended to be a substitute for individualized legal advice. Consult an attorney for assistance with specific concerns or for advice.*

There are a number of legal issues that affect electronic records management. This memorandum summarizes a few such issues, including: destruction of records/spoliation, discovery of electronic records, electronic records as evidence, privacy of e-mail, liability for records/information contained on a web site, personal jurisdiction via electronic records, and the Uniform Electronic Transactions Act.

### I. Destruction of Records/Spoliation

#### A. Destruction in General

In Armstrong v. Executive Office of the President, 1 F.3d 1274 (DC Cir 1993), a group of researchers and nonprofit organizations sought to prevent the deletion of e-mail records created during the Reagan administration, arguing that e-mail records should receive the same protection as paper-based records under the Federal Records Act (FRA). The DC Circuit agreed, holding that substantive e-mail communications are included in the FRA definition of "records" and so e-mail records, including transmittal information, should be stored. Often electronic records contain more information than their hard copy counterparts (such as multiple drafts in word processing). Machine-readable data contains original information that never existed in paper documents.

In Public Citizen v. Carlin, the Federal Court of Appeals overturned a lower court's holding that the federal government's General Record Schedule 20 (GRS 20) was invalid. GRS 20 governed the federal agencies' destruction and storage of certain electronic records. Specifically, the challenged portion of GRS 20 was the provision that authorized the disposal of word processing and electronic mail files that were copied to an agency record keeping system from a personal computer.

The lower court had held that GRS 20 exceeded the statutory authority because (1) it did not analyze the content of the records (it includes "program" records as well as "housekeeping" or administrative records); and (2) it did not set a specific time period for the retention of records before destruction (which is required by the statute). It also stated that hard-copy records are not satisfactory replacements for electronic records and may impair the research value of the records, since hard copies cannot be searched, manipulated, and indexed in the same way as

electronic records, and are not as complete as electronic records (such as information about revisions).

The Court of Appeals held that the statute required a record to be scheduled according to the physical attributes of the record rather than its content. In addition, GRS 20 only authorizes disposal of records after they are copied into an agency record keeping system. There is no risk that the information will be lost to future users, since a record must first be copied before it can be destroyed under GRS 20. GRS 20 does not authorize the disposal of electronic records per se. The National Archivist still has to assess the "administrative, legal, research, or other value" of a record before authorizing its disposal. The Court also held that GRS 20 did state a time for disposal of records, which was after they have been transferred to a record keeping system. The Court of Appeals agreed with the lower court that electronic record keeping has advantages over paper record keeping, but acknowledges that not all agencies have established an electronic record keeping system and that the Archivist does not have to require every such agency to create an electronic record keeping system. Finally, the paper copies of electronic records will be complete, because GRS 20 required retention of hidden information or comments.

A defendant organization may seek to have a lawsuit dismissed for prejudice, if the plaintiff delayed in filing the lawsuit, and if before such filing the organization destroyed relevant records pursuant to its reasonable record retention policy. Minnesota courts are hesitant to impose sanctions for the destruction of documents prior to the initiation of litigation. Capellupo v. FMC Corp., 126 FRD 545 (D MN 1989). Courts in other states do not hesitate to impose such sanctions, however. For example, in Peskin v. Liberty Mutual Insurance Company (530 A.2d 822 (1987)), Peskin filed a claim for insurance coverage 9 ½ years after a fire. Liberty Mutual no longer possessed all the records necessary to establish the parameters of coverage. The records were destroyed by Liberty Mutual pursuant to its records destruction schedule before it received notice of the fire. The court remanded the case to determine whether Liberty Mutual's record retention policies comported with industry standards of practice and were otherwise reasonable.

The duty to preserve evidence starts when the litigant knows, or reasonably should know, that information is relevant in an action or reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is subject of pending discovery request. (See Souza v. Fred Carries Contracts, Inc., 955 P2d 3 (AZ App Div 2 1997) and Fayemi v. Hambrecht and Quist, Inc., 174 FRD 319 (SDNY 1997)). For example, according to Hunter v. Ark Restaurants Corp., 3 F. Supp 2d 9 (DDC 1998), a court can dismiss a case for destruction of evidence when the litigant is on notice that documents are relevant to potential litigation and destroys such documents, depriving the party of the opportunity to present critical evidence on key claims. The obligation to preserve evidence even arises prior to the filing of a complaint

where a party is on notice that litigation is likely to be commenced. Capellupo v. FMC Corp., 126 FRD at 550; Alliance to End Repression v. Rochford, 75 FRD 438 (ND IL 1976). If, however, there is no hint of litigation nor any other reason to retain certain documents, then a litigant's destruction of such documents does not warrant sanction or dismissal of the claim.

Each state has its own rules regarding destruction of evidence. For example, New York has a high standard for spoliation of evidence. Under its "Spoliator Beware" standard, the negligent, non-willful destruction of crucial and dispositive evidence in the sole possession of a party could bring severe sanctions of dismissal or summary judgment against the destroying party (even if the evidence was destroyed before a lawsuit was commenced). When a party alters, loses, or destroys key evidence before it can be examined by the other party's expert, the court has discretion as to sanctions. See Conderman v. Rochester Gas & Electric Corp., 687 NYS2d 213 (Supp 1998). In Conderman, there was an accident caused by certain telephone poles falling on a car. The defendant's risk management department sent an experienced team of claims personnel to the accident site, and they did not mark, identify, preserve or test the poles. The poles were thereafter destroyed, and the plaintiff claimed spoliation of evidence. The court held that New York has a strong public policy regarding the maintenance of key evidence in connection with a lawsuit. In this case, the immediate dispatch of experienced claims personnel showed that the defendant had a high degree of awareness of the likelihood of possible litigation, and supports a finding that crucial evidence was negligently destroyed.

A majority of states do not recognize a separate tort of spoliation of evidence, but limit the remedies for spoliation to the case at hand (such as Arizona in Souza v. Fred Carries Contracts, Inc., 955 P2d 3 (AZ App Div 2, 1997); and Texas in Trevino v. Ortega, 969 SW2d 950 (TX 1998). Courts in these states hold that spoliation does not give rise to independent damages, and is better remedied within the lawsuit affected by the spoliation. Spoliation is an evidentiary concept, not a separate cause of action; the destruction only becomes relevant when someone believes that those destroyed items are instrumental to success in a lawsuit. A minority of states, however, do recognize a separate tort of spoliation of evidence (California, Florida, New Jersey, New Mexico and Ohio).

## **B. Destruction After Commencement of Lawsuit**

Once an organization knows, or has reason to know, of the relevance of documents or information, it has an affirmative duty to preserve such information. If an organization destroys or fails to retain documents or information which it knows, or has reason to know, will be relevant in a lawsuit, it may face sanctions (at the discretion of the Court) for spoliation of evidence ranging from fines and penalties to entry of a judgment against it. See Shepherd v. American Broadcasting Companies, 151 FRD 179 (DDC 1992).

In determining whether a court should exercise its authority to impose sanctions for spoliation, a threshold question is whether a party had any obligation to preserve the evidence. Sanctions may be imposed on a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and who destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably likely to be requested during discovery, and/or is the subject of a pending request. Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443 (CD Cal 1984). Thus, no duty to preserve arises unless the party possessing the evidence has notice of its relevance. Danna v. New York Telephone Co., 752 F. Supp. 594 (SDNY 1990). Of course, a party is on notice once it has received a discovery request. Beyond that, the complaint itself may alert a party that certain information is relevant and likely to be sought in discovery. Computer Associates International, Inc. v. American Fundware, Inc. 133 FRD 166 (D CO 1990); Teletron Inc. v. Overhead Door Corp., 116 FRD 107 (SD FA 1987).

For example, in Applied Telematics, Inc. v. Sprint Communications (1996 US Dist Lexis 14053), Sprint failed to preserve backup tapes of a computer system that routes telephone calls after receiving a request for information in connection with a patent infringement lawsuit commenced by Applied Telematics. Applied Telematics argued that Sprint knew that such information was relevant when it received the request for information. Sprint responded that, pursuant to its normal operating procedures, the computer system is backed up and saved, replacing the prior week's backup. As a result, after one week the historical information is unavailable from the computer system.

The court found that Sprint did know, or should have known, that the backup files were relevant, and failed to take steps to prevent the routine deletion of the backup files. The fact that Applied Telematics failed to ask Sprint to save the files does not relieve Sprint of its affirmative duty to do so. The court went on to find that Sprint did not destroy the backup files fraudulently or with the intent to prevent Applied Telematics from obtaining the evidence, and Applied Telematics did not suffer substantial prejudice from Sprint's actions. As a result, the court awarded Applied Telematics monetary sanctions for the destruction of evidence. The prejudice was not substantial, in part because Applied Telematics failed to pursue other means to obtain the information. The court held that it has discretion to choose an appropriate sanction upon finding improper loss or destruction of evidence, based on the willfulness of the destructive act and the prejudice suffered by the requesting party. If the spoliation or destruction of evidence was intentional and indicates fraud and a desire to suppress the truth, rather than destruction that is a matter of routine with no fraudulent intent, a sanction that has a drastic result, such as entry of judgment, may be appropriate. See also Shepherd v. American Broadcasting Companies, 151 FRD 179 (DDC 1992).

Similarly, in Turner v. Hudson Transit Lines, Inc., 142 FRD 68 (SDNY 1991), the court imposed sanctions on the defendant because it destroyed maintenance records of a bus and as a result was unable to produce them in a lawsuit regarding an injury that took place on the bus. The defendant maintained records for one year, as required by the Federal Highway Administration regulations, then destroyed the maintenance records pursuant to its documentation retention policies. The lawsuit was filed in October 1986, and the document request for maintenance records of the bus was made December 29, 1989. The defendant destroyed the documents in December 1989 and therefore could not produce them. The court held that, at least by the time the complaint was served, the defendant was on notice that maintenance records should be preserved. Even though it did not intentionally destroy evidence, its reckless conduct did result in loss of the records. The corporate managers were responsible for conveying this information to relevant employees. The defendant's management did not advise its employees of the obligation to maintain relevant documents while litigation was pending. It had an obligation to preserve the maintenance records and it failed to do so.

It is no defense for an organization to suggest that particular employees were not on notice. To hold otherwise would permit an organization to shield itself from discovery obligations by keeping its employees ignorant. See also National Association of Radiation Survivors, 115 FRD at 557; Medical Billing, Inc. v. Medical Management Sciences, Inc. v. Reich, 1996 WL 219657 (ND OH 1996).

Even though a party may have destroyed evidence prior to issuance of the discovery order and thus be unable to obey, sanctions may still be appropriate if the inability to produce the records was self-inflicted. See In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 90 FRD 613 (ND IL 1981). For example, in Computer Association v. International v. Americal Fundware, Inc., 133 FRD (D CO 1990), the defendants destroyed a version of source code at issue after a copyright infringement lawsuit was filed. The defendant was sanctioned by the court because it had an obligation to preserve the code because of its knowledge of plaintiff's claims. See also National Association of Radiation Survivors v. Turnage, 115 FRD 543 (ND CA 1987); ABC Home Health Services, Inc. v. International Business Machines Corp., 158 FRD 180 (SD GA 1994); General Environmental Science Corp. v. Horsfall, 141 FRD 443 (ND OH 1992); Hirsch v. General Motors Corp., 628 A2d 1108 (NJ Super 1993); Lexis-Nexis v. Beer, 41 F Supp2d 950 (D MN 1999); Pepsi Cola Bottling Co. of Olean v. Cargill Inc., Archer-Daniels Midland Co., 1995 WL 783610 (D MN 1995).

### **C. Adverse Inference**

If a party destroys evidence, a court may accept an inference that the evidence would be unfavorable to the position of the offending party. The concept of an adverse inference as a sanction for spoliation is based on two rationales: (1)

remedial—where evidence is destroyed, the court should restore the prejudiced party to the same position with respect to its ability to prove its case that the court would have held if there had been no spoliation; or (2) punitive—to deter parties from destroying relevant evidence before it can be introduced at trial. If a party destroyed evidence, it may accept an inference that the evidence would be unfavorable to the position of such party. The rationale is based on the observation that a party who has notice that evidence is relevant to litigation and who proceeds to destroy it is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the evidence. See Schmid v. Milwaukee Electric Tool Corp., 13 F3d 76 (3rd Cir 1994).

When an adverse inference is made, the party may have sanctions imposed, and/or the evidence can be admitted against it. The key considerations in determining whether such a sanction is appropriate are: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. See Kronisch v. U.S., 150 F3d 112 (2nd Cir 1998); Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263 (8th Cir 1993); SDI Operating Partnership LB v. Neuwirth, 973 F.2d 652 (8th Cir 1992).

The state of mind of a party that destroys evidence is a major factor in determining whether an adverse inference is an appropriate sanction. If the party acted in bad faith or intended to prevent the use of the evidence in litigation, then an adverse inference is required; if the party acted willfully, it may be appropriate to draw an adverse inference. See Alexander v. National Farmers Organization, 687 F 2d 1173 (8th Cir 1982). Before an adverse inference is made, the party seeking the destroyed evidence must show that the destroyed evidence would have been otherwise unattainable by the party seeking such destroyed evidence. In order to remedy the evidentiary imbalance created by the destruction of evidence, an adverse inference may be appropriate even in the absence of a showing that the spoliator acted in bad faith. However, where the destruction was negligent rather than willful, special caution must be exercised to ensure that the adverse inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence.

For example, in Brewer v. Quaker State Oil Refining Corp., 72 F3d 326 (3rd Cir 1995), the court stated that if the contents of a document are relevant to the issue in a case, the trier of fact generally may receive the fact that the document cannot be produced as evidence that the party who has prevented production did so out of well-founded fear that the contents would harm him or her if discovered. On the other hand, no unfavorable inference arises when circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where failure to produce the document is otherwise accounted for. For example, when a company cannot produce an employee's personnel file because the employer's in-

house attorney died of a terminal illness after taking possession of the file and the employer cannot find the file after continually looking for it.

#### **D. Inefficient Record Keeping System: Unable to Locate Records**

An organization may face liability if it creates a record keeping and indexing system that makes it difficult or costly to locate and produce documents on request. For example, in Kozlowski v. Sears (73 FRD 73, 1976), the plaintiff was burned when pajamas manufactured and marketed by the defendant ignited. The plaintiff asked for a record of all complaints and communications concerning personal injuries or death allegedly caused by the burning of children's nightwear manufactured or marketed by the defendant. The defendant refused to produce such documents, stating that there is no practical way for anyone to determine whether there are any such records, because it has a longstanding practice of indexing claims alphabetically by name of applicant, rather than by type of product. The court stated that the defendant may not excuse itself from compliance with the discovery request because it "utilizes a system of record keeping which conceals rather than discloses relevant records or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purpose of the discovery rules." See also Continental Illinois National Bank & Trust Company of Chicago v. Caton, 136 FRD 682 (D KS 1991); Baine v. General Motors Corp., 141 FRD 328 (MD AL 1991); Fagan v. District of Columbia, 136 FRD 5 (DDC 1991); Control Data Corporation Securities Litigation, 1988 WL 92085, Fed Sec L Rep 93,720 (D MN 1988); Bowman v. Consolidated Rail Corp., 110 FRD 525 (ND Ind 1986); US v. ACB Sales & Service, Inc. 95 FRD 316 (1982); Dunn v. Midwestern Indemnity, 99 FRD 191 (SD OH 1980); Webb v. Westinghouse Electric Corp., 81 FRD 431 (ED PA 1978).

#### **E. Requirement to Follow Internal Document Retention Policies**

If a corporation has a documentation retention policy or other corporate policy that applies, it creates a standard that it is required to follow. For example, in Gillispie v. Rank Video Services America, (1997 US Dist LEXIS 13183), the court found that the defendant violated its own policy by not promoting the plaintiff, and this violation may constitute evidence of discrimination.

## **II. Discovery of Electronic Records**

Today it is well established that computerized data and electronic records (as well as documentation of the computer system itself) are discoverable if relevant during

discovery (the information-gathering process of a lawsuit). See FRCP 34(a); Adams v. Dan River Mills Inc., 54 FRD 220 (WD VA 1972). Courts have stated that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms. It would be dangerous if new techniques for using information became a hindrance to discovery in litigation. Specifically, a defendant's deleted files on its computer hard drive may be discoverable if they are still recoverable. See Gates Rubber Co. v. Bando Chemical Indus. Ltd., 167 FRD 90 (D CO 1996); Strausser v. Yalamachi, 699 So2d 1142 (FA App 1996) Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 USLEXIS 6355 (SDNY 1995); Seattle Audobon Society v. Lyons, 871 F. Supp. 1291 (WD WA 1994); Easley, McCaleb & Associates, Inc. v. Perry, No. E-2663 (Ga. Super. Cit. July 13, 1994); PHE, Inc. v. Department of Justice, No. 96-2840(PLF) (DDC 1991); Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp 1122 (SD Tex 1976); Greyhound Computer Corp., Inc. v. IBM, (3 Computer L Serv Rep 138 D. MN 1971). When computerized data is produced, it must be in a form reasonably useable by the other party. If a party suspects that the other party is not producing all relevant information or has destroyed records, the party may request access to the other party's computer system, or visit the other party's site.

The proliferation of e-mail has changed discovery greatly. The Federal Rules of Civil Procedure do not explicitly allow for discovery of e-mail, but state more generally that electronically stored data is discoverable. Many courts have upheld e-mail discovery requests, making e-mail messages a fodder for legal action. Most e-mail systems can create a complex record of communication, capturing the exact text that users send and receive, as well as storing information regarding their transmission and receipt. Destroying e-mail is difficult; even if a user deletes a message from his or her machine, most e-mail systems store messages on a centralized backup file for an indefinite period of time. It is relatively easy to retrieve deleted e-mails from most computer databases and these deleted e-mails are generally discoverable. See In re Brand Name Prescription Drug Antitrust Litigation (94-C-87, MDL 997 (ND IL 1995)).

Note, however, that the attorney-client privilege can extend to computer files. If legal counsel's advice or opinion was conveyed through electronic mail, then that message is privileged, except to the extent it contains information meant to be distributed to persons other than the corporate client. See IBM v. Comdisco, Inc. (91-C-67-1992 Del Super LEXIS 67 March 11, 1992). As a result, e-mail communications received from legal counsel should not be forwarded to any party within the organization, unless such party has a need to know such information. In addition, security measures should be in place to ensure that other employees at an organization do not have access to each other's e-mail, including any e-mail communication from the organization's legal counsel.

### III. Electronic Records as Evidence

Computer-generated records cannot be admitted into evidence unless the proper foundation has been laid. For example, in Illinois v. Bovio (455 NE2d 829, 1983), the court ordered a new trial because the state prosecutor did not lay the proper foundation

for admitting computer-generated bank records into evidence, which supported a necessary element of the charge of theft by deception. In Illinois, it must be shown that the computer equipment is standard, that the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and that the sources of information and the method and time of preparation are such as to indicate trustworthiness and justify admission. There was no testimony to show how transaction information was entered into, and processed through, the computer system which would verify the accuracy of the output. Systems which perform calculations must be scrutinized more thoroughly than systems which merely retrieve information. The state needed to show that the computer program was standard, unmodified, and operated according to its instructions.

Other states have more liberal rules regarding the admissibility of electronic records into evidence. For example, the California Uniform Electronic Evidence Act (Act) defines "electronic record" and "electronic records system" and provides a series of rules and presumptions relating to the admissibility of electronic records. The key to the Act is the presumption of integrity given to electronic records when it is established that (a) at all material times the computer system was operating properly or the fact that it was not operating properly did not affect the integrity of the electronic records; and that (b) there are no reasonable grounds to doubt the integrity of the electronic records system.

One way in which to admit electronic records into evidence in federal court is by defining them as "business records" under the Federal Rules of Civil Procedure, therefore excepting them from hearsay. The business records exception relies on trustworthiness and necessity. It consists of five elements: (1) the records must be kept in the ordinary course of business; (2) the particular record at issue must be one that is regularly kept; (3) the record must be made by, or from, information transmitted by a person with knowledge of the source; (4) the record must be made contemporaneously; and (5) the record must be accompanied by foundation testimony by a custodian of the record. All such elements must be met to be admissible. Critical to admissibility of computer records is the foundation testimony regarding the above requirements, including the reason that the message was prepared and sent. See U.S. v. Catabran, 836 F.2d 453 (9th Cir 1988); Rosenberg v. Collins. See also Quality Auto Service v. Fiesta Lincoln-Mercury Dodge Inc., No. 04-96-00967-CV 1997 WL 563176 (TX App Sept 10, 1997); U.S. v. Kim, 595 F2d 755 (DC Cir 1979).

Electronic records and computer printouts of accounting and other bookkeeping records that are entered into the computer on a monthly basis are generally admissible in court as business records. See Midfirst Bank SSB v. CW Haynes & Co., 893 F. Supp 1304 (DSC 1994); U.S. v. Goodchild, 25 F3d 55 (1st Cir 1994). Electronic records reveal more information than their paper counterparts, since they more easily show inconsistencies among documents, contain multiple drafts of documents, contain the history of a document (including who revised the document, in what manner, and when), may contain unprinted annotations, and show the names of documents and other filenames. Electronic data thought to be lost or erased is usually accessible. In addition, there are usually multiple drafts of documents and many different places within a network or computer

they may be stored. Data is routinely backed up over and over, and exists in many different places and formats. Users are adverse to destroying data, people use a lower standard of care when writing e-mail, and computers routinely save many copies of documents in various ways. This makes it very expensive, time consuming, and burdensome to find and produce electronic records. In addition, if you do not produce the records, your adversary may gain access to your computer system.

The admissibility of e-mail is not so clear, however. Although e-mail is obtainable through discovery, there is no guarantee that it will be admissible in federal court. Courts are concerned about whether e-mail satisfies the "regular practice" of the exception, and the casual nature of the messages raises trustworthiness questions. See Aviles v. McKenzie; Strauss v. Microsoft Corp.; Allen v. State; U.S. v. Kim 595 F2d 755 (DC Cir 1979); Plymouth Police Brotherhood v. Labor Relations Commission; Monotype Corporation PLC v. International Typeface Corporation, 43 F.3d 443 (1994).

As of 1996, no federal court had applied the business records exception to e-mail messages. Since then, some courts have held it is admissible, while others have held that it does not meet the requirements of the business records exception in the Federal Rules of Evidence (Rule 803(6)). For example, in Monotype Corporation PLC v. International Typeface Corporation, 43 F.3d 443 (1994), the court excluded an e-mail transmission as evidence to support the defendant's defense. The defendant moved to admit an e-mail transmission under the business records exception to support its defense that it did not copy Monotype's typefaces. The court held that e-mail is far less of a systematic business activity than a monthly inventory printout or other computer-generated printout. E-mail is an on-going electronic message and retrieval system, whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business. See also Michaels v. Michaels; Monotype Corporation PLC v. International Typeface Corporation, 43 F.3d 443 (1994); U.S. v. Catabran, 836 F.2d 453 (9th Cir 1988); U.S. v. Kim 595 F2d 755 (DC Cir 1979).

A survey of recent federal cases, however, shows that e-mail has found its way into the courtroom. For example, in Knox v. State of Indiana, 93 F3d 1327 (7th Cir 1996) e-mail messages in which a supervisor repeatedly asked an employee for sex were admissible in a harassment case. See also Harley v. McCoach, 928 F. Supp. 533 (ED PA 1996); Wesley College v. Pitts, 874 F.Supp 375 (D DE 1997).

#### **IV. Privacy of E-Mail**

An employee has no reasonable expectation of privacy in e-mail communications voluntarily made over the company e-mail system to another company employee, notwithstanding assurances that such communications would not be intercepted by management. For example, in Smythe v. The Pillsbury Company (914 FSupp 97, 1996), the court held that Smythe could be fired for communications made to his supervisor which were forwarded to Pillsbury management. The court found that such a firing does not violate Pennsylvania public policy, and that monitoring and interception of the

contents of e-mail communications made over the company e-mail system by an employer does not invade an employee's privacy interests.

See also Bourke v. Nissan Motor Corp., No. B068705 (CA Ct App, July 26, 1993), which stated that employees had no reasonable expectation of privacy in their work place e-mail when (a) they were aware for some time prior to being terminated that their e-mail was read by the company; and (b) they signed a statement agreeing to restrict their use of company-owned hardware and software to company business.

## **V. Liability for Records/Information Contained on Web Site**

### **A. Copyright**

Web sites have been held liable for intellectual property infringement and other harms caused by their users. A single bad user could cause liability ranging into the millions of dollars. The potential legal risks inherent in owning and maintaining a web site are copyright infringement (direct, contributory, or vicarious) and defamation. Web sites planning to permit users to exchange content should implement a number of techniques to manage their potential risk. In addition, a president, officer, and shareholder in a defendant corporation may be personally liable for the activities of the company, since he or she is active in the day to day operations of the company. See Religious Technology Center v. Netcom On-Line Comm, 907 F. Supp 1361 (ND Cal 1995).

For example, in Comedy III Productions, Inc. et al v. Class Publications, Inc. et al (1996 US Dist LEXIS 5710 April 30, 1996), the defendant violated plaintiff's trademarks in the Three Stooges by selling unauthorized products on its Internet web site. In addition, Playboy Enterprises has initiated a number of lawsuits against web sites that post its copyrighted pictures, or that allow a subscriber to the web site to upload such pictures to the web site. For example, in Playboy Enterprises, Inc. v. George Frena, 839 F Supp 1552 (1993), the defendant operated a subscription computer bulletin board service, which distributed unauthorized copies of plaintiff's photographs. On the web site, subscribers could log-on and browse and download pictures and store them on their personal computers. In addition, subscribers could upload material to the web site so that all other subscribers could view the material. The defendant admitted that the pictures were displayed on his web site, but claimed that he did not place them there; they were uploaded by a subscriber. The defendant did not know about the pictures until he was served complaint papers, at which time he removed the photographs and began monitoring the web site to prevent additional photographs from being uploaded. The court held that the defendant is responsible for material that is on his web site and infringes on another's copyright, even if the defendant did not place the material on the web site and did not have knowledge that such material so infringed. See also Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F Supp 543 (ND Tex 1997); Christopher Scanlon v. Gil Kessler et al, No

97 Civ 1140, 1998 US Dist Lexis 10201 (SDNY July 10, 1998). Further, an operator of a computer bulletin board service may become liable for copyright infringement if it takes affirmative steps to cause copies to be made. For example, if a bulletin board service encourages people to upload documents, and it screens all documents and moves them to the appropriate generally available files, it may be held liable for things posted on its web site by others. See Playboy Enterprises Inc v. Russ Hardenburgh, Inc., 982 F. Supp 503 (ND Ohio 1997).

The Digital Millennium Copyright Act ("DMCA") (17 U.S.C § 1201 et seq; passed by Congress in 1998) makes changes in United States copyright law to address our current digitally networked environment. The DMCA provides for a limitation on "online service providers" liability for monetary damages and injunctive relief with respect to copyright infringement in certain circumstances. It adds a safe harbor to the current United States copyright law. Online service providers are defined as those entities that link users to the Internet and facilitate the transmission of digital data that is translated into another party's copyrighted work. The DMCA provides a safe harbor from liability for online service providers if their online system complies with the procedures and certain requirements set forth in the DMCA, which include the following: (1) the organization meets the definition of an online service provider, (2) the organization engaged in covered activities, and (3) the organization meets the conditions in the DMCA for material, parties to transmission, and procedures. To qualify for the limitation, the material that is transmitted online must be made available by someone other than the online service provider, and the online service provider cannot modify the material. In addition, the online service provider cannot have actual knowledge of any copyright infringement and must cooperate with the processes to disable access and limit harm to the copyright owner in the event of infringement. The safe harbor does not apply to copyrighted material the online service provider may place online itself or through independent contractors, such as on its home page; such material is subject to a traditional copyright analysis under current law.

## **B. Defamation**

In general, courts have been reluctant to hold web site owners liable to defamatory statements made by others on its web site, such as statements made in chat rooms and other interactive medium. The Communications Decency Act, passed in 1996, states that no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider. To date, courts have treated this language as a nearly complete bar against liability for users' defamatory postings. The safe harbor only applies to information provided by another organization or person, however, and does not apply to information put on the web site by the defendant itself.

As a result, in general computer bulletin board services are not liable when people post things without authorization and the web site operator does not create or control the content of the information available to its subscribers, but merely provides access to the Internet. In Cubby, Inc. v. Compuserve, Inc., No. 90 Civ 6571 (SDNY 1991). Cubby was suing Compuserve for libel, unfair competition, and business disparagement based on allegedly defamatory statements made in a publication included in a computerized database. The court found that Compuserve had no opportunity to review the allegedly defamatory information before it was uploaded into computer banks, from which it is immediately available to subscribers. In addition, Compuserve received no part of the fees charged for access to the relevant database; it has just one main subscription fee. The court found that Compuserve acted as a distributor, and not a publisher, of the statement and cannot be held liable for the statement because it did not know and had no reason to know of the statements. Once Compuserve decides to carry a publication, it has little or no editorial control over that publication's contents. In this situation, Compuserve is like a bookstore, library, or news stand.

On the other hand, an operator may become liable if it takes affirmative steps to cause copies to be made. For example, if a bulletin board service encourages people to upload documents, and it screens all documents and moves them to the appropriate generally available files, it may be considered to have "republished" the material. One who repeats or otherwise republishes defamatory matter is liable as if he or she had originally published it. But, vendors and distributors of such matter are not liable unless they knew or had reason to know about it. In Stratton Oakmont, Inc. v. Prodigy Services Company, Supreme Court, State of New York Index No 31063/94, Stratton is suing Prodigy for libel based on allegedly defamatory statements made in on Prodigy's "Money Talk" computer bulletin board. Prodigy held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition, and expressly likening itself to a newspaper. It has a series of "content guidelines" and enforced them through an automatic software screening program. Prodigy actively utilized technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and bad taste, Prodigy is clearly making decisions as to content and such decisions constitute editorial control. As a result, Prodigy is a publisher rather than a distributor and can be sued for libel. Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than other computer networks that make no such choice (such as Compuserve, above).

### **C. Risk Management**

The following are suggestions for a web site to take to minimize its risk regarding potential copyright infringement and defamation liability:

1. Do not actively monitor the web site. Active monitoring of the web site will give the web site actual or putative knowledge of user conduct and content. Thus it creates the possibility that a web site will be liable for all user harms except those preempted by the safe harbor described above.
2. Consider empowering independent contractors to monitor your site and give them the authority necessary to resolve problems.
3. Respond to complaints promptly.
4. Review your user agreement(s). Provisions enabling the web site to blacklist subscribers or edit content on subjective or arbitrary standards provide strong evidence of the web site's right and ability to control its users and their content. User agreements should only prohibit users from engaging in conduct that is illegal or tortuous.
5. All employees who interact with the web site can take legally significant actions that could undermine a risk management strategy; thus the web site's risk management strategy should be explained to all employees, and employees responsible for dealing with web site problems should be given special training on how to implement strategies.

## **VI. Personal Jurisdiction via Electronic Records**

The minimum contacts required for personal jurisdiction in another state can be electronic. As a result, an organization that posts advertisements on the Internet through its web site may be subject to jurisdiction in all states in which such information can be accessed. For example, in Inset Systems Inc. v. Instruction Set, Inc. (937 F. Supp. 161, 1996), the court found that ISI was subject to Connecticut jurisdiction because it had a toll-free telephone number and an Internet web site on which it posted advertisements. There are at least 10,000 Internet-connected computer users in Connecticut, all of which could access ISI's advertisements again and again.

In addition, a person who conducts business via electronic mail with a person in another state is subject to jurisdiction of the courts in such state. In Hall v. Laronde (666 CA Rptr 2d 399, 1997), a California court held that a person living and working in New York may be sued in California when he negotiated the purchase, and of software modification from a California resident via electronic mail and the telephone, even though the California resident reached out to the defendant first. The defendant worked with the California resident through a period of time, and made continuing royalty payments, thus creating a continuing obligation between himself and the California resident.

## VII. Uniform Electronic Transactions Act

The purpose of the Uniform Electronic Transactions Act (UETA) is to develop an act relating to the use of electronic communications and records in contractual transactions. The UETA governs electronic records and signatures relating to a transaction, defined as limited to business, commercial and governmental affairs. It is intended to be consistent with the Uniform Commercial Code, but not duplicative of it. As a result, the UETA is procedural and affects the underlying substantive law of a given transaction only if absolutely necessary in light of the differences in media used. Whether a record is attributed to a person, and whether an electronic signature has any effect, is left to other substantive law.

The UETA expressly validates electronic records, signatures, and contracts. It affects the medium in which information, records, and signatures may be presented under current legal requirements. It provides for the use of electronic records and information for retention purposes, providing certainty in an area with great potential in cost savings and efficiency. The UETA makes clear that the actions of machines programmed and used by people will bind the user of the machine, regardless of whether a human was involved in a particular transaction. It also specifies the standards for sending and receiving electronic records. It does not specify the standards for an electronic signature, however. Certain legal rules requiring certain writing and signatures under law are not affected by the UETA (such as wills, etc). It applies only to transactions between parties who have agreed to conduct transactions electronically; it is intended to facilitate the use of electronic means, not require the use of electronic records and signatures.

The requirements for electronic transactions are as follows:

1. Confidentiality: the contents of messages or substance of transactions must be kept secret to unauthorized parties.
2. Access control/confidentiality: the information is only available to authorized parties; the access to information is controlled, and distribution or disclosure of the records is restricted.
3. Chain of custody: the authentication of stored electronic records (this strengthens the credibility and privacy of records).
4. Message integrity: the message is not tampered with; it is accurate.

The UETA provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. The medium in which a record, signature, or contract is created, presented, or retained does not affect its legal significance. It also provides that electronic records and signatures do satisfy legal requirements for writings and signatures, provided the parties have the ability to retain (print or download) the information for later review. An electronic record or electronic signature is attributable to a person if it was the act of the person. It may be proven by

showing the efficacy of any security procedures applied to determine the person to whom the electronic record or signature was attributable.

The UETA also governs the retention of electronic records. It states that if a law requires certain records (including checks) to be retained, that requirement is met by retaining an electronic record that accurately reflects the information and remains accessible for later reference. The requirement of continuing accessibility addresses the issue of technology obsolescence and the need to update and migrate information to developing systems. The UETA would permit parties to convert original written records to electronic records for retention, and states that electronic records can be considered originals so long as the accuracy and accessibility requirements are met. The concern focuses on the integrity of the information and not with its originality. So long as there exists reliable assurance that the electronic record accurately reproduces the information, the electronic records and paper-based records are functionally equivalent.

The UETA provides that, in a legal proceeding, evidence of an electronic record or signature may not be excluded from evidence because it is an electronic record or signature, or it is not an original. Admissibility of evidence depends upon the substance of the information rather than the media in which the information is presented.

The UETA contains provisions specific to electronic records by government agencies. It authorizes (but does not require) state agencies to use electronic records and signatures generally for intra-governmental purposes, and to convert written records and manual signatures to electronic records and signatures. It gives an option to leave the decisions to each government agency or to assign that duty to a state officer. It also authorizes the destruction of written records after conversion to electronic form. In addition, the UETA broadly authorizes (but does not require) state agencies to send and receive electronic records and signatures in dealing with non-governmental persons. The UETA requires government agencies or state officers to take account of consistency in applications and interoperability among state agencies to the extent practicable when promulgating standards. For purposes of check retention statutes, the same electronic record of the check is covered by the UETA, so that retention of an electronic image/record of a check will satisfy such retention statutes so long as certain requirements are fulfilled.