

June 2003

Volume II, Number 6

Legal Bytes

Records, Records Everywhere!

Effective record retention and retrieval are essential to commercial enterprises. From a legal point of view, documentation retention and retrieval are critical for audit, legal and regulatory compliance purposes, and facilitate efficient management of a company's legal affairs—whether initiating or responding to litigation or regulatory action; administering relationships with suppliers, customers, investors and shareholders; or identifying and protecting company assets, including intellectual property. The importance of implementing a formal records retention process should not be underestimated in today's legal and regulatory environment.

Procedures applicable to electronic records are often non-existent or inadequate, and "best practices" do not yet exist. In truth, in a digital environment, electronic record creation, duplication, transmission and use are fundamentally different than paper-based processes, and the manner in which records are identified, evaluated, stored, retrieved and destroyed, is fundamentally different. It should not be surprising that regulation and litigation are forcing even recalcitrant companies to evaluate what, to whom, how and for how long electronic files are maintained and accessible. Authenticity and integrity of digital records, easily duplicated, transmitted and altered, must be ensured. Where compliance is an integral part of doing business, this is not merely good customer service—paper-based policies must be restructured. Waiting for a lawsuit or regulatory action to cure the problem is a more expensive way to manage than investing in an ounce of prevention.

Consider this record-keeping nightmare: A plaintiff, Laura Zubalke sued her former employer, UBS Warburg (*Zubulake v. UBS Warburg*, 02 Civ. 1243 (SAS)) and her attorneys requested certain electronic records in routine discovery. Warburg argued to the court that the plaintiff should bear the expense, because finding and reviewing records responsive to the discovery request would cost about \$300,000! In case you are wondering, in general, the party producing the records bears the cost and a typical trial today might involve the paper equivalent of between 25,000 and 100,000 printed pages.

Although a case in New York last year (*Rowe Entertainment Inc. v. The William Morris Agency Inc.*, 2002 U.S. Dist. LEXIS 8308 (S.D.N.Y. May 9, 2002)) created a "balancing" test to determine which party should pay for the production of electronic records, this case returns New York to a closer alignment with the Federal Rules, which start with the traditional legal presumption that whoever has the records, pays for producing them. In the words of the Court, "As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the 'strong public policy favor[ing] resolving disputes on their merits,' and may ultimately deter the filing of potentially meritorious claims."

(continued)

Light Bytes

"I am not young enough to know everything."

— Oscar Wilde

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Useless But Compelling Facts

What is the correct response to the Irish greeting: “*Top of the morning to you.*”

Please send your contest entries to jrosenbaum@reedsmith.com. Reed Smith employees are not eligible.

Answer to Last Month's Question:

Michael zur Muehlen at Stevens Tech sent in the most voluminous response with right answers, as follows: abstemious (*probably obsolete now that everyone uses abstentious*), adventitious (*not where you expect it*), annelidous (*wormy*), arsenious (*related to the poison*), arteriosus (*of conus arteriosus*) and facetious. Congratulations.

“Records, Records Everywhere!” – continued from page 1

Recently, Cohasset Associates, Inc. conducted a survey which found only 44 percent of those responding had existing record retention systems and processes that included provisions for electronic records. To put this in perspective, three years ago, lawyers from the Section of Litigation of the American Bar Association participated in a Pricewaterhousecoopers study and found that 82.7 percent of clients did not have any protocol for responding to discovery requests for electronic documents and 75 percent of clients had no idea electronic documents were even subject to discovery. An astounding finding, given that more than 93 percent of all commercial documentation is in electronic form and more than 80 percent in *only* electronic form!

Need help? Need guidance? Need to assess the legal and regulatory risks and liabilities? Need a policy? Call Reed Smith—you can contact me at jrosenbaum@reedsmith.com or call 212.702.1303—we have experience throughout our offices across the nation and in the U.K.

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Business Processes Go Digital

A small group of innovators set out to develop a way to represent business processes digitally and published a specification (BPML) whose significance has not escaped larger companies—IBM and Microsoft developed an alternative specification (Business Process Execution Language). BPML is based on a mathematical model called the pi-calculus invented by ACM Turing Award winner, Robin Milner. As companies intertwine core operational and financial business processes, new levels of management control and accountability will be essential. When shared databases became widespread in the early 1980s, to comply with the Foreign Corrupt Practices Act and a spree of computer crime, auditors developed methods and techniques to audit *through*, instead of *around*, database management systems. EDP Audit and Control became a certified practice among auditors, and EDP Auditors became a fixture in the courtroom. Today, new legal requirements and regulations, spawned by Sarbanes-Oxley, the Basel Accord, and new SEC and NASD rules, place greater emphasis upon control, management, audit and reporting. In short, business process management systems will shift regulatory, auditing and legal concerns from “data” to “business processes,” with increasing implications for legal and regulatory compliance.

Interested in learning more, consider looking at *Business Process Management: The Third Wave*, by Howard Smith and Peter Fingar (www.bpm3.com). Written by business experts for business people, one cannot help but extrapolate the legal issues that may arise as companies digitize and manage their operations using business process management systems.

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If you would like to know more about the topics in this issue, about Reed Smith or the ways we can help serve your legal needs, please contact Joe Rosenbaum, head of our New York-based e-commerce practice.

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