Off the Record
Volume 42, Issue 3
February 16, 2005

Meeting: Wednesday, February 16, 2005, 11:30 to 1:30
Location: Marriott Courtyard—Kearny Mesa
Reservations - Contact Linda Maczko @ (858) 534-3995
On-line RSVP: http://www.sandiegoarma.org/arma_registration.htm

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Document imaging technology can address a myriad of business needs including cutting costs, accelerating business processes, reducing physical storage requirements, aiding with regulatory compliance and ensuring the physical protection of your data. Whether your business needs require archive and retrieval, forms processing, business process management, document distribution or disaster recovery solutions, selecting the right scanner(s) and image enhancements tools is critical to your success as the scanner is the entry point for digitizing your information.

Our Featured Speaker:
Pamela Doyle, Director
IPG Spokesperson
Fujitsu Corporation

Pamela Doyle is responsible for forming and driving key imaging industry relationships as the worldwide spokesperson for Fujitsu. In her capacity as Fujitsu's industry luminary, she frequently shares her imaging experience at numerous events, including global conferences such as AIIM, COMDEX and ARMA. In dedicating a major portion of her career to the document and image management industry, Pamela has distinguished herself with a forthright style, a compelling market vision, and a solid technical background.

Prior to joining Fujitsu in 1995, Pamela served as Director of Strategic Relations for PaperClip Imaging Software. She currently serves as chairperson for both DCIA of CompTIA and the TWAIN Working Group and has achieved credentials in CompTIA's CDIA_ program. She is recognized as a member of AIIM's Master in Information Technologies, (MIT) initiative. Most recently, CompTia awarded Pamela with its 2001 "Outstanding Achievement Award: to recognize her vision and commitment to the advancement of the imaging industry.

In this presentation, Ms. Doyle defines the critical criteria for selecting the right scanner including paper handling, speed, deployment, and image enhancement tools. She will also address recent capture trends including the internet, distributed capture, and color. Citing actual customer experiences, she will explain how capturing the highest quality image enables companies to maximize their investment in their document imaging solution.

Attendees will learn:

- Recent trends driving the need for document imaging technology
- Technology update
- Document analysis
- Scanner selection criteria
- Capture trends
- Customer case studies

MEETING AGENDA

11:30—12:00 Registration & Networking
12:00—12:15 Chapter Meeting
12:15—1:30 Lunch & Keynote Session

Mark your calendars for February 16th at 11:30 AM at the Courtyard Marriott in Kearny Mesa.

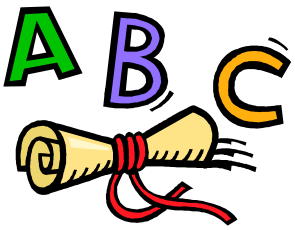
Please register early as seating is limited.

RSVP to Linda Maczko via telephone: 858-534-3395 or mail to:lmaczko@ucsd.edu.

Inside

Fast- Forward to the Future

President's Message
By Susan Roberts



There is RIM, SOX, ROI, KM, CRM, FAI, ISO, IM, IT, RM, HIPPA, EDM, and many more acronyms that were not here 2 to 5 years ago…… and don't forget e-mail, e-documents and e-policies.

What was – yesterday – is not – today…….and we find ourselves "jumping into tomorrow."

This is the New Year and YOUR future begins TODAY. To "stay-current" we all need to delve into and investigate – technology issues ,legal issues, records' management issues, and always professional development issues.

And you say – "Hey! – I only have so many hours in the day!"…."and I am already spread so thin!"….and how true this is.

This is where ARMA fits into your plans….check out the website: www.arma.org - topic areas include compliance/risk management; electronic records; legal/regulatory issues; privacy issues; records and information management; standards/best practices. There is information for International RIM professionals, IT professionals and legal professionals.

For your career development there is online learning, web seminars, industry-specific career partners. The annual conference/expo; careers in the job-bank ….all listed and available at the ARMA website.

Often-times (to use a well-known phrase) *to be the best that you can be* – may require sources and assistance. Project-planning, scheduling and controls is encompassing many tasks at once.

How many of have said – "there is so much going on…out there."

TO USE the many resources that are available to you – enables you to "step-up – to the future."

The San Diego Chapter of ARMA Board of Directors, is a team dedicated to YOU and assistance for the betterment of your job and career.

The TEAM is "right here" and available with answers to your questions.

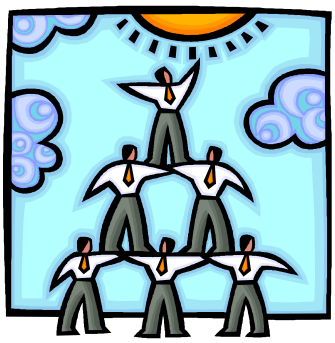
The TEAM is constantly searching and finding speakers that will bring the members and guests information and current practices in the records/knowledge information field.

See www.sandiegoarma.org for our website for the upcoming events and information you can use…..find the person – like Linda for membership, for example – and he or she would be glad to assist.

Now – check out the websites and see what there is to see !!

(and HOPE to see you at the upcoming luncheon – February 16th.

- Susan



Off the Record

Association of Records Managers & Administrators
San Diego Chapter

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Off the Record is a semi-monthly newsletter of the San Diego Chapter for the Association of Records Managers and Administrators.

This newsletter is published to inform the members of activities of the Chapter, and disseminate news and opinions of Board Members, or Chapter Members. Opinions are those of the author, and do not necessarily reflect official policy or opinion of ARMA, the San Diego Chapter of ARMA, or its members. Your statements and articles are solicited.

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The End of the Ostrich Defense

The information management world has been much abuzz of late over a series of interlocutory orders in the case of *Zubulake v. UBS Warburg*.

Since the filing of the case in 2002, federal judge Shira Scheindlin of the Southern District of New York has issued five opinions and orders, gaining her a reputation as the scourge of sloppy electronic records management. Scheindlin's July 20, 2004, order (*Zubulake* V) imposed hefty sanctions o the defendant, including the much-feared sanction of an adverse inference and an accompanying jury instruction, meaning the jury was told it could infer that the defendant destroyed potentially relevant evidence because the company feared the evidence would be unfavorable.

Zubulake continues to be an instructive case for those interested in the legal system's attempts to deal with records management issues in general and electronic records management issues in particular. In prior orders, Scheindlin considered the question of costs and difficulties of electronic discovery and the proper allocation of the costs between the parties. In so doing, she developed a test for determining the appropriateness of cost-shifting, taking into account prior authority such as the Rules of Civil Procedure and prior case doctrine, and ordered data sampling to be done in order to determine the potential relevance of e-mails located on backup tapes (*Zubulake* I). In a later order (*Zubulake* III), she applied that test and allocated costs for restoring backup tapes based upon the results of the data sampling done pursuant to her prior order. In the current phase of the case (as of the end of 2004), Scheindlin has had occasion to examine the rule upon the results of her earlier orders.

The Significance of the Case

Zubulake is not itself a particularly noteworthy or groundbreaking case. As noted by the judge herself, it is a routine gender discrimination suit involving no novel facts or question of law. Nor are the discovery issues that have presented themselves novel; the discovery under dispute is routine discovery of e-mail on active servers, archives, and backup tapes, an issues likely to be familiar to most records and information managers, many of whom have had to undertake similar discovery at their own organizations. What is novel and instructive is the court's handling of the issues presented during the dispute and fact-finding process.

Subsequent to *Zubulake* III, the parties restored the backup tapes in question, and e-mail from them was recovered and given to the plaintiffs. During the restoration process, it was determined that some backup tapes had been destroyed or otherwise rendered unrecoverable. Although at least some of the e-mail contained on those tapes was still available from other tapes due to the redundant nature of the backup process, *Zubulake* contended that critical e-mail might be permanently unavailable.

Analysis revealed that some e-mails had been deleted from the active system after a duty to preserve them was attached. In some cases, this apparently resulted from miscommunication between counsel and UBS Warburg employees, but in other cases, no explanation of the destruction was offered. Zubulake claimed that this amounted to spoliation of evidence. She therefore sough a variety of sanctions, including restoration at the defendant's cost of still more backup tapes, re-deposition of certain key witnesses at the defendant's expense, and an adverse inference instruction from the court.

in an order dated October 22, 2003 (*Zubulake* IV), the court discussed at length several questions of interest:

When does the duty to preserve evidence attach? Since some of the missing e-mail apparently pre-dated the filing of the Equal Employment Opportunity Commission (EOC) complaint at the center of the case, the court considered the time at which the duty to preserve the e-mail attached. The e-mails already produced had a considerable impact on this question, since in the court's mind they indicated that all of the relevant employees were worried about litigation well in advance of the actual filing, many even going so far as to tag e-mail with "attorney-client privilege" when in fact no attorney was involved in the e-mail thread. The court concluded that the duty to preserve was triggered in April 2001, five months before the filing of the EEOC complaint.

What should preserved? The court considered the impact of a duty of preservation which would force retention of every paper document, e-mail, or electronic

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document in anticipation of litigation, and noted that "[s]uch a rule would cripple large corporations, like UBS, that are almost always involved in litigation." The court did, however, conclude that "[w]hile a litigant is under not duty to keep or retain every document in its possession . . . It is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Further, "[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter."

In considering the issue of short-term backup tapes and their continued use and recycling, the court concluded that their preservation in anticipation of litigation might not always be required, with one important caveat: "If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes I not otherwise available. This exception applies to all backup tapes."

How should it be preserved?

The court did not attempt to impose any particular solution on litigants:

> In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain all them-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to reserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.

None of this is groundbreaking — it is merely a careful, detailed, and reasoned application of longstanding discovery rules to the area of electronic records. Nor is it particularly oppressive — the judge explicitly recognized the need to limit the duty of preservation and explicitly recognized the existence of alternative methods of complying with the rule.

Neither were the results earth-shattering.

In analyzing Zubulake's motion for an adverse inference for spoliation of evidence, the court used a standard, three-part analysis in which a showing must be made that

1. the party having control over the evidence had an obligation to preserve it at the time it was destroyed.
2. The records were destroyed with a "culpable state of mind"
3. The destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense

The court specifically discussed the issues of "culpable state of mind": "In this circuit [United States Second Circuit], a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions [citation omitted]."

Notwithstanding her conclusion that e-mails and backup tapes had been destroyed after the duty to preserve them attached, Sheindlin rejected the demand for an adverse inference. The court concluded that parts one and two of the test had been met: the duty to preserve had attached at the time the e-mails and tapes were destroyed; and the destruction was at least negligent, and in some cases grossly negligent or reckless, and thus culpable.

However, the court was unpersuaded that a showing of relevance had been make:"This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him. This is equally true in cases of gross negligence or recklessness; only in the case of willful spoliation is the spoliator's mental culpability itself evidence of the relevance

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of the documents destroyed. [citations omitted]."

In light of this requirement, the court concluded that the relevance requirement has not been met; the e-mails produced thus far, while showing a clear pattern of improper conduct, did not show that the conduct was gender-related and the likelihood of proving this with further e-mails was deemed by the court to be low. Thus, an adverse inference was unwarranted. The court did, however, permit the re-deposing of key witnesses at UBS Warburg's expense for the limited purpose of exploring the issue of destruction of evidence and any newly discovered e-mails.

At this point it appeared that UBS Warburg had effectively net and parried Zubulake's discovery efforts. Some costs had bee shifted to Zubulake, allegations of spoliation had resulted in minimal sanctions, and nothing conclusively supporting a gender discrimination claim had been uncovered.

The Roof Falls

The complexion of the case changed when the newly ordered depositions uncovered a long series of improprieties at UBS Warburg, which were cited in *Zubulake* V and included:

- failure of counsel to adequately inform and instruction all relevant UBS Warburg employees as to their duties regarding the preservation and turning over of all relevant evidence
- failure of counsel to request relevant information from key employees
- failure of counsel to inform themselves about how employees were maintaining relevant evidence, including e-mail
- failure by employees to produce relevant material, including e-mail, to counsel
- deletion of e-mails by UBS Warburg employees after having been instructed in writing and personally by counsel to retain them
- failure to safeguard backup tapes containing relevant e-mail

Some of these failures arose from classic information management miscommunications: In one instance, an employee told counsel that she maintained the relevant e-mails in an "archive." Counsel thought she meant a backup tape, while she meant only an e-mail folder on her computer. Others arose from simple failure to follow up on orders given: backup tapes were destroyed or overwritten because no one followed up to see whether and how the order was being complied with.

Still others had no innocent explanation: notwithstanding clear instructions from counsel (communicated, ironically, via e-mail), employees deleted relevant e-mail from their systems. The problem was compounded by the fact that many backup tapes were missing, notwithstanding a retention policy requiring their preservation and orders from counsel to preserve all relevant backup tapes.

Some of the e-mail was recoverable from backup tapes or other sources, thug proving the deletion from the active system. Other e-mail was apparently gone completely. The deletion of this e-mail was proved through two methods: testimony by witnesses during depositions and by reading other e-mail, some which clearly referred to e-mail that had vanished from active systems or, in some cases, entirely.

The result of all of this was that Zubulake was only given some relevant materials two years after it should have been produced and that some material — who knows how much?—could not be produced at all.

The court made a number of relevant observations about the discovery process and the duties of counsel:

- Counsel must actively oversee and direct the discovery and preservation process — merely issuing an order or memo is not enough
- Counsel must meet with key players in the litigation to ensure they understand their role and duties
- Counsel must take steps to protect relevant data
- Counsel must be familiar with the client's document retention policies

But in the final analysis, the failings were the responsibility of the client. The court therefore revisited its earlier decision on an adverse inference and concluded that in light of the newly discovered facts, an adverse inference and jury instruction was appropriate.

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This is an extreme penalty. In the course of rejecting Zubulake's demands for an adverse inference in *Zubulake* IV, Scheindlin noted: "The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable," the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly [citations omitted]."

Lessons to be Learned

As of the end of 2004, the final outcome of *Zubulake* had yet to be known — there may be still more developments which affect it. Indeed, we may never learn the details of the outcome as the specter of an adverse inference may spur UBS Warburg into settlement talks, and if the case settles, the details of the settlement will no doubt remain secret. We can, however, learn many things from the events that have thus far occurred:

Culpability: The judge's final determination that UBS Warburg ought to be sanctioned with an adverse inference for spoliation of evidence was predicated on a finding of it or its agents having a culpable state of mind. Yet, at no point did the judge make an explicit finding that anyone actually deleted or destroyed anything with the intent to prevent Zubulake from getting it. This might be inferred from the overall tone of *Zubulake* V, but nowhere it is stated. The point is that it is not needed. Enough errors by counsel and litigant, combined with enough prejudice to the other party, may rise to the requisite level of culpability, regardless of actual provable motives on the part of employees. Other organizations whose electronic records and discovery processes are in disarray would do well to consider the implications of this.

Discovery Management: Many of the issues ultimately giving rise to sanctions were apparently the result of failure to communicate between counsel and UBS Warburg employees, as well as the failure of counsel to supervise discovery efforts. UBS Warburg is a large and distributed organization; close supervision of discovery in many locations, including some outside of the United States, in such a case may be a formidable job. Warburg is not unique in this way; many other organizations are equally large and equally distributed. For all such organizations, communication and active involvement is a key factor in avoiding sanctions. Merely issuing a notice of litigation hold may well be inadequate and will be no defense if issues arise.

There is another lesson here as well: the line employees actually involved in a dispute such as this may not be the most reliable custodians when it comes to retaining things like e-mail. Procedures for ensuring that relevant material is captured and removed from their control early on may save the organization many headaches later.

Backup Tapes and Retention Policies: UBS Warburg was burned twice by its handling of backup tapes. Missing and poorly handled tapes provided part of the basis for sanctions for spoliation of evidence, while the backup tapes that did exist helped to prove the spoliation because they contained copies of deleted e-mails. The lesson is simple: handle backup tapes consistently. If the policy states that a year's worth of tapes will be kept, then a year's worth — not six or some other arbitrary number of months' worth — should be kept.

Another lesson is equally simple: less is better. The reason UBS Warburg was sanctioned for not having a full year's worth of backup tapes is because it had a retention schedule that said the company retained tapes for a year. Strictly adhering to the retention schedule makes life a lot simpler.

Judges and Lawyers: Sheindlin took the trouble to learn a lot about electronic records management during the course of this case and used that knowledge to analyze the facts in considerable detail. She was, no doubt, ably assisted in gaining this knowledge and going this analysis by Zubulake's counsel. Nonetheless, the result was that she provided a very sound analysis of the failings of UBS Warburg's electronic records management

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and discovery processes, as well as sound an common-sense guidelines for future litigants.

The lesson here is that litigants can expect more of this judicial understanding. The orders in this case have been widely publicized, and the analysis and commentary are regarded in the legal community as cutting edge. To the extent that Scheindlin was aided or prodded in her analysis by Zubulake's counsel, it is likely that other lawyers will do the same, as will other judges.

The orders and analysis in this case provide a good roadmap for future litigants contemplating an allegation of spoliation of evidence, so if an organization's discovery responses are inadequate, they can be expected to be challenged. If an organization claims backup tapes contain nothing relevant, it should be prepared to prove it. It should be assumed that whatever e-mail is produced will be gone over with a fine-toothed comb and that material from active systems will be compared to what resides on the backup tapes, with discrepancies being brought to the court's attention.

Each of these lessons can and should be incorporated into the management of electronic records and the implementation of litigation discovery at all organizations. Careful consideration of the issues resulting in sanctions will
Reveal that the fixes are not and large, difficult to design or implement. The key is anticipation. We can learn from the past. Nowhere is this more true than here.

This article appeared in *The Information Management Journal,* January/February 2005, Vol. 39, No. 1, and was written by John C. Montana, J.D. He is a records management and legal consultant and principal of Montana an Associates. He may be contacted at *johnmontana@qwestinternet.com.*

Zubulake: The Real Issues

In many ways the recent uproar evoked by *Zubulake v. UBS Warburg* is reminiscent of the one that arose in the legal world when the decision on client documents cam down in *Sage v. Proskauer Rose* in 1997.

In both cases, a court was faced with defining the responsibility of a party to maintain and produce a body of (among other things) electronic data to another party. In both cases, the responding party asserted a defense to production that was dismissed more or less in its entirety by the court. In both cases, a large part of the interested public responded with horror: The conclusion generally drawn in both cases was that the courts had engaged in cutting-edge analysis and decision-making on the production (and by extension, the maintenance) of electronic records and data.

Who Should Pay?

Both the *Zubulake* and *Sage* cases involved relatively routine matters. In *Zubulake,* plaintiff Zubulake sued her former employer and during discovery requested production of all e-mail related to the dispute. In *Sage*, a former client sought to obtain all documents and information related to their representation after a dispute arose between them. In *Zubulake,* the single question before the court was one of apportionment of costs between the parties. Should the defendant, UBS Warburg, be required to bear the entire cost of going through an e-mail system, optical disks containing e-mail databases required by the Securities and Exchange Commission, and 94 backup tapes looking for responsive e-mail, or should the plaintiff share in the cost?

In answering this question, the court examined something called the Rowe Test, a list developed by a court in a prior case (*Rose Entertainment Inc. v. William Morris Agency*) to help determine whether cost-shifting is appropriate. That test, then only a year old and used in a handful of cases, considered eight factors:

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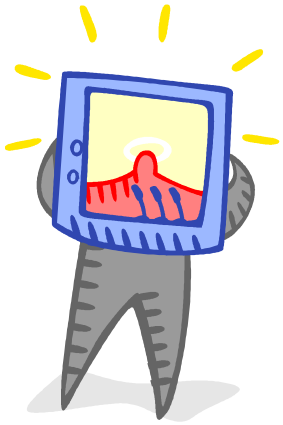
1. the specificity of the discovery requests
2. the likelihood of discovering critical information
3. the availability of such information from other sources
4. the purposes for which the responding party maintains the requested data
5. the relative benefits to the parties of obtaining the information
6. the total cost associated with production
7. the relative ability of each party to control costs and its incentive to do so
8. the resources available to each party

The court analyzed this test, concluded it was flawed and tended to weight excessively in favor of cost-shifting, and came up with a new test that considered the following factors:

1. the extent to which the request is specifically tailored to discover relevant information
2. the availability of such information from other sources
3. the total cost of production compared to the amount in controversy
4. the total cost of production compared to the resources available to each party
5. the relative ability of each party to control costs and its incentive to do so
6. the importance of the issues at stake in the litigation
7. the relative benefits to the parties of obtaining the information



The chief analytical difference between the two tests is that under the Rowe Test, the factors weight equally, and an affirmative answer on any point tends to result in cost-shifting; the *Zubulake* court rejected this approach in favor of an outcome based on the total mix of circumstances.

In doing all this, the court engaged in an extensive analysis of electronic data discovery and its issues. It noted and rejected a tendency by earlier courts to assume that discovery of electronic records is necessarily more difficult than that of paper records and concluded that, in keeping with the longstanding requirements of the Rules of Civil Procedures and prior case precedent, cost-shifting, when appropriate at all, should be limited to those electronic items that are difficult to obtain, such as files on backup tapes requiring restoration, and not to items maintained online or easily searchable repositories.

The upshot of all of this was that UBS Warburg was required to produce at its own cost all responsive e-mail on the active systems and optical disks because they required no restoration; and it was required to restore five sample tapes at its own expense. If the results of the sample restoration turned up significant amounts of relevant material, the court would then apply it seven-part test and make a cost-shifting determination regarding the other 89 tapes. After the sample restoration was complete, the court applied its test in a later order and split costs for further restoration — 25 percent to Zubulake and 75 percent to Warburg.

To What Data Is the Client Entitled?

In *Sage v. Proskauer*, the question was even simpler: Does the ex-client's entitlement to possession of a copy of the client file (a standard and non-controversial doctrine) extend to drafts, internal memoranda, and electronic records and data created as part of the representation? The defendant argued that the right should be limited to the formal client file, or that the ex-client should at least be required to specify the drafts, internal documents, and electronic data sought based on a showing of particularized need.

The court concluded:

1. The client's entitlement presumptively extended to all records and data created during the representation, with narrow exceptions based on protection of the rights of others such as other clients (again, not particularly controversial).
2. It was unreasonable to require the client to specify the particular items they wanted because they could not predict a priori either what they would need in the future or what data was even there, all of the material in question being in possession of the lawyer (no big surprise—protection of the client's interests has been a hallmark of this area of the law since time immemorial).

It is noteworthy that the court did not suppose itself to be creating any new doctrine whatsoever. It rested its decision on a long line of prior authority and

simply aligned itself with what it determined to be the then-existing majority view.

Rational Analysis — at Last

So what, then, are the cutting-edge issues and revolutionary doctrines pro-pounded by these courts?

In reality, there are none. In both cases the court did nothing more than take existing, long-standing, and entirely non-controversial legal doctrine and apply it in an entirely predictable and reasonable manner to electronic records and information. The uproar arises from three simple facts:

1. The courts in both cases demonstrated a sound understanding of records and information and the issues surrounding its identification, recovery, and production.
2. Both courts engaged in an extensive analysis of how existing legal doctrine might be applied in this arena.
3. The courts forced the parties on the receiving end to face some unpleasant facts about having to hand over their electronic data to somebody else, at considerable cost and difficulty to themselves.

The novelty is that lawyers and litigants are used to dealing with judges who have little or no understanding of the issues surrounding the management of electronic data. This situation cuts both ways. Both plaintiffs and defendants in the past have successfully talked judges into patently unreasonable orders regarding e-mail and other electronic data—overwhelmingly broad electronic discovery orders both extraordinarily expensive and impossible to comply with on the one hand, and unreasonably deferential protective orders or excessive cost-shifting on the other. In both scenarios, these orders arose because the prevailing litigant's lawyers were able to impose upon the judge a version of the situation highly favorable to their client, if perhaps at variance with the realities of electronic records and information management.

In *Zubulake* and *Sage* courts simply did not buy into this. However, neither court did anything that has not been done before, and both could and did cite extensive prior authority for the actions they took. The following facts make these cases stand out:

1. The courts engaged in extensive analysis of prior law and, in *Zubulake*, of the technical issues of producing electronic data
2. The disputes went to litigation and the cases were published
3. The cases received much publicity
4. The courts involved are relatively prestigious courts.

The real legal effect of both cases is to make their thoughtful, sound, and persuasive analysis widely available to be cited by other litigants and, most likely, widely adopted by other courts. This means, in turn, that the next court will be more able to engage in an intelligent analysis of its own, free from the spin of litigants and lawyers.

If there is a lesson to be learned from either case, it is that organizations interested in the issues central to these cases had better get used to more decisions and outcomes of these sorts. A new generation of judges is coming up, familiar with computers and increasingly familiar with electronic records, electronic discovery, and the ins and outs of data recovery. Like these courts, they will look to real technical authority (the *Zubulake* court cited a number of technical articles and the works of the Sedona Conference and other authorities in considering the issue before it) and will be far less easily persuaded of the impossibility of finding and recovering computer data. This should come as no surprise to anyone, at least not now.

This reality does not necessarily spell doom for anyone. Indeed, the *Zubulake* court actually concluded that some cost-shifting was appropriate, although it could have forced UBS Warburg to foot the entire bill. Businesses and other organizations already are, and have been for years, spending large sums of money on electronic records production for adverse parties, a situation not likely to be materially changed one way or the other by these cases.

Both of these cases should serve as a wake-up call: If an individual or organization's electronic records are in a mess, they had better clean that mess up because if they go into court and claim undue burden, the court now has in front of it a paradigm for judging just

Zubulake: The Real Issues

how undue that burden is and plenty of authority for forcing that paradigm on the individuals or organization. If that day arrives, it may be a bad thing for the organization but, overall, a good thing for society. Rather than panicking over cases like this, everyone should be glad that rational analysis is at last entering the realm of electronic records and the courts.

This article appeared in *The Information Management Journal,* January/February 2005, Vol. 39, No. 1, and was written by John C. Montana, J.D. He is a records management and legal consultant and principal of Montana an Associates. He may be contacted at *johnmontana@qwestinternet.com.*

E-Mails Waste Businesses' Archive Space

Between one-third and one-half of all electronic communications kept in company storage systems are irrelevant and do not need to be there, says e-mail, Web, and instant messaging solutions provider Orchestria.

According to Orchestria, the need to store communications data in order to comply with industry regulations is leading many large companies to route all employee e-mails and other electronic communications to expensive, high-availability storage. But most of these communications are personal e-mails and spam that have no bearing on business, Orchestria found.

"Companies have a tendency to store everything in the fear that not doing so will put them in breach of regulations." said Bo Manning. Orchestria president and CEO. "What they end up with is a data archive that is crammed to the bursting point with communications that are irrelevant to the business and which are simply taking up expensive storage space."

Orchestria predicts companies can typically save 30 to 40 percent on storage costs and free up 30 percent of storage space by implementing a software system to analyze incoming and outgoing messages and archive them according to their relevance to the business.

This article appeared in *The Information Management Journal,* November/December 2004, Vol. 38, No. 6, Page 11.

Records Hoax Targets Veterans

If you receive an e-mail warning that the National Personnel Records Center (NPRC) plans to destroy all paper military records, hit the delete key.

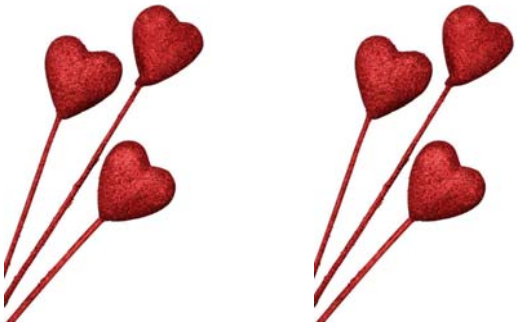
The official-looking message circulating via e-mail and on veterans-related Web sites is a hoax, according to Scott Levins, assistant director of military records at NPRC, a St. Louis-based division of the National Archives and Records Administration (NARA).

Levins recently told *Federal Computer Week* that the HPRC does not intend to destroy veterans' paper records as part of its digitization process, as the fake e-mail alleges. The e-mail, which carries an official-looking header reading "Destruction of Original Military Records, HQ AFR/DP/04-254" tells veterans to quickly request a copy of their records before the alleged destruction process begins. Levin said he was concerned this could lead to a flurry of requests for records by veterans to the center, which already faces a backlog of 120,000 records requests.

To debunk the hoax, NPRC officials posted a notice on the eVetsRecs Web site, informing visitors that 'Neither the Department of Defense nor the NPRC intends to destroy any [Official Military Personnel Files] stored at the center. The purpose of any electronic scanning would be to reduce the handling of fragile records during the reference process or to reduce the time necessary to locate and answer an OMPF inquiry."

This article appeared in *The Information Management Journal,* November/December 2004, Vol. 38, No. 6, Page 8.

Happy Valentine's Day!!



From the ARMA Board Members

Distance Learning

Education Corner
by Benay Berl

Welcome to 2005! Have you made any resolutions for the new year? I have a suggestion for a spectacular New Year's resolution – optimize your career by earning your Certified Records Manager (CRM) designation.

To learn more about the requirements for testing go to the Institute of Certified Records Managers website at www.icrm.org. You will learn if you are ready to be a "candidate" and will be guided through the application and testing process.

On March 11 – 12 the Orange County Chapter of ARMA will present a two day seminar to help you prepare for the examinations. I recommend that you look into the seminar. You can find details at www.ocarma.org.

If you need a local mentor, please contact me and I will make some suggestions. Get started on the next step in your RIM career in 2005!

Education Chair—Benay Berl

A Note from Alex

A warm hello to all! For those of you who don't know me, my name is **Alex Fazekas-Paul,** I am your treasurer for the San Diego chapter. You may have seen me at the table as you get ready to go into one of our meetings this past year.

First of all I'd like to give thanks for the opportunity to work for such an outstanding organization and chapter.

I'd also like to give thanks to all those members who have touched my professional life from the local as well as all the other chapters out there. Those connections have been key and a tremendously positive influence.

For those of you who haven't done so, please take the time to introduce yourself to myself and other board members, so that we may place a face with name and get to know you and how better to serve your needs. It is all members past, present and future that make a world of difference for the chapter.

On closing I'd like to report that as of 01/19/2005 the SD ARMA treasury has a positive balance of $4983.07. The funds that we bank assist with continuing to provide you with quality meeting, educational and networking opportunities. Thank you for your continued support!

I look forward to seeing you at our next meeting.

ISG

ISG
by Tracee Hughs

San Diego ARMA is proud to announce it's first Industry Specific Group—LEGAL

What is ISG?

ISG stands for Industry Specific Group. Each ISG addresses the needs of a specific industry.

Who is ISG for?

Anyone who is interested in establishing a network of professionals working in similar industries facing similar needs.

Why would you want to participate in an ISG?

An ISG is a group formed to focus on the specific needs of a particular industry (i.e., Legal Services, Government, Utilities, Pharmaceutical, to name a few). The ISG program provides a forum to exchange the information for the benefit of all.

How do you find out more about ISG?

Contact the ISG coordinator, Tracee Hughs, thughs@rdblaw.com or visit the Education and ISG table at the next ARMA meeting.

When does the ISG—Legal meet?

ISG Legal will meet at 11AM on normal meeting dates at the Education / ISG table outside the meeting room.

February Registration Form

Marriott Courtyard—Kearney Mesa
8651 Spectrum Center Blvd.
San Diego, CA 92123
(858) 573-0700

To Register: FAX this form to **Linda Maczko at (858) 534-6523**, or **Call Linda @ (858) 534-3395**, or **Email** : lmaczko@ucsd.edu **NO LATER than 3:30 p.m., Friday , February 11 , 2005. Cancellations later than 48 hours prior to the event will be billed to the person registered.** *If not sending advanced payment, cash or check payment required at registration.*

	Member	Non-Member
Lunch (please circle)	**$25.00**	**$30.00**

Name: _____

Organization: _____

Phone: _____ **FAX :** _____ **EMAIL :** _____

FYI

Here's the URL to a very important site—the Chapter Connection on the ARMA International Website!!
Go to *http://www.arma.org/intranet*

Click on Chapter Connection
Check out this URL to find out about

ARMA Webinars / Calendar of Events

http://www.arma.org/resources/calendar.cfm

FREE TRAINING CLASSES!!

Centers for Education and Technology (CET), a part of the San Diego Community College District, is offering free training classes in a wide range of topics. Their Business courses include offerings in HTML, XML, JavaScript, Java programming, Linux, Visio, UNIX, Cisco, Oracle, MS Office A+ Training, TCP/IP, These courses are offered at several campuses throughout the city.

Please take a look at their web site,
http://www.sandiegocet.net/index.php, for class and registration information.

Check out vital information you might have missed!
http://www.arma.org/learning/seminar_archives.cfm
This is a link to ARMA Audio and Web Seminars that you might have missed.

2004-2005 Meeting Programs
February 16
April 21
June 15

ARMA Information

Compliance/Risk Management
Electronic Records
Legal/Regulatory Issues
Privacy
Records/Info Management
Standards/Best Practices

New Online Courses: Issues and Approaches in Archiving Electronic Records. ARMA's new online course will introduce you to the unique issues inherent to archiving electronic records. Learn about the strengths and weaknesses of various approaches to electronic records archiving, as well as recommendations for electronic archival processes and systems. Now available in the ARMA Learning Center.

Useful Links

San Diego ARMA Board Meetings
March 23
May 18

MEMBERSHIP

Membership Corner

By Linda Maczko

Welcome From the Membership Corner – "ENERGIZE – Plug Into the Source!" In the last newsletter I presented ARMA's membership campaign for this year - "Energize - Plug into the Source".

When you refer a new member you also become a CORE Club Member - Connecting Others Through Recruitment and Encouragement. The CORE Club is an elite group of professionals dedicated to spreading the word. Recruit just one member and become a member of the Club. You also can win rewards for yourself and the chapter, see: http://www.arma.org/energize/incentives.cfm

Recruitment gives you the opportunity to be a mentor to that person, to encourage them to get involved, to join an AMRA chapter, and to volunteer within the chapter. Go to the ARMA Web Site at: http://www.arma.org and check out the resources.

What do you do:

Download a membership flyer and an application from ARMA International. Or have them do it online at http://www.arma.org/join/apply.cfm

Write your name or member number in the sponsor area of the application.

Give the application to colleagues, people, vendors, friends in similar positions within different industries, or anyone else you think might benefit from ARMA membership. Email them the online application at http://www.arma.org/join/apply.cfm

Bring them to a program.

You can make a difference.

Or if you know someone who is interested in joining or if you would like more information on the membership campaign, refer them to Tracee Hughs or myself! By the way - have them mention your name.

San Diego ARMA Chapter—2003/2004 Officers/Directors

Office	Person	Company	Phone	Fax
President	Susan Roberts	Corovan sroberts@corovan.com	858-748-1100 x263	858-679-7341
Vice President/ Education	Benay Berl	Olivenhain Water District bberl@olivenhain.com	760-753-2459 x127	760-753-5640
Secretary	Candace Sanchez	Iron Mountain candace.sanchez@ironmountain.com	858-404-1612	858-455-7125
Treasurer	Alex Fazekas-Paul	Sempra Energy Research Afazekas@semprageneration.com	619-696-2949	619-696-2119
Programs	Richard Berlin	Document Imaging Service Corp rberlin@nomorepaper.com	619-296-3472 X100	619-296-3479
Public Relations	Laura Avilez	Symitar Systems, A JHA Company lavilez@symitar.com	(888) 796-4827 x766842	619-542-6707
Newsletter/ Web	Cynthia Lacy	San Diego Data Processing Corp clacy@sddpc.org	858-581-9763	858-581-9606
ISG/Membership Co-Chair	Tracee Hughs	Ross, Dixon & Bell, LLP thughs@rdblaw.com	619-557-4351	619-231-2561
Membership Co-Chair	Linda Maczko	UCSD lmaczko@ucsd.edu	858-534-3395	858-534-6523
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