

Zubulake v. UBS

The Significance for Records Management:
New Risks—New Remedies

The Significance for Records Management: New Risks— New Remedies

The rapidly expanding business use of electronic content such as e-mails and e-documents has had many implications for records management (RM), including:

- The introduction of new regulatory requirements
- The need for more scalable systems
- The emergence of new forms of risk

One of the most significant trends has come in the area of legal discovery, the process by which companies produce records requested by opposing counsel in the course of a civil action. Traditionally, discovery involved simply retrieving indexed paper files from a storage facility—for most companies, a straightforward and relatively painless process. Responding to requests for e-records, and particularly e-mails, can be a far more complex and costly matter. Nonetheless, recent rulings such as those in the case of *Zubulake v. UBS*¹ make clear that companies have to be prepared to provide such records in an effective and timely manner—and face both high costs and legal sanction if they are unable to do so.

“Routine” Legal Discovery Becomes Anything But

Zubulake v. UBS began as a gender discrimination suit between an equities trader named Laura Zubulake and her former employer. As part of pre-trial discovery, Zubulake requested UBS to produce “[a]ll documents concerning any communication by or between UBS employees concerning the plaintiff”²—including all e-mails written by five UBS employees during the period preceding her termination. UBS’s response included roughly 100 pages of e-mails, but this was clearly incomplete; Zubulake herself had produced more than 450 pages of e-mails. As with most companies, UBS’s RM system did not encompass e-mails. As a result, the only way it could comply with the request would be to find and restore deleted e-mails from archival media—a process that the company complained would cost more than \$175,000. (Subsequent estimates put the figure closer to \$300,000, including both vendor charges and paralegal fees.) Saying that such figures were far out of line with typical discovery costs, UBS asserted that Zubulake’s request was unreasonable.

U.S. District Judge Shira A. Scheindlin was unsympathetic to this line of reasoning, ruling that UBS had neglected its duty to preserve the evidence

contained in the e-mails as well as failing to follow its own retention policy. While Judge Scheindlin eventually directed Zubulake to pay 25% of the cost of retrieving the lost e-mails, she also emphasized that the time it had taken UBS to produce these records—nearly two years—was excessive, and directed the company to pay any costs Zubulake incurred in re-depositing any relevant witnesses.

U.S. District Judge Shira A. Scheindlin ruled that UBS had neglected its duty to preserve the evidence contained in e-mails relevant to the dispute as well as failing to follow its own retention policy.

Zubulake v. UBS sent shock waves through the RM community, but it should have come as no surprise that e-mails would achieve such importance in discovery. As the primary means by which business users communicate and exchange content, these messages contain exactly the kind of information central to litigation. E-mails have played a key role in recent cases involving Frank Quattrone of Credit Suisse First Boston, Jack Grubman of Salomon Smith Barney and Sanjay Kumar of Computer Associates.

Nonetheless, the legal status of e-mails as records has caught most companies unprepared. Most document management (DM) and RM systems make no provision for e-mails. Instead of being retained, organized and managed according to matter, user and other metadata, these messages are left at the mercy of individual users’ deletion habits and content-blind IT policies. To retrieve a given set of e-mails, companies must do as UBS did—painstakingly search backup media for old messages and deleted emails, a flawed and open-ended process that can easily miss crucial items. Often, backup tapes contain not just e-mail, but all a server’s data from a given period, making it necessary to restore the entire volume before the e-mails can be separated out. The burden is amplified by the sheer number of messages involved, as business users churn out constant e-mail traffic over the course of each day. In 2003, fewer than 10 billion e-mail messages were sent per day worldwide; by 2005 this has been projected to surpass 35 billion (IDC).

Whose Responsibility—And Whose Costs?

The difficulty of producing historical e-mails has driven the expense of e-discovery to unprecedented heights. The 2003 Socha-Gelbmann Electronic Discovery Survey found that e-discovery costs had doubled in recent years, and would likely continue their ascent. A single hard drive can cost thousands of dollars to reconstruct; in a large case, amounts over one million dollars are entirely possible.

In the days of paper records, relatively low discovery costs made their payment a point of little contention, and it is common law or rules of civil procedure that directed each party would pay for producing the records requested by the opposition. In response to UBS's claim of excessive costs, Judge Scheindlin acknowledged that this presumption could be difficult or unfair when a party seeks electronic information; indeed, in some cases, plaintiffs have used huge e-discovery requests to try to force an out-of-court settlement. At the same time, although she did shift part of the cost to Zubulake, she also said that "[a]s 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."³ Thus, the limited cost-shifting she allowed in this case is likely to be the exception, not the rule, moving forward—especially now that companies know better.

Although Zubulake is not binding, Judge Scheindlin is a recognized leader in the field of discovery and her recommendations in the case will carry considerable weight. Reflecting on the rapid evolution of case law during the time Zubulake was being litigated, she declared that "All parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information." Specifically, she said that organizations facing anticipated or pending litigation must preserve the backup tapes of "key players"⁴—and have an effective way to retrieve the e-mails and other e-records they contain.

The 2003 Socha-Gelbmann Electronic Discovery Survey found that e-discovery costs had doubled in recent years, and would likely continue their ascent.

Lessons Learned

The outcome of Zubulake sends a clear message to those charged with RM systems and policies: in the

eyes of the law, e-mails are no different from other forms of records. As such, they must be managed according to the same uniform and consistently applied policies as paper and electronic records. While data may be destroyed if there is no regulatory, legal, or business reason to maintain it, this must also be part of an established policy, not simply the ad hoc purging of an archive—especially not if the data is being destroyed specifically because of its potential for future liability. In fact, Judge Scheindlin noted explicitly that companies must take special measures to preserve information and data potentially subject to discovery by suspending or varying ordinary retention and destruction policies. In this regard, having the ability to selectively prevent e-mails from being destroyed—a level of control

With Contextual RM, e-mails are filed according to the matter to which they pertain, alongside relevant content of all other forms.

beyond that found in a typical e-mail system—can be just as important as making them part of the same RM regime as other records.

Responding to this heightened responsibility goes beyond policy; to minimize the potentially devastating impact of an e-discovery request on ordinary IT operations, companies must ensure that their RM infrastructure is capable of providing a high level of control and efficiency in managing not just e-records and paper documents, but e-mails as well. Though adequate for a limited number of e-records, the manual methods for classification and administration most systems still involve can't possibly scale to accommodate millions of user e-mails over the course of a year—one reason most such systems omit e-mail records.

As an established leader in enterprise content management, Interwoven has long recognized the value and significance of e-mail as a form of business content, and has worked to integrate it into the same functionality-rich environment used to manage content of other types. As a result, Interwoven's Contextual Records Management paradigm already provides a remedy for the e-discovery challenges described above. With Contextual RM, e-mails are filed according to the matter to which they pertain, alongside relevant content of all other forms. Integrated e-mail management ensures that all e-mails are captured and filed as they should be; users simply copy, forward or drag-and-drop e-mails to an addressable

folder in a unified content repository. On arrival, each e-mail automatically inherits metadata according to the location where it has been filed, ensuring comprehensive, accurate and effortless classification.

Contextual RM enables companies to respond to an e-discovery request efficiently and cost-effectively. An entire matter folder can be retrieved, including all relevant e-mails as well as other forms of content; e-mails can also be searched by metadata, keywords or full-text. Most importantly, because Contextual RM supports the seamless transition of content from work in progress to records, companies can be confident that all of the requested e-mails can—and will—be located in the RM system without having to resort to costly forensic analysis and piecemeal data recovery from archival media.

Although the prospect of e-discovery puts fear in the hearts of many businesses, it doesn't have to. By making e-mail an integrated part of a company's RM infrastructure, Interwoven makes it no more difficult to access and provide than any other kind of record—and makes the high costs and prolonged timeframe seen in Zubulake a thing of the past.

Footnotes

(First note refers to the case itself by case number; the others refer to rulings in that case).

1. Zubulake v. UBS Warburg LLC, S.D.N.Y., No. 02 Civ. 1243.
2. Zubulake v. UBS Warburg LLC, 2003 WL 21087884 (S.D.N.Y. May 13, 2003).
3. Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004).
4. Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004).

About Interwoven

Interwoven, Inc., provider of Enterprise Content Management (ECM) solutions for business, enables organizations to unify people, content and processes to minimize business risk, accelerate time-to-value and sustain lower total cost of ownership. Interwoven delivers deep industry-specific solutions which reduce business process cycle time from initial collaboration through design, production, sales, marketing, legal review, IT and service. Interwoven leads the industry with a service-oriented architecture today and easy-to-use, best-in-class components and solutions. Today, 3,300 enterprises, law firms and professional services organizations worldwide are Interwoven customers, including BT, Ford, Freshfields Bruckhaus Deringer, General Motors, Jones Day, Motorola and Yamaha.

Interwoven do not provide legal advice, and nothing in this document should be construed as legal advice. Before acting on any such information, consult your own legal advisor.

Interwoven, Inc.
803 11th Avenue
Sunnyvale, CA 94089 USA
(408) 774-2000

Interwoven, TeamSite, Content Networks, OpenDeploy, MetaTagger, DataDeploy, DeskSite, iManage, FileSite, MediaBin, MetaCode, MetaFinder, MetaSource, OpenTransform, Primera, TeamPortal, TeamXML, TeamXpress, VisualAnnotate, WorkKnowledge, WorkSite, WorkDocs, WorkPortal, WorkRoute, WorkTeam, the respective taglines, logos and service marks are trademarks of Interwoven, Inc., which may be registered in certain jurisdictions. All other trademarks are owned by their respective owners. Copyright 1996-2005 Interwoven, Inc. All rights reserved. wpub_1—November 2004.