

E-Records and E-Signatures:
Emerging Technology and Business Applications in Financial
Services
Washington DC -- November 8, 2004

“From E-Business to E-Records to E-Evidence”

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Recent news items

- OCC Advisory Letter 2004-9 (June 21, 2004): “Electronic Record Keeping”
- Pew Internet & American Life Project: “IM gains a following in U.S. workplaces”
- FDIC Financial Institution Letter 84-2004 (July 21, 2004): “Guidance on Instant Messaging”



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New legal requirements

- Sarbanes-Oxley
 - Section 103: maintain audit-related records for up to 7 years
 - Section 404: certify effectiveness of internal controls
- SEC
 - Rule 17a-4: Broker/Dealer communication preservation
- USA Patriot Act, Title III
 - 31 CFR Part 103: Anti-money laundering regulations
- Zubulake v. UBS Warburg (“Zubulake V”)
 - 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004)



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Is “digital” different?

- “Document”
 - Tangible
 - Static
 - Complete
 - Well-accepted methods of authentication
- “Electronically stored information”
 - Intangible
 - Dynamic
 - Amorphous
 - Needs context
 - Authentication methods under development



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The intended benefits of IT-driven business processes

- Increased productivity
- Reduced costs
- Instant management and reporting
- Access to information
- Promise of faster, less expensive, more equitable administration of justice



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The unintended consequences of IT-driven business processes

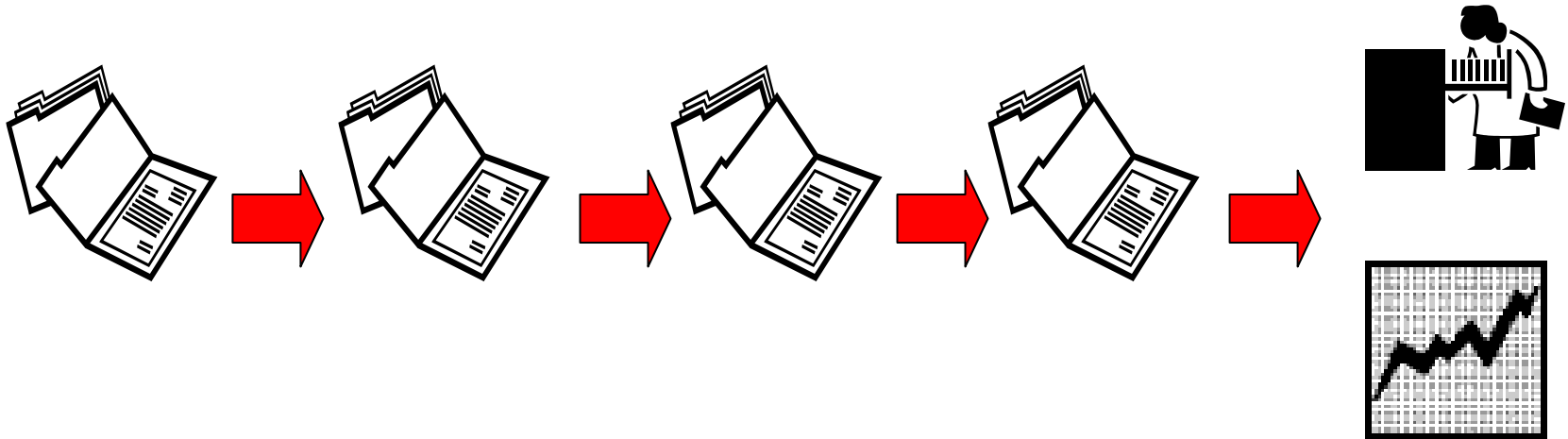
- Information overload
- Reduced privacy
- Reduced accessibility
- Growing digital divide
- More expensive, cumbersome litigation in our courts



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The record of a transaction

- Paper-based business process



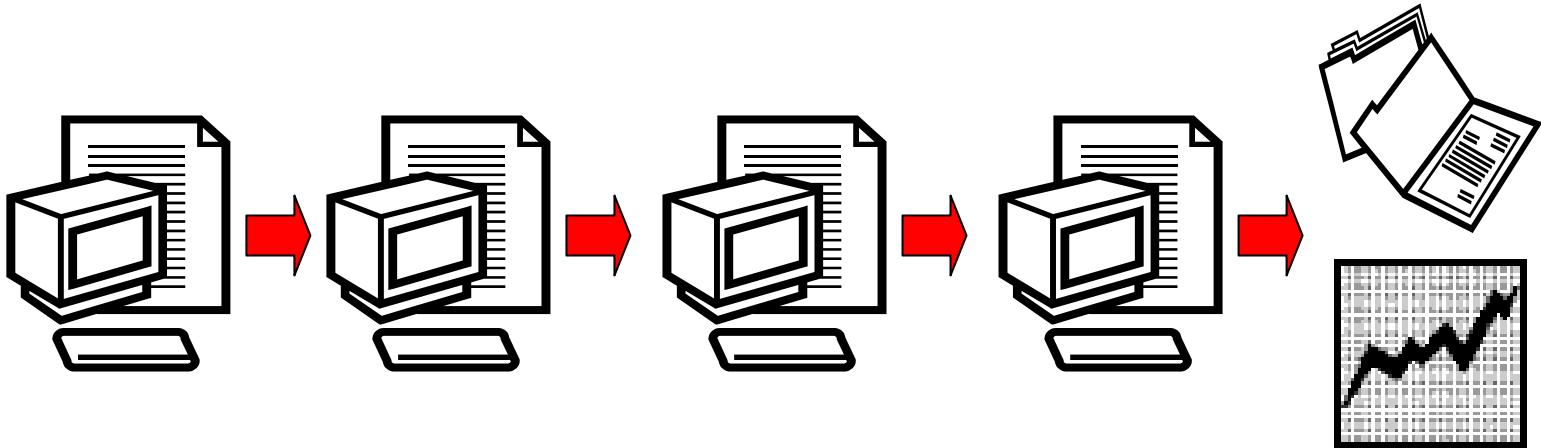
Each stage of the process generates an artifact, and together the artifacts constitute a “record”



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The record of a transaction

- “Protodigital” business process



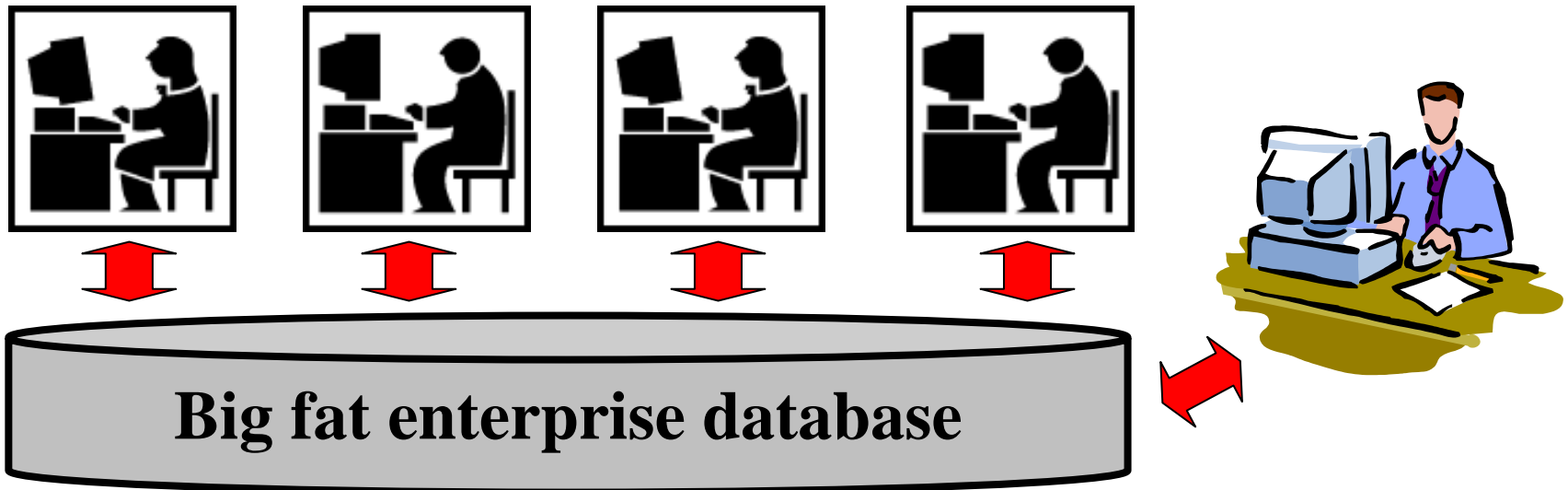
Computers replace typewriters and pens,
but are used to create artifacts, either paper or digital,
which are saved as the “record”



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The record of a transaction

- True digital business process



No artifacts are generated; each stage of the process modifies the enterprise-wide relational database



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Compare the two systems

- In the paper and protodigital processes, each stage of the process generated evidence in the form of a “document,” either paper or electronic
- The true e-business process begs the question:

“Dude, where’s my record?”



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Information systems are not recordkeeping systems (and IT is not RM)

- Recordkeeping systems provide evidence of transactions
- Information systems create and manage information in fungible chunks
- Pre-computer IT generated the building blocks of records in the course of business, digital IT does not
- Digital IT is optimized to support real-time business processes, not recordkeeping



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“Corporate amnesia”

- Information changes constantly
- Forms and processes change constantly
- Systems are upgraded and replaced
- Backups are haphazard and inaccessible
- Questions of security
- Questions of reliability



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Informal, parallel business processes

- Email, IM, voice communication, virtual meetings
- Essential to business operations
- Essential to creativity, good customer relations
- Meticulously recorded and saved by IT systems
- Sloppily managed and maintained by RM systems
- Often considered to be “non-records”



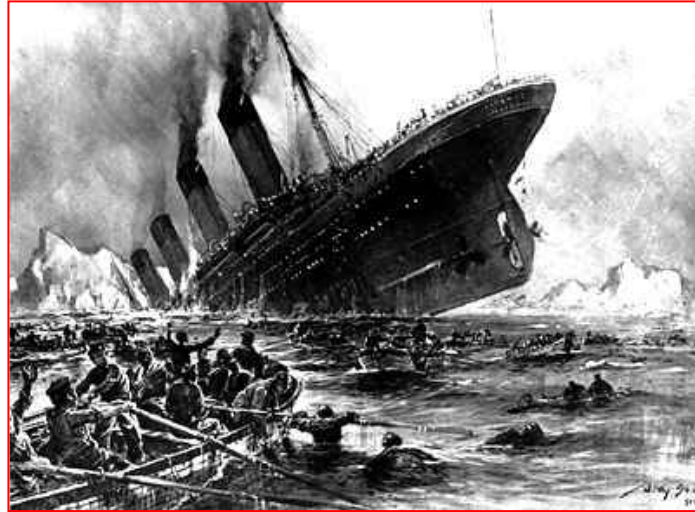
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Non-records: The evidential irony

- If the “document” helps your case, you can’t get it into evidence
- If it hurts your case, your opponent will almost always be able to get it into evidence



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“[E]very organization is building its own fleet of Titanic ships in the form of electronic records technology.... Many of the records these vessels carry will be shipwrecked on the dozens of icebergs growing in the future seas of IT.”

Collaborative Electronic Notebook Association, "Titanic 2020"

<<http://www.censa.org>>



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Federal Rules of Evidence

- Rule 104: Judges determine admissibility; juries determine weight and credibility
- Rule 402: All relevant evidence is admissible
 - Rule 802: Hearsay is not admissible
 - Rule 803(6): “Business records” are an exception
- Rule 901: Evidence must be authenticated
 - Rule 901(b) (9): “Process or system” authentication
 - Rule 1001(3): Accurate computer output is an “original”



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Rule 901(b) (9): “Process or system”

- Authentication is a “condition precedent” to admissibility
- Condition is satisfied by “evidence sufficient to support a finding that the matter in question is what its proponent claims.”
- **“Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.”



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Rule 803(6): “Records of Regularly Conducted Activity”

- “A memorandum, report, record, or data compilation , in any form...”
- Made or transmitted by a person with knowledge
- Kept in the course of regularly conducted business activity
- Part of a regular practice to keep such information
- Shown by testimony of the custodian or other qualified witness



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Indicia of untrustworthy business record evidence

- Inability to find records during discovery
- Incomplete records produced
- Extraneous and contradictory documents in the record
- Opaque or unreliable e-business processes
- Security lapses



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Rule 801(d)(2): “Admission by a party-opponent”

- The statement is NOT hearsay, by definition
- Offered AGAINST the party
- Made by the party, agent, or employee, within the scope and term of his or her employment
- Authenticated



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Examples of “admissions against interest”

- Email in Phen-fen litigation: “Can I look forward to my waning years signing checks for fat people who are a little afraid of a silly lung problem?”
- Email in WorldCom litigation: “[Do] not have any more meetings with AA [Arthur Andersen] for any reason. I do not want to hear an excuse just stop. Don't make me tell you again.”



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There is hope!

- Transparency
 - in records management
- Trustworthiness
 - in business process
- Teamwork
 - brings it all together



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Transparency reduces costs and risks

- Have an electronic records management (ERM) system in place
- Have a “litigation response” plan in place
- Be ready to locate and classify records accurately and inexpensively
- Have full documentation of both your ERM system and response plan available
- Be ready for your Rule 30(b)(6) deposition, trial testimony



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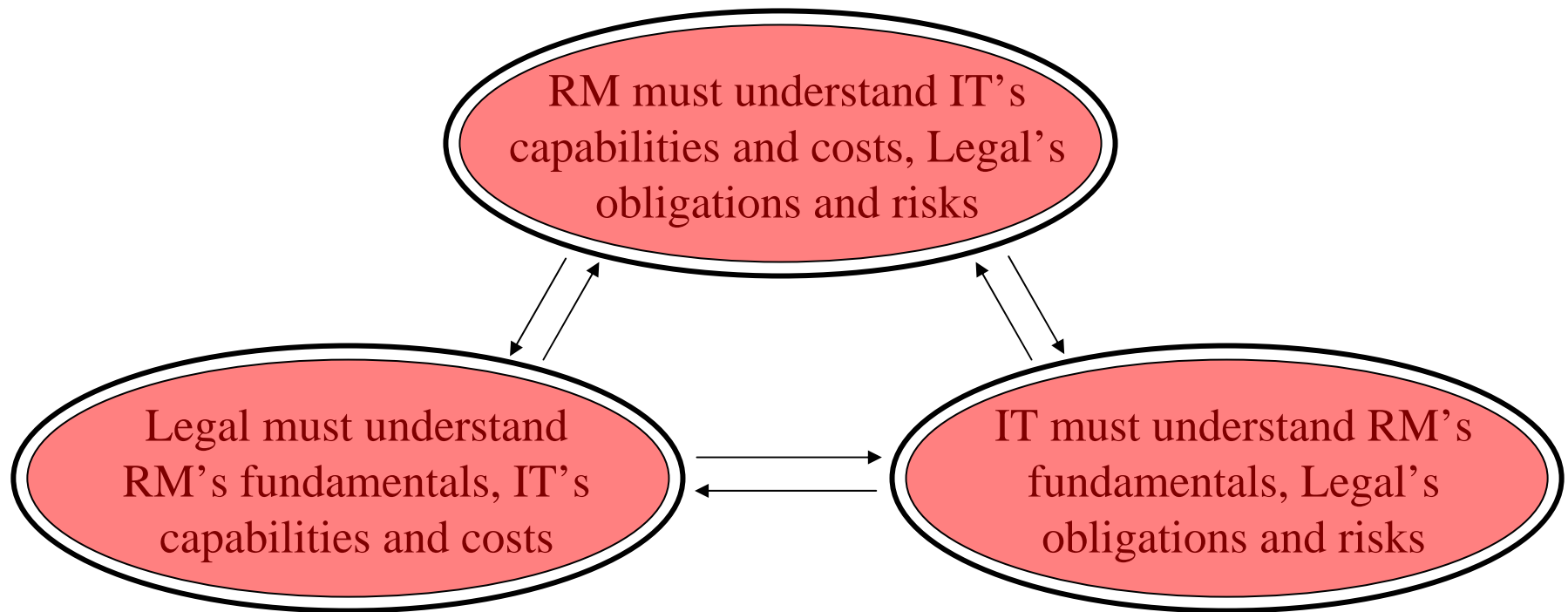
Trustworthiness creates admissible e-business records

- Design useable data capture and records management into e-business processes
- Thoroughly document e-business process
- Periodically audit records management aspects of e-business process
- Be ready to testify



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Teamwork creates e-evidence





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Additional resources

- “SPeRS: Standards and Procedures for Electronic Records and Signatures,” Electronic Financial Resources Counsel
- “The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age,” and “The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production”
 - www.thesedonaconference.org
- Proposed Amendments to the Federal Rules of Civil Procedure
 - www.uscourts.gov
- Articles, presentations, and rulemaking news
 - www.kenwithers.com

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