

# NOTES

**MER 2008**

## **The Weight of Paper** *– Where Records are Electronic, Can Paper be Destroyed?*

Session 24

Richard (Dick) Fisher  
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Nixon Peabody LLP

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### Session Outline

- ◆ The "weight" of paper
  - The benefits of a diet
- ◆ The "legal" weight
- ◆ The "regulatory" weight
- ◆ The "economic" weight
  - No Paper Weight - ROI Case Study
- ◆ The trustworthy, reliable diet

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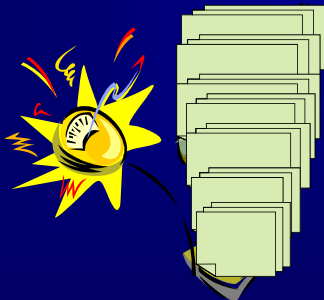
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### The Weight of Paper



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# NOTES

## The Weight of Paper

### Paper: A Love or Hate Relationship

LOVE 	HATE 
◆ I can cuddle it!	◆ Must I keep it?
◆ I can file it!	◆ Must I file it?
◆ I can copy it	◆ How many *#@^ copies are there?
◆ I can mark it up	◆ I can't find the *#@^ copy I marked up

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## The Weight of Paper

### The traditional weight (issues)

- ◆ Manual handling
- ◆ Manual paper/file flow: sneaker-net, snailmail
- ◆ Manual storage and retrieval
  - On-site: folder, file cabinet, file room, record center
  - Off-site (CRC): assemble, box, store, request, receive, resend
- ◆ Manual records administration (users, records management)
- ◆ Manual legal discovery

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## The Weight of Paper

### The "weight" loss diets

- ◆ Imaging the paper (AIIM 2005 Study)
- ◆ "Born-digital" creation and filing
- ◆ "Received-digital" processing and filing
- ◆ Electronic records management
- ◆ Electronic legal discovery
- ◆ Electronic business process efficiencies (20%-50% productivity improvements)

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## The Weight of Paper

### The "weight" loss problems

- ◆ Keep paper after imaging
- ◆ Fail to leverage imaging investment into other business areas
- ◆ Continue to print/file paper "born" or "received" digitally
- ◆ Believe "paper" is official/authentic record (even if electronic version is regularly used)
- ◆ Dual legal discovery challenge: electronic and paper

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## The "Legal" Weight of Paper

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## The "Legal" Weight of Paper

### Federal Rules of Evidence

- ◆ Rule 1001(4): "A duplicate is a counterpart produced ... by mechanical or electronic re-recording."
- 1. Rule 1003: "A duplicate is admissible to the same extent as an original unless..."
- ◆ Rule 1004(1): "The original is not required...if the originals lost or destroyed."

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## The "Legal" Weight of Paper

### Uniform Photographic Copies of Business and Public Records as Evidence Act (UPA)

28 U.S.C.A. 1732

- ◆ "If an business . . . in the regular course of business . . . has kept or recorded any . . . writing, . . . and in the regular course of business has caused all or the same to be recorded, copied or reproduced by any . . . or other process which accurately reproduces or forms a durable medium for so reproducing the original, **the original may be destroyed.**

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## The "Legal" Weight of Paper

### Court Order Allows Destruction of Paper Copy

- ◆ Bankruptcy court: American Home Mortgage Holdings (AHM)
- ◆ Motion to destroy or return duplicate paper copies of mortgage loans
  - 490,000 loan files imaged by AHM
  - After scanning, paper returned to owner or stored in CRC.
- ◆ Judge granted motion by AHM to destroy or return paper copies stored in CRC (Feb 2008)

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## The "Legal" Weight of Paper

### Federal Courts accept images in lieu of paper

- ◆ In 2001, Administrative Office of the U.S. Courts implemented an electronic filing system called Case Management/Electronic Case Files (CM/ECF)
- ◆ April 2008, CM/ECF is in use in 99% of Federal Courts
  - 31 million cases,
  - Used by 320,000 attorneys and others
  - PDF required format (including PDF Image)
- ◆ Administrative Office did not declare that electronic record must be official record, but many District Courts have done so

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## The "Legal" Weight of Paper

### Federal Courts accept images in lieu of paper

- ◆ District Courts guidelines generally state that:
  - "When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Court."
  - "An electronic document has the same legal status and effect as a paper document."
- ◆ Paper submittals received by most Courts are scanned and stored as PDF Image

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## The "Legal" Weight of Paper

### Federal Courts accept images in lieu of paper

- ◆ **Electronic Signature:** "The submission of a document that is (i) signed with an "/s/attorney name" or electronic image of the attorney's signature, and (ii) filed under that attorney's login and password, shall constitute an original signature for purposes of Federal Rule of Civil Procedure 11." (District of Utah)
- ◆ Example URLs for CM/ECF Guidelines:
  - [http://www.uscourts.gov/cmecf/cmecf\\_about.html](http://www.uscourts.gov/cmecf/cmecf_about.html)
  - [http://www.uscourts.gov/cmecf/cmecf\\_court.html](http://www.uscourts.gov/cmecf/cmecf_court.html)
  - <http://www.utd.uscourts.gov/documents/utahadminproc.pdf>

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## The "Legal" Weight of Paper

### Case Law – United States vs. Russo

- ◆ A foundation for admission of computerized records consists of:
  - "showing the input procedures used, the tests for accuracy and reliability."
  - "that both the machine and those who supply the information have performed their functions with utmost accuracy."

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## The "Legal" Weight of Paper

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- ◆ Comments
- ◆ Guidance

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## The "Regulatory" Weight of Paper

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## The "Regulatory" Weight of Paper

Internal Revenue Service (IRS)

- ◆ IRS Revenue Procedures 97-22 and 98-25
- ◆ "An electronic storage system must ensure an accurate and complete transfer of the hardcopy or computerized books and records to an electronic storage media." (97-22, 4.01)

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## The "Regulatory" Weight of Paper

### Internal Revenue Service (IRS)

- ◆ 97-22, Section 7: "This revenue procedure permits the destruction of the original hardcopy books and records and the deletion of the original computerized records . . . , after the taxpayer has:
  - (1) has completed its own testing of the electronic storage system . . . to ensure compliance . . .
  - (2) has instituted procedures that ensure its continued compliance with all the provisions of this revenue procedure"

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## The "Regulatory" Weight of Paper

### Food and Drug Administration

#### Updated Guidance for 21 CFR Part 11

- ◆ "In some cases, actual business practices may dictate whether you are using electronic records instead of paper records under § 11.2(a)."
- ◆ The electronic record may be considered to fall under the requirements of Part 11 if it is used in the regular course or business - - even if you believe or have declared that the paper copy is the official record.

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## The Weight of Paper

### Hon. Ron Hedges

- ◆ Best Evidence
- ◆ Regular Course of Business

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## The "Economic" Weight of Paper

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## The "Economic" Weight of Paper

### Traditional Paper Replacement

#### Benefits

- ◆ Reduce cost of manual handling (filing, storage, retrieval, refiling)
- ◆ Reduce cost of paper storage (internal or CRC)
- ◆ Reduce cost of printing and materials cost
- ◆ Faster access and lower cost of retrieval

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## The "Economic" Weight of Paper

### Traditional Paper Replacement

#### Investment

- ◆ Capture investment (scanners, storage, etc.)
- ◆ Ongoing cost of capture (labor to scan, index, QC)
- ◆ Incremental DM, ECM or RM investment
- ◆ Potential full DM or ECM investment
- ◆ Ongoing system/application administration

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## The "Economic" Weight of Paper

### New Thinking Benefits

- ◆ Improved security and control of records (RM)
- ◆ Opportunity to improve efficiency/flow of business processes (workflow, BPM, wait times, )
- ◆ More efficient, lower cost records management (work flows, auto classification, etc.)
- ◆ Reduced and more efficient cost of legal discovery
- ◆ Improved insight into business process (statistics, audit trails, process efficiencies)

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## The "Economic" Weight of Paper

### Example ROI

- ◆ Regional Bank
- ◆ IBM FileNet Imaging and ECM installed
- ◆ Eight (8) business functions still using paper
- ◆ 80% of paper is electronically created or received
- ◆ Electronic capture assumption
  - 60% born-digital capture
  - 40% imaged

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## The "Economic" Weight of Paper

### Example ROI

#### Investment

- ◆ Image scanning equipment & additional storage (and maintenance)
- ◆ Image scanning software (and maintenance)
- ◆ Ongoing scanning, indexing, QC labor
- ◆ Records Manager acquisition
- ◆ Professional services

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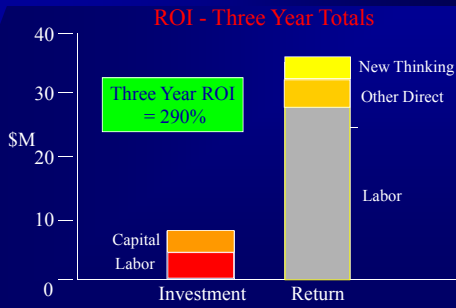
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## The "Economic" Weight of Paper



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## The Trustworthy, Reliable Diet

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## The Trustworthy Diet

### Reliable, Accurate Electronic Record Capture and Management

- ◆ Accurate and complete E-record capture (image or born-digital), including metadata
- ◆ Quality control of all steps in the process
- ◆ Complete and accurate transfer to retention protected storage **under records mgmt. control**
- ◆ Quality assurance at final point of storage
- ◆ Ready accessibility

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## The Bottom Line - Weight of Paper

If there is a trustworthy electronic copy, its OK to destroy the paper

- ✓ OK: laws and statutes
- ✓ OK: regulatory agencies (IRS)
- ✓ OK: Federal Courts
- ✓ OK: the economics
- ✓ OK: with a reliable, accurate "weight" loss diet

Why does your legal counsel not think its OK?

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## The Weight of Paper

Hon. Ron Hedges

- ◆ Comments
- ◆ Guidance

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Thank You!

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