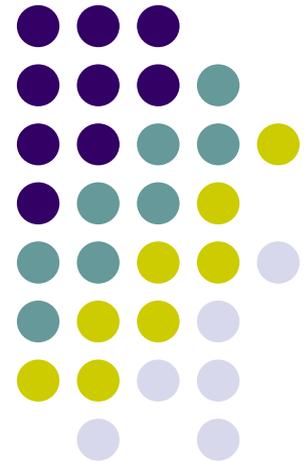
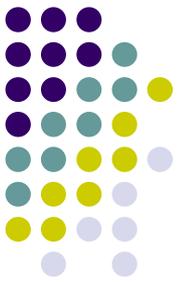


New and Emerging Issues At The Border of E-Recordkeeping & E-Discovery

**New Approaches to Recordkeeping
Library and Archives Forum on Canadian Democracy
Ottawa, April 9, 2008**

**Jason R. Baron
Director of Litigation
U.S. National Archives and Records Administration**

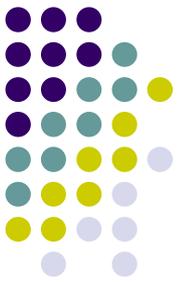




Overview

- **Why E-Records Management?**
- **Practical Guidance And Lessons Learned From NARA**
- **Hot Topics & Best Practices**
- **Additional Resources**

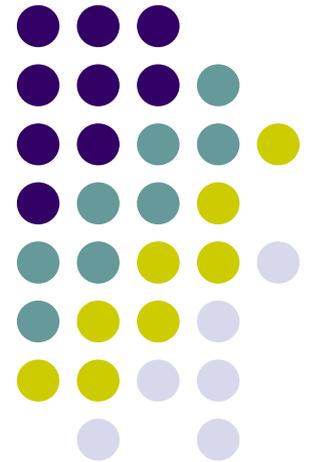
Managing E-Haystacks: A Big Challenge



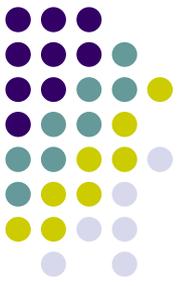
www.123rf.com

“Digital information lasts forever, or five years – whichever comes first”

--Jeff Rothenberg, senior
computer scientist, RAND
(1999)



Why E-Records Management in the U.S.?

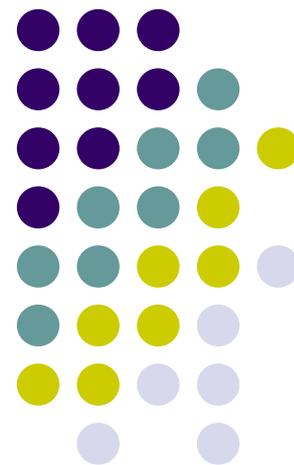


- **Enterprise Risk and Legal Liability**
- **Mitigating Risk Thru E-Records Mgmt**
- **The New US Federal Rules of Civil Procedure (Dec. 2006)**
- **New State Rules of Civil Procedure (wholesale adoption of federal rules by 11+ states, more to come with some variations)**

A New Legal Term of Art Under the Federal Rules of Civil Procedure: *Electronically Stored Information* or “ESI”

“Electronically stored information”:

-The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI...A common example [is] email ... The rule ... [is intended] to encompass future developments in computer technology. --Advisory Committee Notes to Rule 34(a), 2006 Amendments



Common Sources of ESI

Mainframes, network servers, local drives
(including network activity logs)

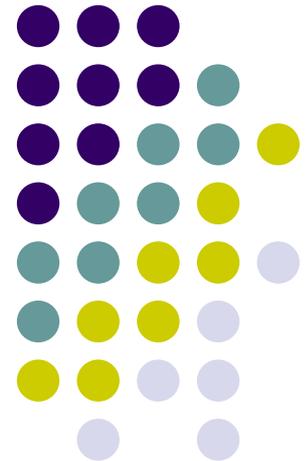
DVDs, CD ROMs, floppy disks

Laptops

Backup tapes

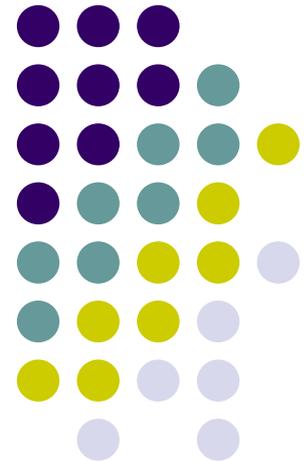
External hard drives (e.g., flash, Zip, Jazz,
ipods)

Third party storage



Common Forms of ESI

Email with attachments (all kinds)
Text files, powerpoint, spreadsheets
Voice mail, instant and text messaging
Databases, proprietary applications
Internet, intranet, wikis, blogs, RSS feeds
(plus cache files, slack space data, cookies)
Data on PDAs, cellphones
Videoconferencing & webcasting
Metadata

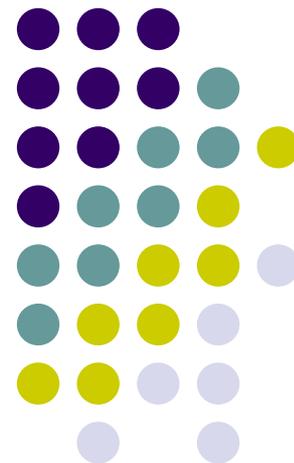


Selected Changes to the Federal Rules of Civil Procedure, Part 1: Discussing ESI at the Rule 26(f) Initial “Meet and Confer” and at the Rule 16(b) Pre-Trial Conference

New FRCP Rule 26(f) conference obligations: parties must have early meet and confer to discuss “any issues relating to preserving discoverable information,” including “any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced.” Thus, meet and confers will necessarily include:

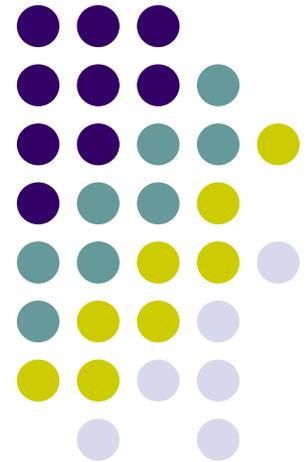
- + Scope of ESI holdings
- + Preservation issues
- + Formatting issues
- + Access issues

Similarly, Rule 16(b) provides for pre-trial disclosure of ESI



Selected Changes to the Federal Rules of Civil Procedure, Part 2: Two-Tier Rule on ESI “Accessibility”

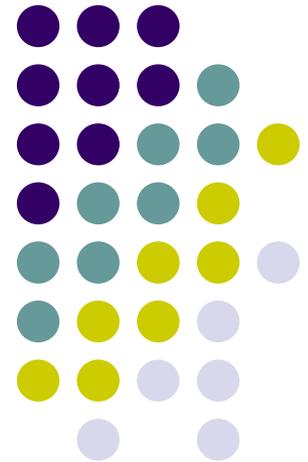
- Rule 26(b)(2)(B) – Parties need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.



Selected Changes to the Federal Rules of Civil Procedure, Part 3: Accommodation for Routine Deletion of ESI

- Rule 37(f): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

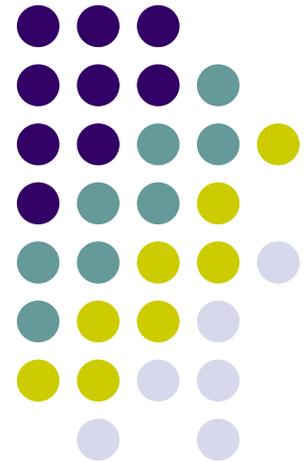
-Advisory notes: Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. "Litigation hold" concept referenced.



The Supreme Court on Record Retention

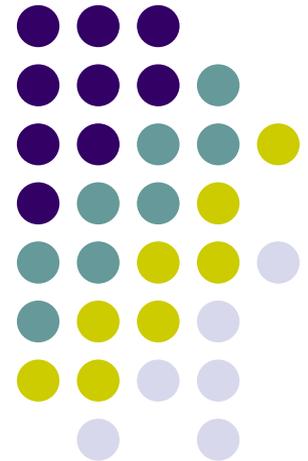
“‘Document retention policies,’ which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business * * * It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”

--Arthur Andersen LLP v. U.S., 125 S. Ct. 2129 (May 31, 2005)



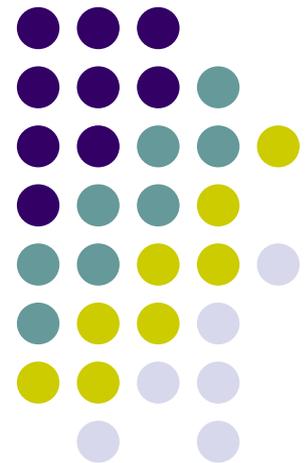
Foundational elements of recordkeeping in the U.S. federal sector

- + Definition of a “federal record,” 44 U.S.C. 3301
 - + Agency file plans and agency records schedules
 - + Appraisal decisions signed off by Archivist on what constitute permanent records (eventually accessioned into NARA), and what constitute temporary records (stored by agencies during active use and then at offsite federal or other record centers for the duration of the retention period of the records)
 - + Record schedules subject to public notice in Federal Register
 - + General Records Schedules for admin. records
- See 44 USC 3303, 3303a(a), (d)

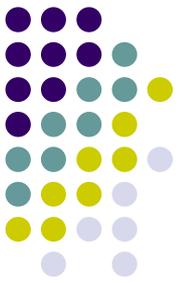


What do the new U.S. rules mean for agency management of public records?

- + Agencies will be confronting requests for initial disclosure of ESI on their electronic systems early on, including for how e-mail is stored, how backups are performed, how other networked applications and databases are preserved
- + ESI may be subject to production in particular requested formats (native, PDF, TIFF, etc.), with or without metadata
- + Important that key designated IT and RM personnel know scope of their agency's holdings & retention of records under existing schedules, to serve as trusted reporters

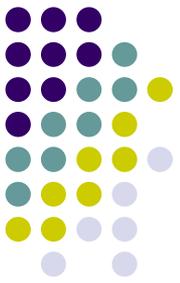


Taking Reasonable Steps: The Impact of Technology on E-Records Management, Snapshot 2008



- **A universe of proprietary products exists in the marketplace: document management and RMAs**
- **US Dept of Defense 5015.2 compliant products**
- **However, scalability issues exist**
- **Utopia is records mgmt without extra keystrokes**
- **Agencies must prepare to confront significant front-end process issues when transitioning to electronic recordkeeping**
- **Records schedule simplification is *key***

Federal Email Retention in the U.S.

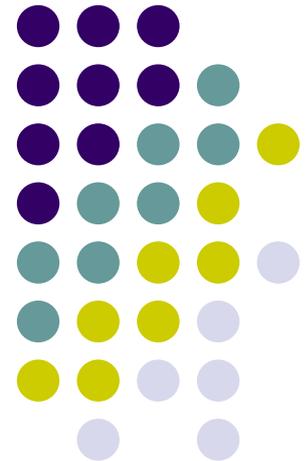


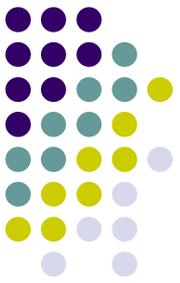
- **NARA has had regulatory guidance on email since 1995: all users must print out email records, with appropriate metadata, or store in an electronic recordkeeping system before the electronic version on the live system is to be deleted. 36 C.F.R. 1234.24; GRS 20, Item 14.**
- **Email records appropriate for preservation for less than 180 days may be managed on live email systems and allowed to be deleted as part of automatic processes, without a user further needing to print out or electronically archive. See 71 Fed. Reg. 8806 (Feb. 21, 2006) (“transitory email”); GRS 23, Item 7.**
- **Special legal or compliance obligations may require that additional preservation actions taken.**

Hot topic: backup tapes

General Record Schedule 24, Item 4 treats backups as temporary records that may be recycled in the ordinary course of business

A legal hold may require IT staff taking a range of additional actions (e.g. from pulling one day's worth of backups to shutting down recycling)

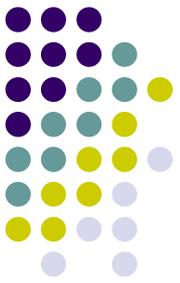




Hot topic: Metadata

- What is it?
 - Email header information (possibly hidden)
 - Proprietary features of word processing (e.g. summary fields)
 - Embedded & shadow data
 - Deleted keystrokes
 - Tracking info
 - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: “inadvertent” production

Hot topic: Electronic Archiving

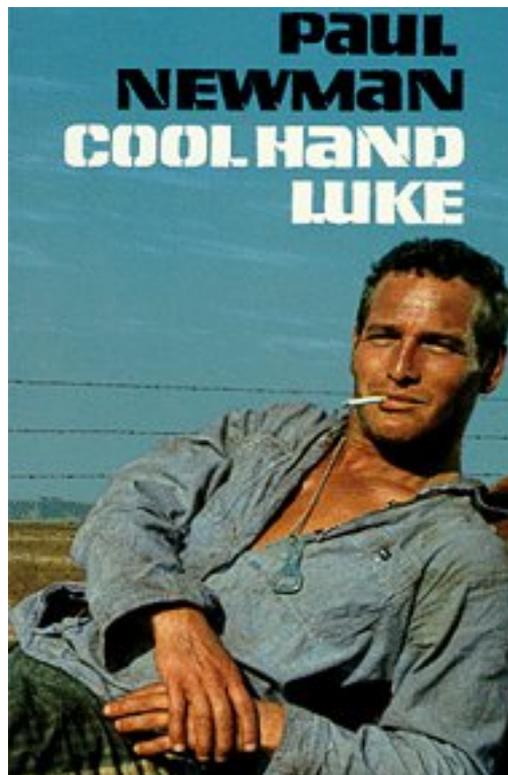


- What is it?
100% snapshot of (typically) email, plus in some cases other selected ESI applications
- How does it differ from an RMA?
Goal is of preservation of evidence, not records management *per se*
- Pros and Cons



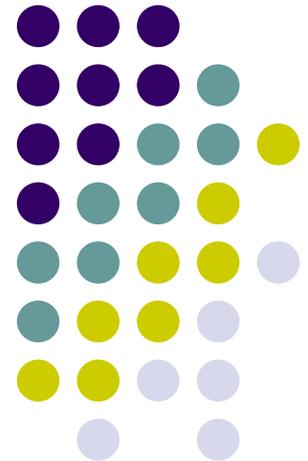
“What we’ve got here is a failure to communicate”

Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004)



What Can Go Wrong?

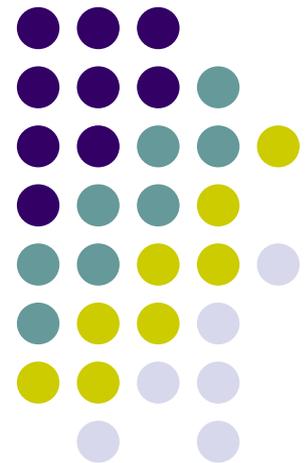
- Typically, courts look at “spoliation” of evidence -- an assessment of the loss of relevant evidence and the identification of who, if anyone, should bear a consequence, as well as what that consequence should be.
- Monetary Sanctions
- Exclusion of Evidence
- Adverse Inference Instruction
- Default Judgment
- Contempt Sanctions



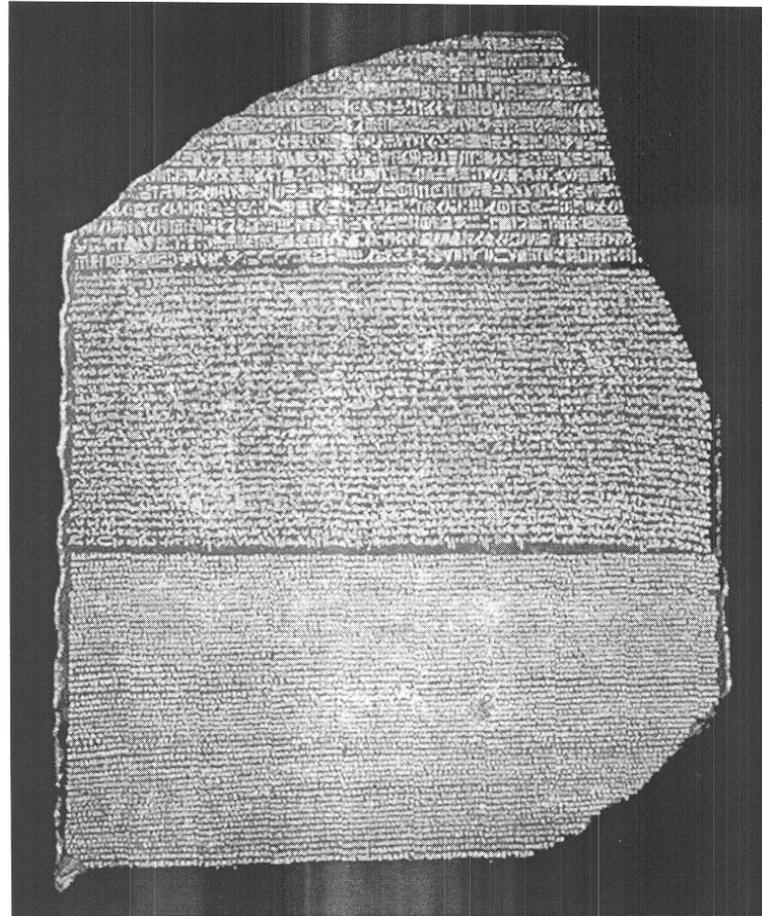
Two Cautionary Tales ...

Qualcomm Inc. v. Broadcom Corp., 2007 WL 2296441 (S.D. Cal. Aug. 6, 2007) (opinion recommending sanctions, involving underlying failure of a party to disclose 200,000 emails prior to trial)

United Medical Supply Co. v. United States 2007 WL 1952680 (Fed. Cl. June 27, 2007) (sanctions imposed for failure to adequately preserve ESI based on faulty email communications with contractors)



Rosetta Stone Approach



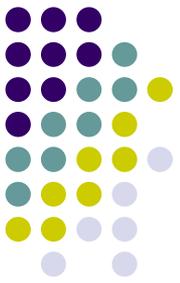


Preservation Order

- **"Documents, data, and tangible things" is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video; phonographic tape; or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.**
--Pueblo of Laguna v. U.S. 60 Fed. Cl. 133 (Fed. Cir. 2004).

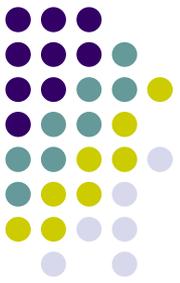
What's an Agency to do?

Best practices at the erecords/ediscovery nexus:



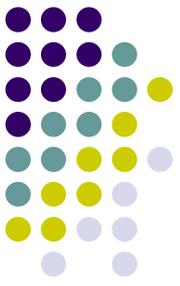
- * Inventorying for the purpose of obtaining intellectual control over your Agency's electronic systems (network applications, backups & legacy media)
- * Understanding existing records schedules & retention periods (and updating & simplifying schedules in anticipation of transition to electronic recordkeeping)
- * Consider appointing "Knowledge Counsel" in General Counsel and Solicitor offices to act as agents of change, working with CIOs, IT staff, and records officers
- * Formulating explicit e-records guidance on what constitute records, including guidance on how legal holds will be implemented
- * Incorporating records mgmt & e-discovery issues in end-user training

A Plug for Dealing With Search Issues In the Context of Real User Needs



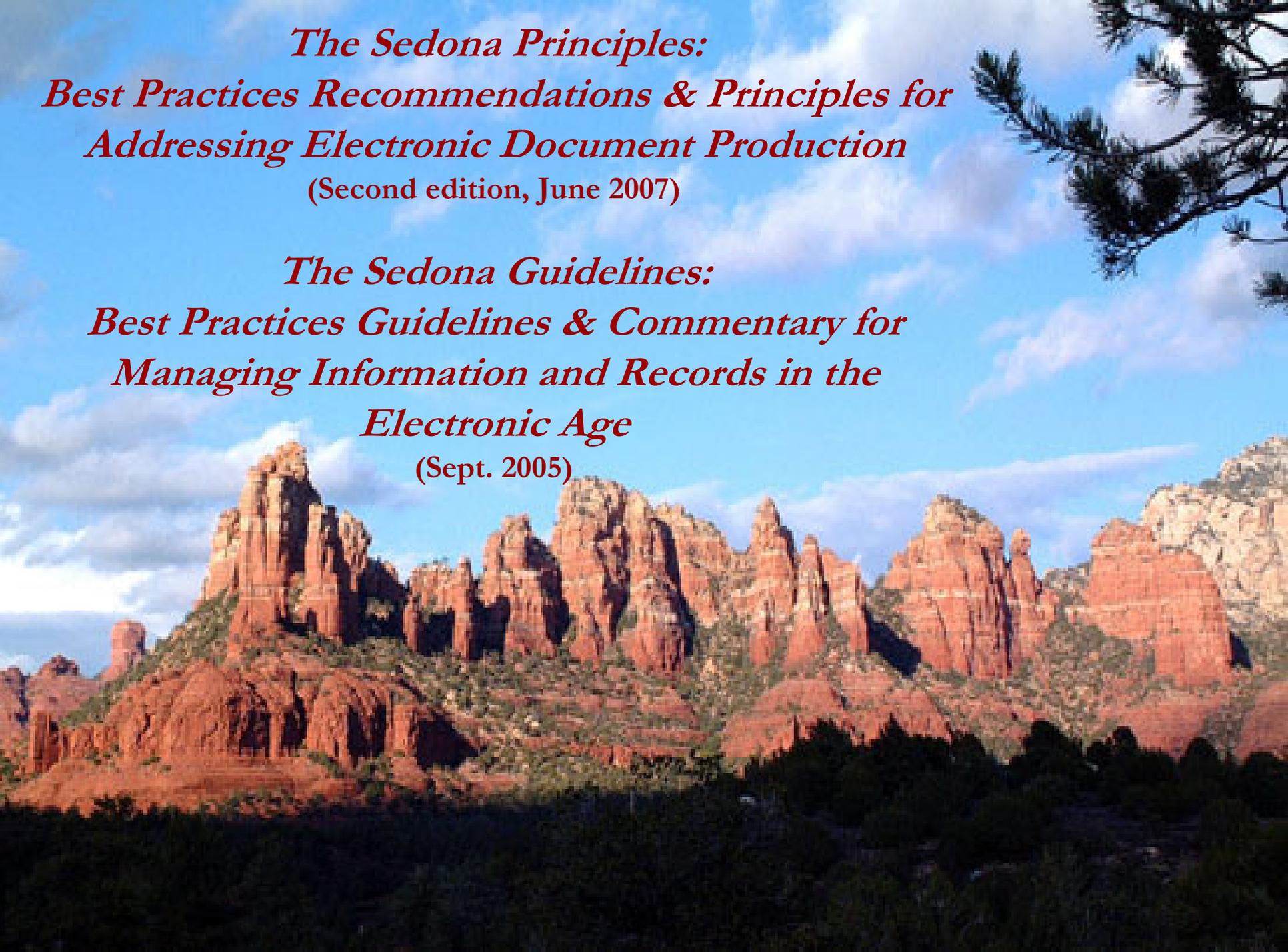
- Finding responsive needles in E-haystacks: the problems with keywords
- Maximizing recall of responsive docs
- Weeding out false positives
- The challenge: evaluating competing search products in the marketplace against some objective standard lawyers will embrace

See “Information Inflation: Can The Legal System Adapt?,” George L. Paul and J.R. Baron, in 13 Richmond Journal of Law & Technology 10 (2007), <http://law.richmond.edu/jolt/v13i2/article10.pdf>, and The Sedona Conference® Commentary on The Use of Search and Information Retrieval Methods in E-Discovery (2007 draft), <http://www.thosedonaconference.org>



Additional E-discovery and RM Resources

- Title 44 U.S. Code, Chaps 21, 29, 31, 33
- 36 C.F.R. Part 1234 E-Records Mgmt
- <http://www.archives.gov/records-mgmt/> (comprehensive records management website, with toolkit of best practice white papers, including on transitioning to enterprise electronic recordkeeping; also FAQs on many subjects, including scanning documents, instant messaging, wikis)
- www.thesedonaconference.org (Sedona Guidance and Sedona Principles, 2d edition white papers, plus many other commentaries and practice guides)

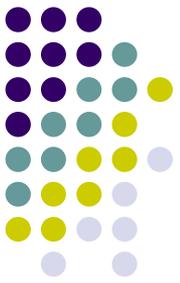


*The Sedona Principles:
Best Practices Recommendations & Principles for
Addressing Electronic Document Production*

(Second edition, June 2007)

*The Sedona Guidelines:
Best Practices Guidelines & Commentary for
Managing Information and Records in the
Electronic Age*

(Sept. 2005)



Questions?

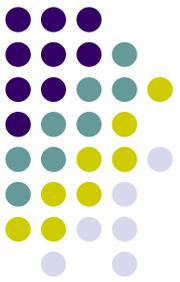
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Speaker Bio

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Jason Baron serves as Director of Litigation for the National Archives and Records Administration, and is a frequent lecturer and author on e-records and e-discovery topics. Between 1988 and 1999, Mr. Baron held successive positions as trial attorney and senior counsel in the Civil Division of the Justice Department, where he litigated cases involving White House e-mail. He serves as NARA's representative to The Sedona Conference®, where he is Co-Chair of the Sedona Conference® Search and Retrieval Sciences Team and Editor-in-Chief of the Sedona *Best Practices Commentary On the Use of Search and Information Retrieval Methods in E-Discovery*. He also recently has co-authored a law review article entitled "Information Inflation: Can The Legal System Adapt?," 13 RICH. J.L. & TECH. 10 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf>. Mr. Baron serves on the Georgetown U. Law Center Advanced E-discovery Institute advisory board, is an Adjunct Professor at the U. of Maryland, and currently coordinates the NIST TREC Legal Track, a multi-year international research project on text retrieval methods.