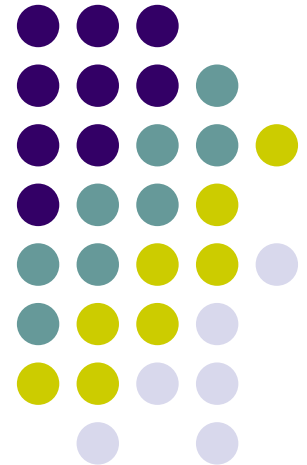


# Panel: The Challenge of Electronic Records in the Digital Age

## E-Discovery Battles Won and Lost: A Federal Perspective on What CIOs Need To Know

**NASCIO 2007 Annual Conference  
Tucson AZ**

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



# Managing E-Haystacks: A Big Challenge





# Overview

- **“ESI” and The New Federal Rules of Civil Procedure**
- **Challenges in Litigation**
- **Cautionary Tales**
- **Best Practices**
- **Hot Topics**
- **Additional Resources**

# The Statutory + Oversight Environment Feds Work In

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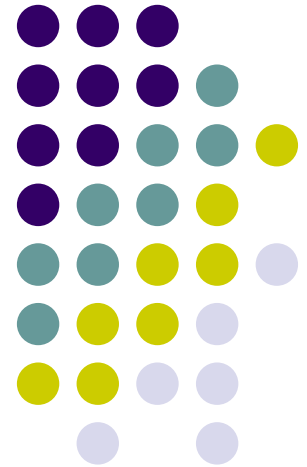
FRA FOIA Privacy Act GPEA

GPRA E-Gov Act

ITRMA (Clinger-Cohen)

PDD-63 (Critical Infrastructure  
Protection)

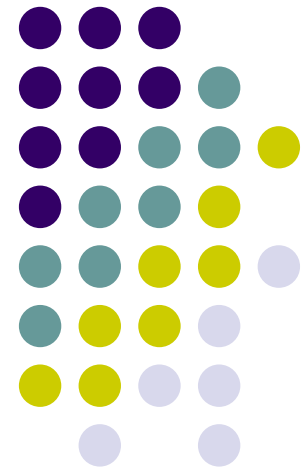
OMB GAO IGs Congress



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

## “Electronically stored information”:

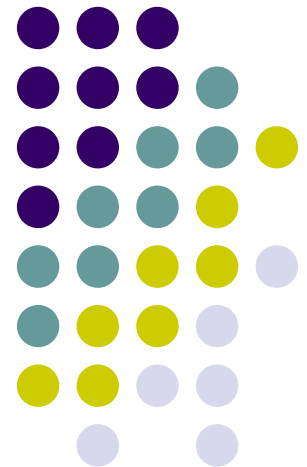
*-The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI...A common example [is] email ... The rule ... [is intended] to encompass future developments in computer technology. --Advisory Committee Notes to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



# Common Forms of ESI

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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



# Common Sources of ESI

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

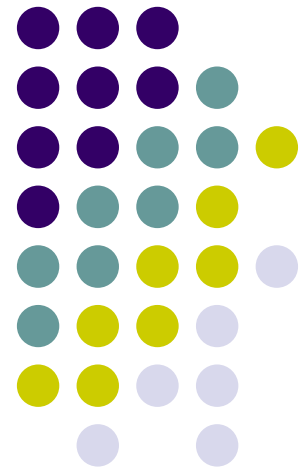
DVDs, CD ROMs, floppy disks

Laptops

Backup tapes

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

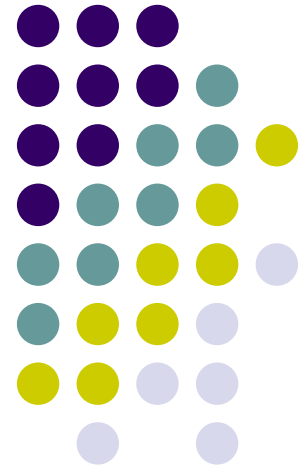
Third party storage



# The Supreme Court on Record Retention

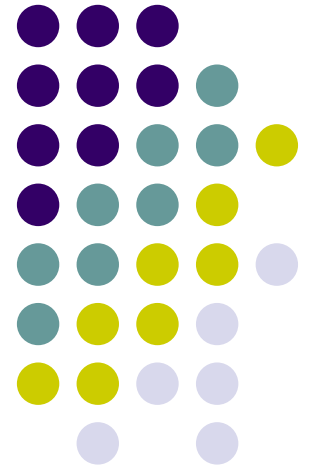
**“Document retention policies,’ which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business \* \* \* It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy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

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



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

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

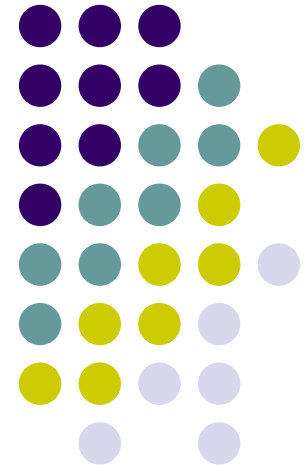


# Selected Changes to the Federal Rules of Civil Procedure: Discussing ESI at the Rule 26(f) Initial “Meet and Confer” and at the Rule 16(b) Pre-Trial Conference

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:

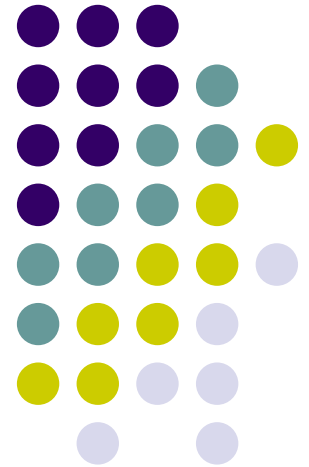
- + Scope of ESI holdings
- + Preservation issues
- + Formatting issues
- + Access issues

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



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

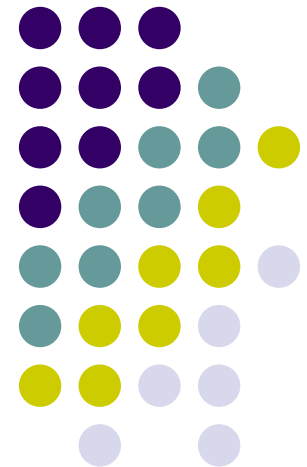
- Rule 26(b)(2)(B) – Parties need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably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



# Selected Changes to the Federal Rules of Civil Procedure: Accommodation for Routine Deletion of ESI

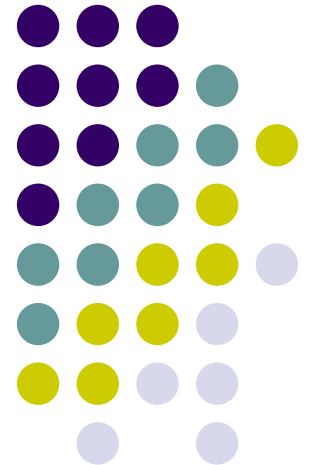
- Rule 37(f): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

-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.



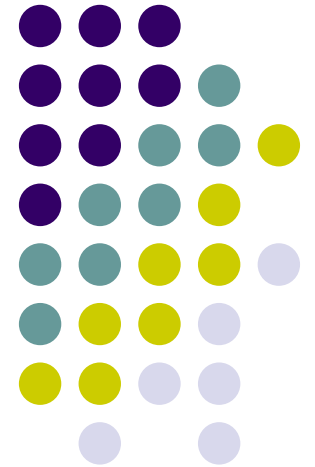
# What Can Go Wrong?

- 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



# Cautionary Tales

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# Armstrong v. EOP (1989)

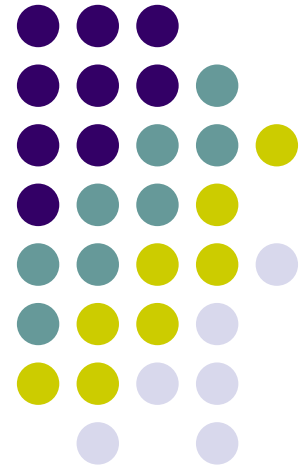
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The Crisis: Last minute TRO at end of Reagan Administration start of 7+ years of litigation

The Result: Injunctions, restoration of backups at huge expense, plus WH email archiving

Takeaways:

- recognized importance of managing e-mail
- WH email archiving with record tagging
- importance of metadata
- legacy issue of backup tapes



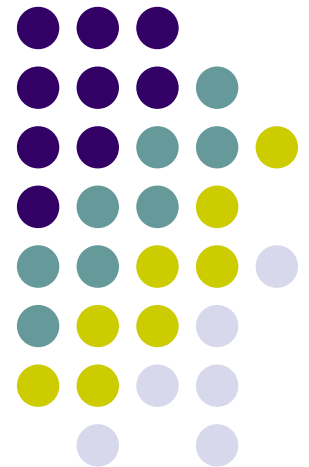
# Public Citizen v Carlin (1998)

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The Crisis: Threat of “no delete” rule applied government-wide while thousands of records schedules reviewed

The Result: GRS 20 upheld on appeal

Takeaway: GRS 20 & 24 now allow email and other forms of ESI to be deleted and/or recycled assuming recordkeeping obligations are otherwise met



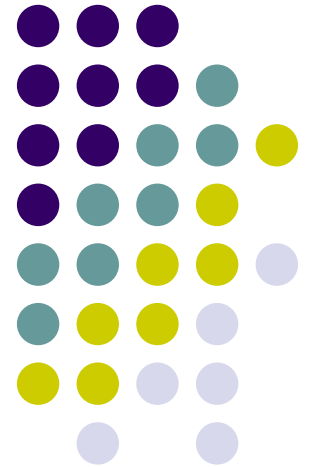
# Alexander v. FBI (2000)

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The Crisis: Missing WH email due to technical issues with email archiving

The Result: Huge restoration project for EOP backup tapes + GAO investigation

Takeaway: QC measures a must

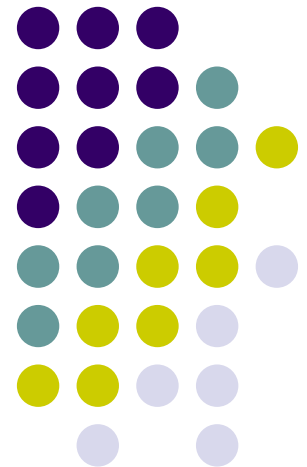


# Landmark Legal Foundation v. EPA (2003)

The crisis: contempt & sanctions motion filed in FOIA lawsuit after erasure of backups and deletion of email occurred post-injunction to preserve documents

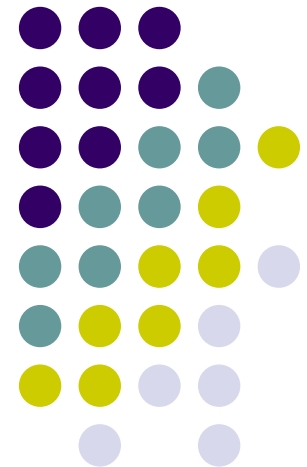
The result: motion granted

Takeaways: primacy of need for good communication channels between IT & legal



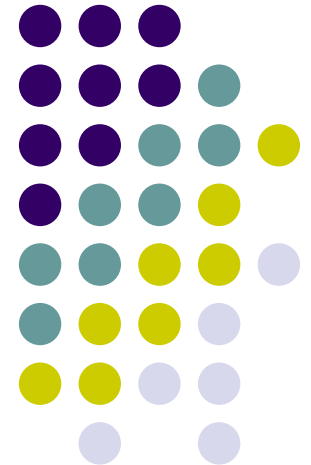
# Latest cautionary case-law...

*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)



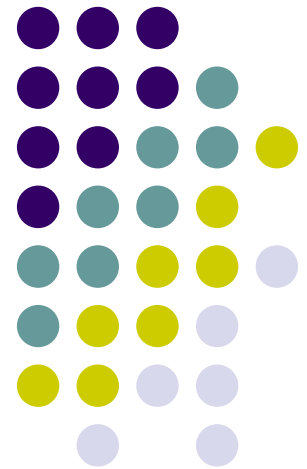
# Best practices at the E-records/E-discovery nexus

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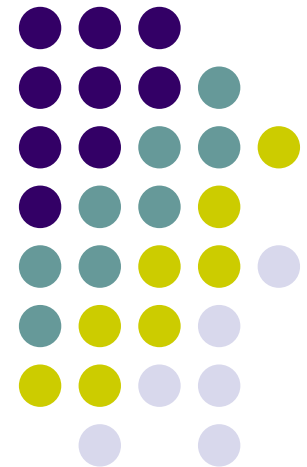
# The Intersection of the Federal Records Act and E-Discovery

- + As a baseline, the FRA already requires appropriate preservation of all electronically stored information which falls within the federal record definition (44 USC 3301)
- + Agencies must anticipate demands for preservation of evidence in litigation and compliance/oversight settings that go beyond baseline record retention requirements



# Foundational elements of recordkeeping in federal government

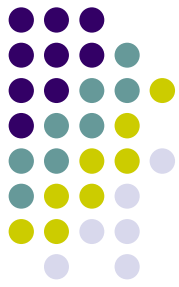
- + Agency file plans and agency records schedules
  - + Appraisal decisions signed off by Archivist on what constitute permanent records (eventually accessioned into NARA), and what constitute temporary records (stored by agencies during active use and then at offsite federal or other record centers 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)



# Lifespan of Federal Records



- The definition of what constitutes a federal record (44 USC 3301) allows for tremendous flexibility in what is considered to be “record” material, spanning from ephemeral records (retained for hours/days) thru to short term temporary (weeks/months), long term temporary (years or decades) to permanent records (forever)
- Problem: matching up the retention span of various e-records with the working life of information technology



# Transitory Email Reg

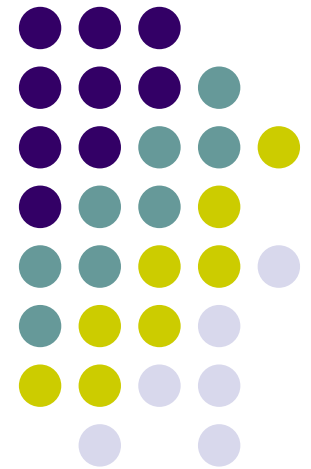
- NARA final regulations published in the Federal Register on February 21, 2006 (71 F.R. 8806), modifying 36 CFR 1234.24
- Email records appropriate for preservation for less than 180 days may be managed on live email systems and allowed to be deleted as part of automatic processes, without a user further needing to print out or electronically archive.
- Special legal or compliance obligations may require that additional preservation actions taken

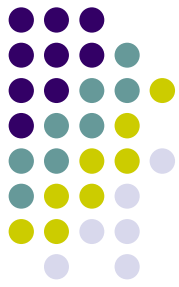
# Backup tapes

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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

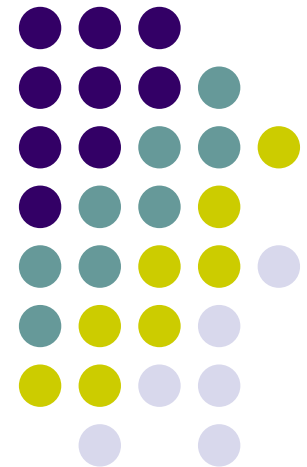


# Impact of Technology on E-Records Management: Snapshot 2007

- **A universe of proprietary products exists in the marketplace: document management and RMAs**
- **DoD 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***

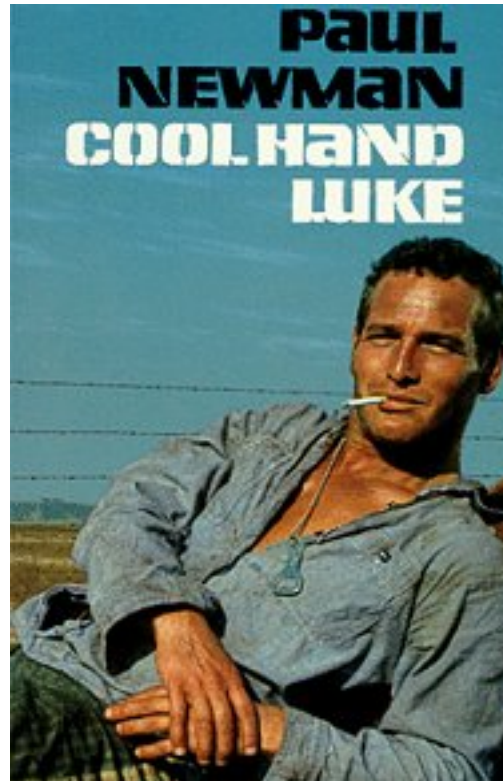
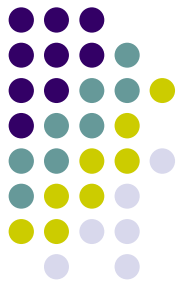
# What do the new Federal Rules mean for agency management of federal records?

- + 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
- + Federal 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

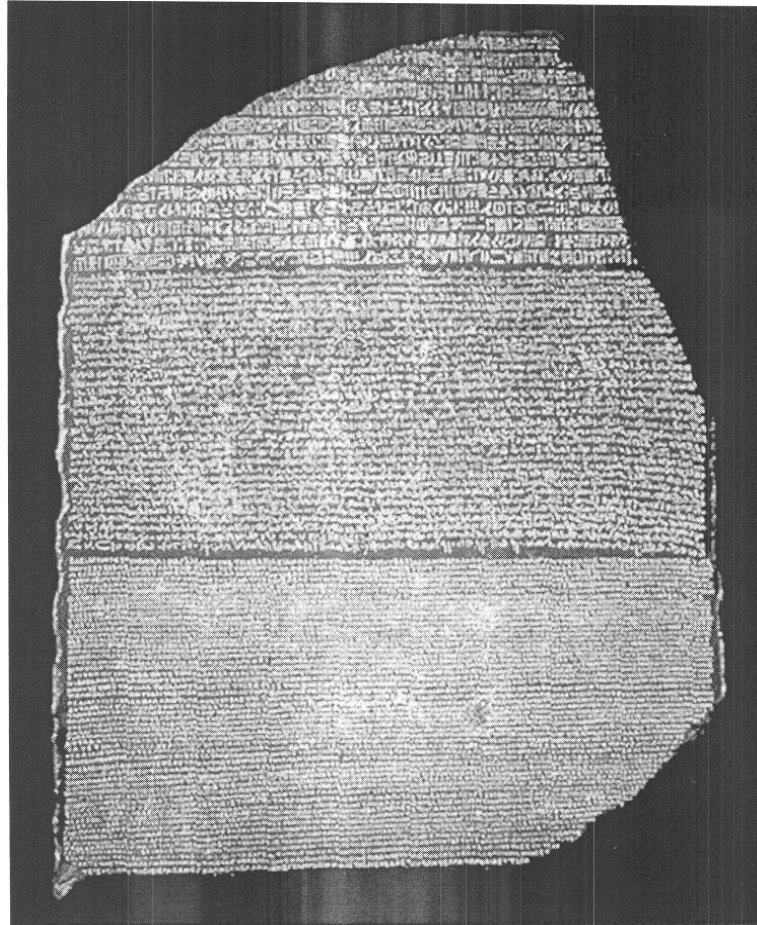


# *Zubulake V:*

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



# 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).**

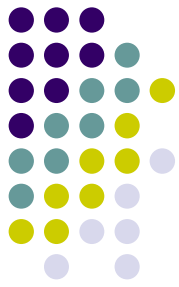
# What's an Agency to do?

## 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



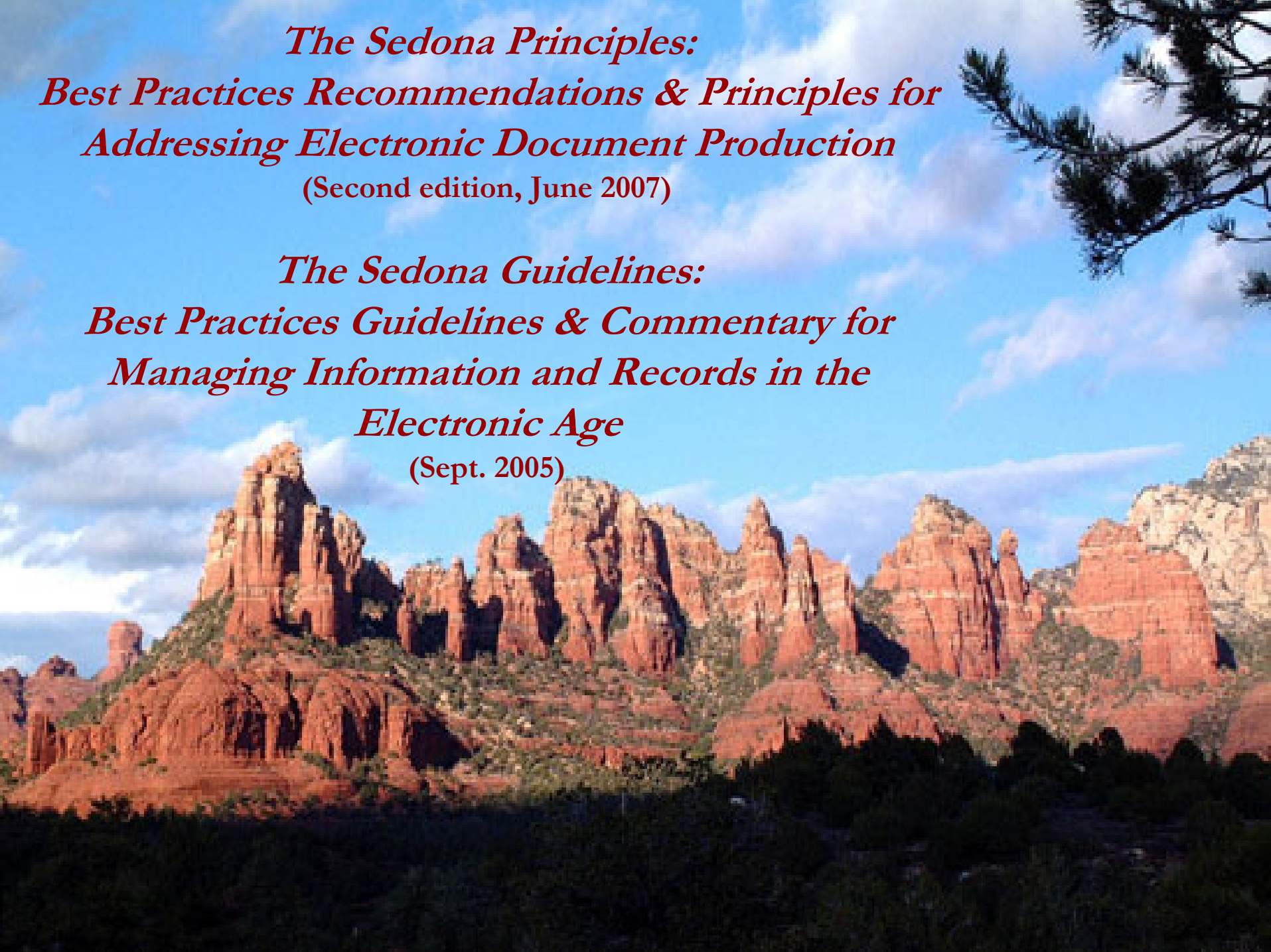
- Finding responsive needles in E-haystacks: the problems with keywords
- Maximizing recall of responsive docs
- Weeding out false positives
- Evaluating competing search products in the marketplace against some objective standard lawyers will embrace

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/article11.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](http://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)



# Speaker Bio

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**email: [jason.baron@nara.gov](mailto:jason.baron@nara.gov)**

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.