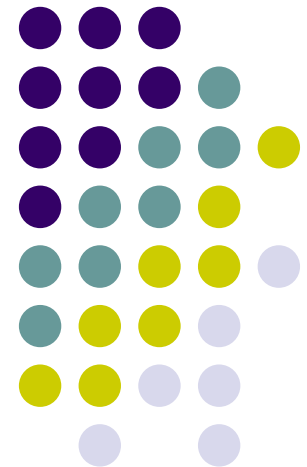


The E-Records/E-Discovery Connection: What Public Sector Agencies Need to Know

New Mexico Digital Preservation Conference—Dig In
NARA/Denver Region Pre-Conference Workshop
June 4, 2008

Jason R. Baron
Director of Litigation
Office of General Counsel
National Archives and Records Administration



Overview



- The Federal Records Act in the 21st Century
- ESI-related Dec. 2006 Amendments to the Federal Rules of Civil Procedure
- Focus on Preservation orders & legal holds
- A Word About Search and Retrieval
- Additional Sources

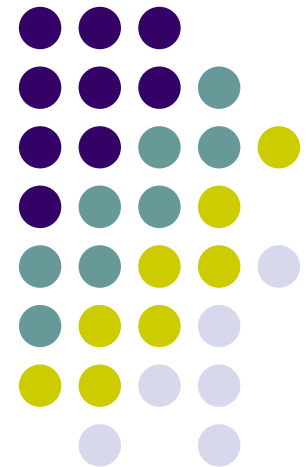
Managing E-Haystacks: A Big Challenge



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)



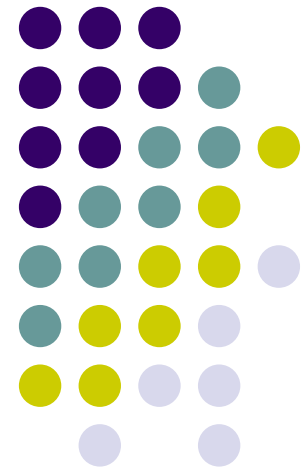
Definition of federal record under 44 USC 3301

...all books, papers, maps, photographs, *machine readable materials*, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and *preserved or appropriate for preservation* by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them. (Italics added.)

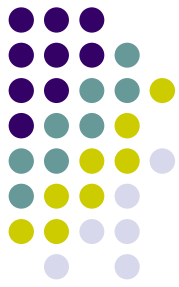


Foundational elements of recordkeeping in government

- + 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
 - + Unscheduled records cannot be disposed of until such time as they have been scheduled
 - + General Records Schedules for admin. records
- See 44 USC 3303, 3303a(a), (d)



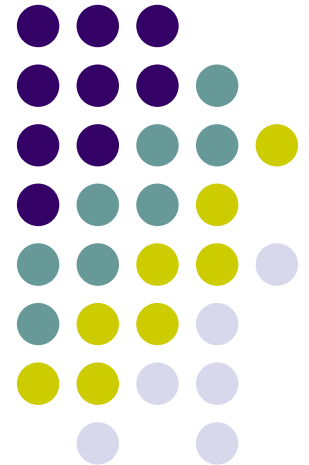
Lifespan of Federal Records



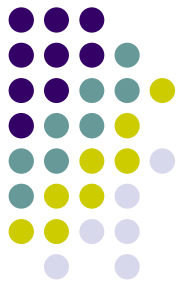
- The definition of what constitutes a federal record (44 USC 3301) allows for tremendous flexibility in what is considered to be “record” material, spanning from ephemeral records (retained for hours/days) thru to short term temporary (weeks/months), long term temporary (years or decades) to permanent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

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

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



Fast Forward to 21st Century E-Records in Government

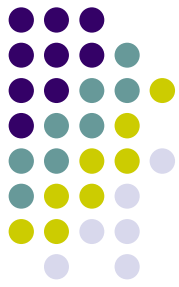


- E-mail with word processing attachments
 - Integrated with Voice Mail and VOIP
 - Electronic Calendars
 - Instant and Text Messaging
- Web portals, blogs & wikis, RSS feeds
 - Videoconferencing & Webcasting
 - Structured databases
 - Flash drives & new storage devices
- Remote PDAs, Blackberrys, etc. etc. etc.

Email Issues Addressed in *Armstrong v EOP* & GRS 20 Cases



- Email messages can be federal records under 44 USC 3301
- Agencies must manage the unique “electronic” email record, as it is only a “kissing cousin” of a hard-copy printout
- General schedule 20 allows for deletion of electronic versions of email on the desktop provided recordkeeping copy kept in either paper or electronic form



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.



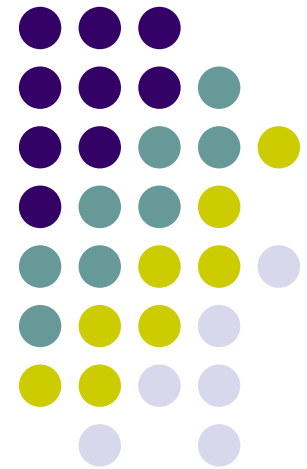
Hot topic: Metadata

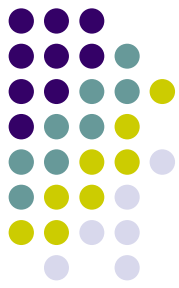
- What is it?
 - Email header information (possibly hidden)
 - Proprietary features of word processing (e.g. summary fields)
 - Embedded & shadow data
 - Deleted keystrokes
 - Tracking info
 - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: inadvertent production

Hot topic: 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)

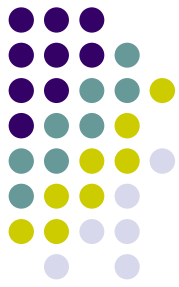




Impact of Technology on E-Records Management: Snapshot 2008

- **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***

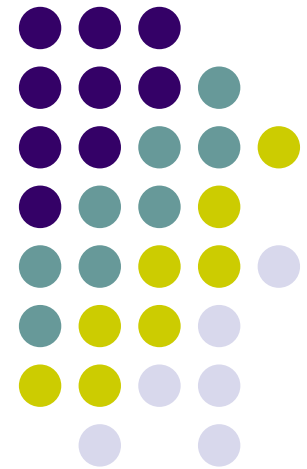
Hot topic: Electronic Archiving



- 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

The Intersection of the Federal Records Act and E-Discovery

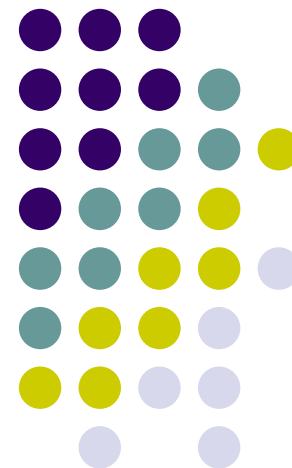
- + As a baseline, the FRA already requires appropriate preservation of all electronically stored information which falls within the federal record definition (44 USC 3301)
- + The existence of a valid record retention policy is a factor used by courts in considering whether to impose sanctions when hearing allegations of destruction of evidence



Selected Changes to the Federal Rules of Civil Procedure: Definition of ESI

-A new term of art: “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

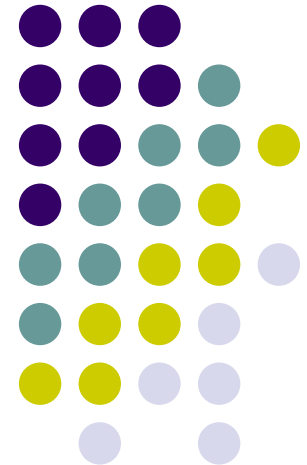


Selected Changes to the Federal Rules of Civil Procedure: Discussing ESI at the Rule 26(f) Initial “Meet and Confer” and at the Rule 16(b) Pre-Trial Conference

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:

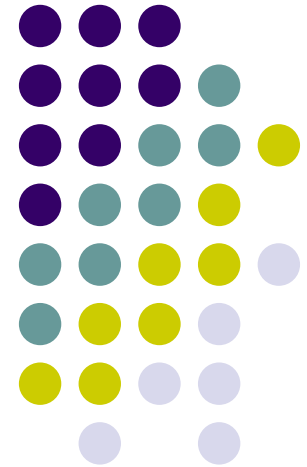
- + Scope of ESI holdings
- + Preservation issues
- + Formatting issues
- + Access issues

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”

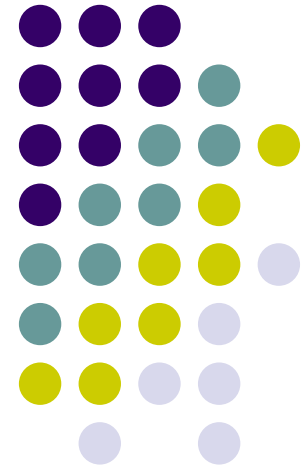
- Rule 26(b)(2)(B) – Parties need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably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



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

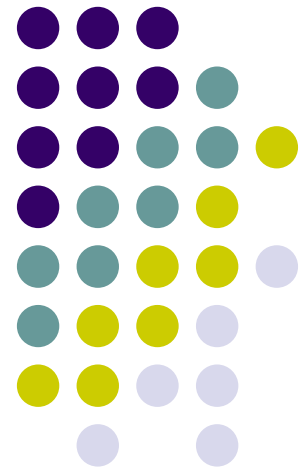
- Rule 37(f): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

-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 does this mean for agency management of federal records?

- + Agencies will be confronting requests for initial disclosure of ESI on their electronic systems
- + Includes electronic mail, other networked applications, and databases maintained by an agency that are relevant to the particular action
- + Federal ESI may be subject to production in particular requested formats, with or without metadata
- + Important that key designated personnel know scope of their agency's holdings & retention of records under existing schedules, to serve as trusted reporters
- + What's good for goose, good for gander: an agency's affirmative requests of private parties should be tailored to the new rules



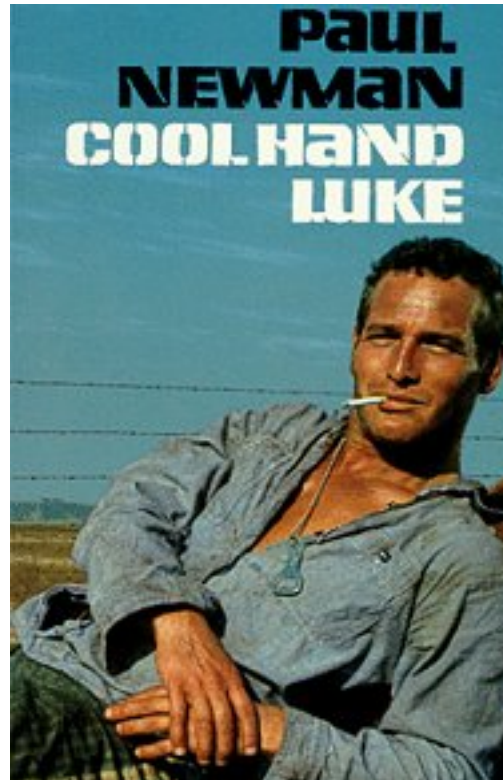
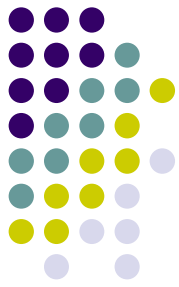


Preservation Order

- **"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).

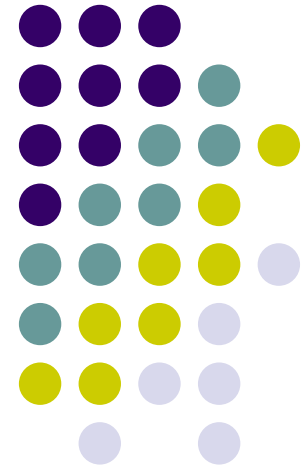
Zubulake V:

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



What Can Go Wrong?

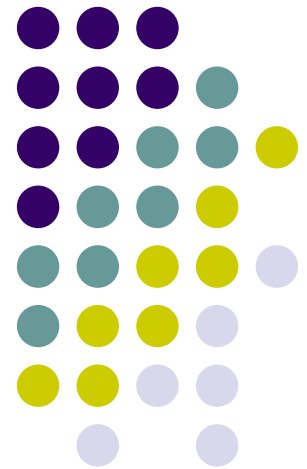
- Typically, courts look at “spoliation” of evidence -- an assessment of the loss of relevant evidence and the identification of who, if anyone, should bear a consequence, as well as what that consequence should be.
- Monetary Sanctions
- Exclusion of Evidence
- Adverse Inference Instruction
- Default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



Two Cautionary Tales ...

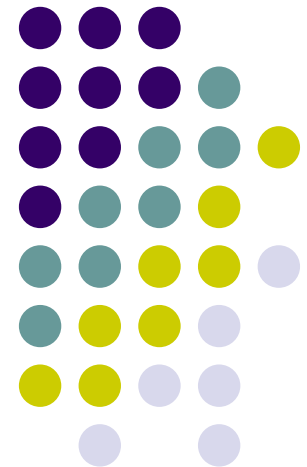
Qualcomm Inc. v. Broadcom Corp., 2007 WL 2296441 (S.D. Cal. Aug. 6, 2007) (opinion recommending sanctions, involving underlying failure of a party to disclose 200,000 emails prior to trial)

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)

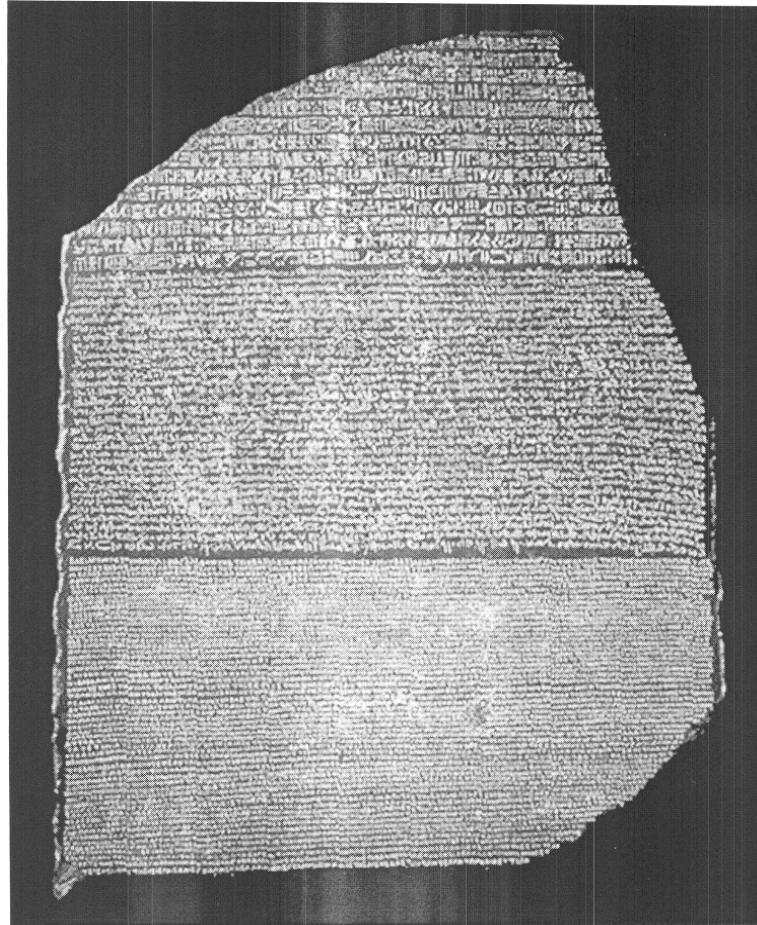


A Special Word about EEO & MSPB Actions

- + Leading edge of case law, e.g., *Zubulake V*
- + Ephemeral “gotcha” email
- + Best practice: agency instructions to ADOs & responsible management officials at or before formal admin complaint: preserve *all* your electronic records



Rosetta Stone Approach



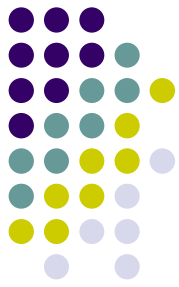
What's an Agency Lawyer to Do?

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 for your Agency's records (and consider 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 and records officers
- * Formulating explicit e-records guidance on what constitute records, and including holds guidance
- * Providing training on FRA and e-discovery obligations

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 The Sedona Conference® Best Practices Commentary on The Use of Search and Information Retrieval Methods in E-Discovery (Aug. 2007), <http://www.thesedonaconference.org>

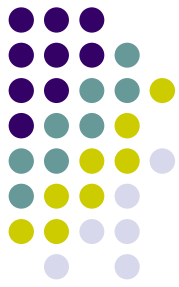
Judge Facciola writing for the U.S. District Court for the District of Columbia



“Whether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. See George L. Paul & Jason R. Baron, [*Information Inflation: Can the Legal System Adapt?*](#), 13 RICH. J.L. & TECH.. 10 (2007) * * * Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”

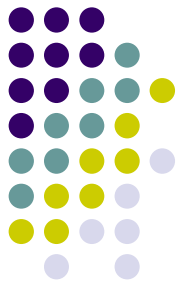
-- ***U.S. v. O'Keefe***, 537 F.Supp.2d 14, 24 D.D.C. 2008).

Judge Grimm writing for the U.S. District Court for the District of Maryland

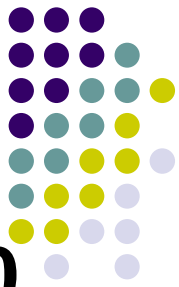


“[W]hile it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying on such searches for privilege review.” ***Victor Stanley, Inc. v. Creative Pipe, Inc.***, --- F.Supp.2d ---, 2008 WL 2221841, * 3 (D. Md. May 29, 2008); *see id.*, *text accompanying nn. 9 & 10* (citing to Sedona Search Commentary & TREC Legal Track research project)

A Federal Lawyer's Idiosyncratic List of Top 10 Federal Records-related Cases



- **10. Arthur Andersen , LLP v. U.S., 544 U.S. 696, 125 S. Ct. 2129 (2005)**
- **9. Zubulake v. UBS Warburg, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*)**
- **8. McPeek v Ashcroft, 202 F.R.D. 31 (D.D.C. 2001), later opinion, 212 F.R.D. 33 (D.D.C. 2003)**
- **7. Pueblo of Laguna v. US, 60 Fed. Cl. 133 (Fed. Cir. 2004).**



Top 10 Cases (Con't)

- 6. **Landmark v. EPA II, 272 F.Supp.2d 70 (D.D.C. 2003)**
- 5. **U.S. v. Philip Morris, 2004 WL 1627252 (D.D.C. 2004)**
- 4. **Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) (citing prior opinions)**
- 3. **Public Citizen v. Carlin, 184 F.3d 900 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000)**
- 2. **Armstrong v. EOP, 1 F.3d 1274 (D.C. Cir. 1993)**
- 1. **The Next Case To Be Filed Against Your Agency**

NARA's New ERA: Electronic Records Archives



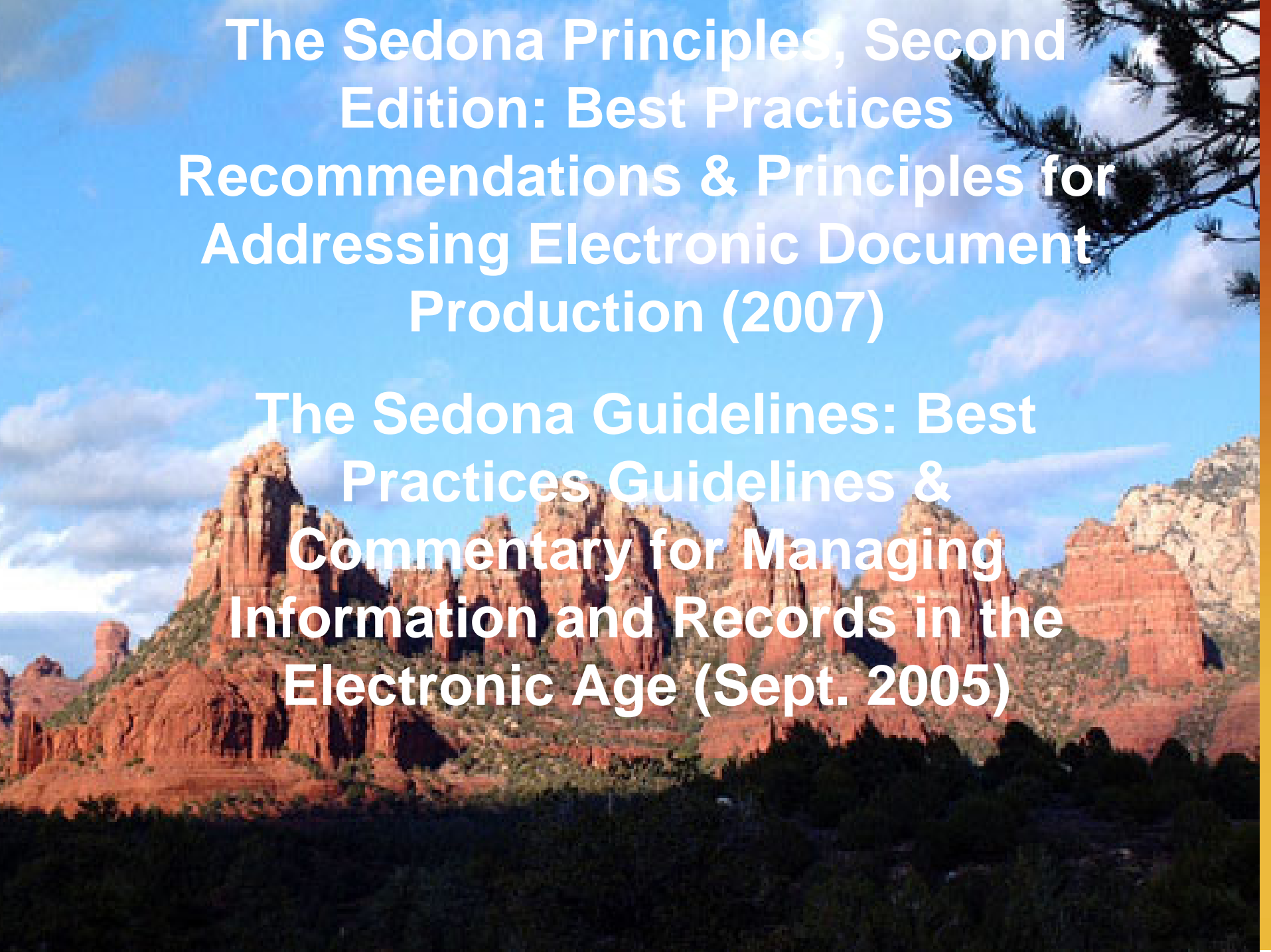
- NARA's vision for the Electronic Records Archives:
 - *The ERA will authenticate, preserve and provide access to any kind of electronic record, free from dependency on any specific hardware or software, enabling NARA to carry out its mission into the future*

http://www.archives.gov/electronic_records_archives/index.html

NARA's E-Records Challenge Under ERA



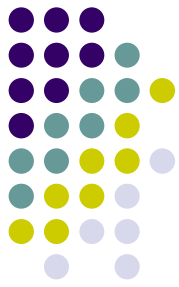
- Take any type of record
- Created using any type of application
- On any computing platform
- From any entity in the Federal government, and
- Provide e-discovery and delivery to anyone with a legal right to access
- Now and for the life of the republic.



**The Sedona Principles, Second
Edition: Best Practices
Recommendations & Principles for
Addressing Electronic Document
Production (2007)**

**The Sedona Guidelines: Best
Practices Guidelines &
Commentary for Managing
Information and Records in the
Electronic Age (Sept. 2005)**

Additional 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 electronic recordkeeping; FAQs on many subjects, including scanning documents, instant messaging, wikis)
- **DoD 5015.2 -- www.archives.gov/records-mgmt/resources**
- **www.thesedonaconference.org** (Sedona Guidance and Sedona Principles white papers)



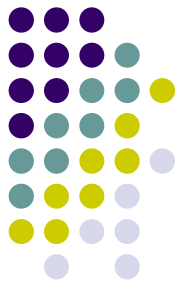
- Jason R. Baron
Director of Litigation
Office of General Counsel
National Archives and Records
Administration

8601 Adelphi Road Suite 3110

College Park, MD 20740

tel. (301) 837-1499

Email: jason.baron@nara.gov



Speaker Bio

Jason R. Baron, Director of Litigation, NARA

tel. (301) 837-1499

email: 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.