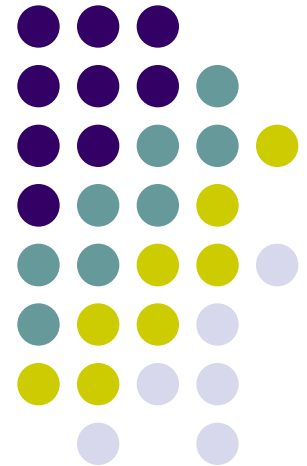


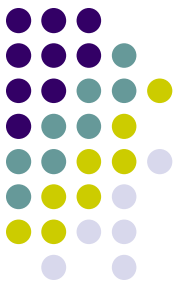
# The E-Records/E-Discovery Connection: Selected Hot Topics & Case Law (U.S., Canada, U.K.)

Colloquium Presentation  
School of Library, Archival & Information Studies  
The University of British Columbia  
Vancouver, BC, Canada  
February 12, 2009

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



# Overview



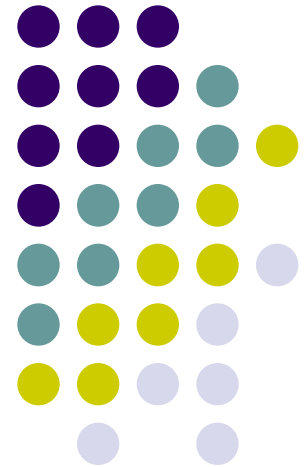
- Public Records Laws in the 21<sup>st</sup> Century
- The Importance of Email (Lessons from the Federal Sector)
- Records Retention Schedule Anxiety (And Possible Cures)
- Brave New World of ESI: Emerging Issues Under the Dec. 2006 Amendments to the Federal Rules of Civil Procedure
- Focus on Preservation orders & legal holds

# The U.S. Supreme Court on Record Retention

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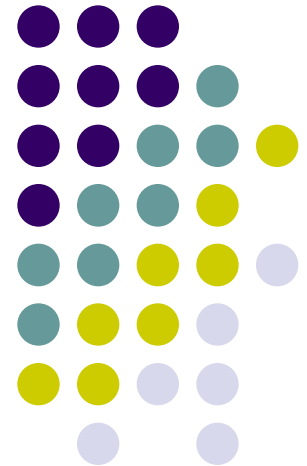
**“‘Document retention policies,’ which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business \* \* \* It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy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

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



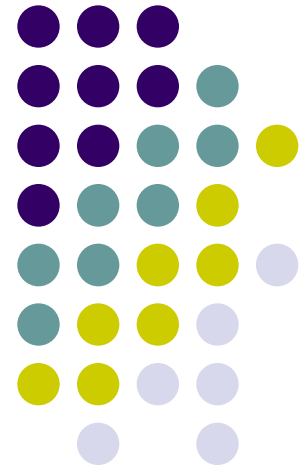
# Foundational elements of recordkeeping in government: the federal experience

- + 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)

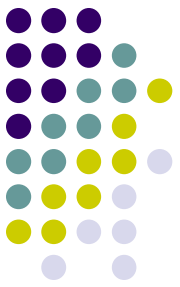


# Definition of federal record under 44 USC 3301

...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.)



# Lifespan of Federal Records

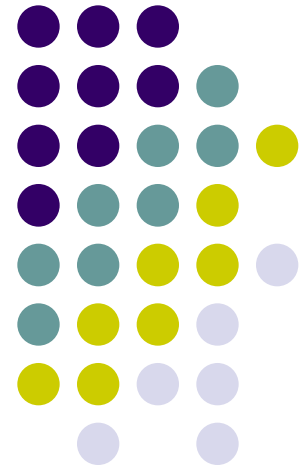


- The definition of what constitutes a federal record (44 USC 3301) allows for tremendous flexibility in what is considered to be “record” material, spanning from ephemeral records (retained for hours/days) thru to short term temporary (weeks/months), long term temporary (years or decades) to permanent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

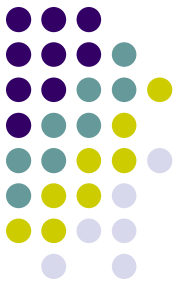
**“Digital information lasts forever, or five years – whichever comes first”**

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



# Fast Forward to 21<sup>st</sup> 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.



# The Original Email Case...

## How e-mail almost halted an inauguration

*Journalist makes a federal case out of preserving President Reagan's e-mail as government records*

BY CHRISTOPHER J. DODD  
GCS Staff

As Ronald Reagan spent his last night in the White House in January 1989, veteran journalist Scott Armstrong sat in a nearby federal courthouse. There, lawyers argued that Armstrong was preventing George Bush from moving in.

Armstrong had filed suit to preserve e-mail stored on White House systems, but Justice



In 1989, Scott Armstrong maintained that presidential e-mail, some concerning the Iran-Contra affair, should be saved.

Department lawyers said the messages had to be erased before the new president took office.

It was a crucial moment, Armstrong recalled recently. If the messages had been destroyed at that point, the essence of the case would have evaporated. Without the e-mail, some of which dealt with the Iran-Contra affair, the case was pointless, he said.

"The notion was that they had to destroy

this information in order to inaugurate a president of the United States," Armstrong said. "That night, they were going to destroy everything."

Barrington Parker, the judge who, within hours, would issue the initial but pivotal order barring Reagan administration officials from destroying the electronic files, responded with a "deep, bellowing laugh," Armstrong recalled.

But Justice lawyers continued to argue that the issue was similar to a landlord-tenant dispute. If the judge sided with Armstrong, it would be as if a tenant planned to move out but the court had ordered that the furniture be kept there and the new furnishings couldn't be moved in, the lawyers argued.

### Eve of destruction

That night, Parker issued a temporary restraining order preventing destruction of the e-mail and forced the two sides to reach an accommodation. The White House would copy the data and maintain it pending resolution of the case.

At the time, few would have expected that electronic documents would block an inauguration, but few observers then foresaw how pervasive the use of electronic documents and e-mail would become.

Now the case, *Armstrong vs. Executive Office of the President*, is almost wrapped up. U.S. District Court Judge Charles R. Richey has closed out the case in his court after his earlier finding that the White House e-mail had to be reviewed to determine whether to preserve it as a record.

However, one element of the case—whether the records of the National Security Council are agency records or presidential records—remains to be resolved in an appeals court. This determination would affect preservation of the NSC files and set the rules on public access, Armstrong said.

At the end of the eight-year court fight, there is little disagreement that the Armstrong case focused attention on the government's use and preservation of electronic documents.

"It has certainly focused attention on the

importance of e-mail," said Miriam Nisbet, special counsel for the Archivist of the United States. "There's nothing like a federal case to get your attention."

The National Archives and Records Administration in late August issued guidelines to agencies about how to deal with preserving e-mail as records. "This guidance was issued as part of an overall response to the Armstrong case," Nisbet said.

"But we certainly would have issued guidance on the management of electronic records," she said.

"That would have included the management of e-mail. It's hard to say what we would have done" if there hadn't been a suit.

"The very idea that electronic documents are records was formed upon the federal government by this case," said Michael Tankersley, a lawyer with the Public Citizen Litigation Group in Washington who has handled the Armstrong case.

### Changed position

But some observers suggest that the government's change in position is due in part to the case and in part to a change in the times.

"There has been an evolution in the use of e-mail. Because of that, there has been a consensus to have record-keeping guidance," said Jim Hastings, a NARA employee who educates other agencies' employees about electronic records management.

There has been a meeting of the minds regarding e-mail, Justice lawyer Jason R. Baron said recently. "In 1995, it is clearly the

case that there is just an explosion of use of e-mail in the federal government," he said. "It is clear that e-mail can be federal records."

Many involved with the Armstrong case see the admission that electronic messages can be records as a victory in itself.

On a basic level, Armstrong said the case has done what it set out to do: save Reagan and Bush administration documents.

Although still critical of the government's propensity to operate behind closed doors, he said the case has changed the "bizarre, Luddite" way the government had been dealing with information.

"They now understand that records are kept in electronic form," he said. "Form doesn't make any difference."

"It's hard to say what we would have done" if there had not been a suit, Nisbet said.



# Armstrong v. EOP (1989)

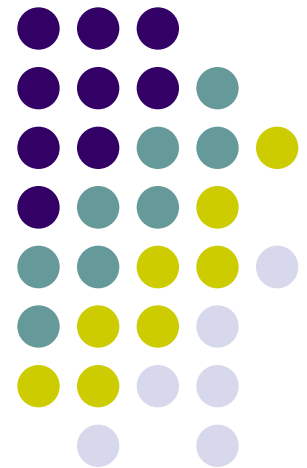
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The Crisis: Last minute TRO at end of Reagan Administration start of 7+ years of litigation

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



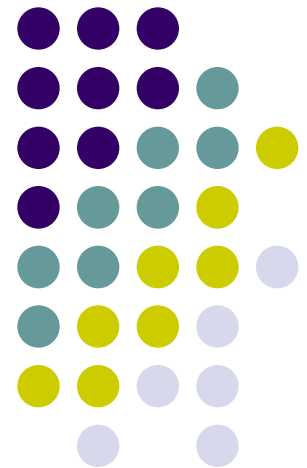
# Public Citizen v Carlin (1998)

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

The Result: General Record Schedule (GRS) 20 upheld on appeal

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



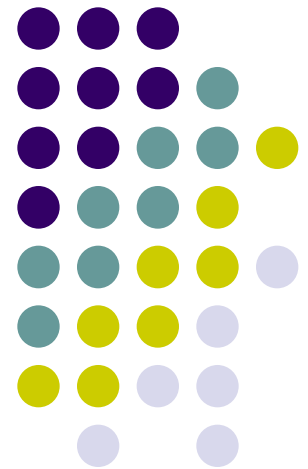
# Alexander v. FBI (2000)

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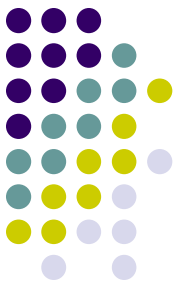
The Crisis: Missing WH email due to technical issues with email archiving

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

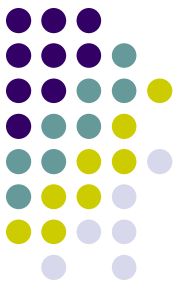
Takeaway: QC measures a must



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

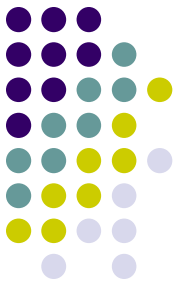


- Email messages can be federal records under 44 USC 3301
- Agencies must manage the unique “electronic” email record, as it is only a “kissing cousin” of a hard-copy printout
- General schedule 20 allows for deletion of electronic versions of email on the desktop provided recordkeeping copy kept in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

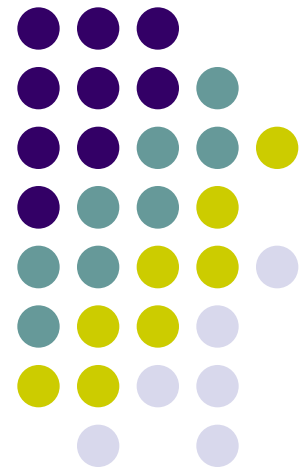
- What is it?
  - Email header information (possibly hidden)
  - Proprietary features of word processing (e.g. summary fields)
  - Embedded & shadow data
  - Deleted keystrokes
  - Tracking info
  - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: inadvertent production

# Hot topic: backup tapes

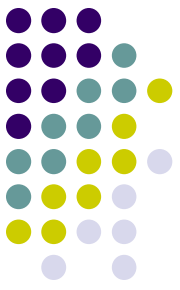
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General Record Schedule 24, Item 4 treats backups as temporary records that may be recycled in the ordinary course of business

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)



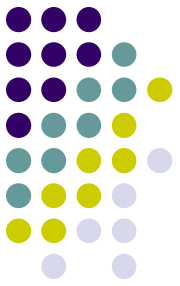




# Impact of Technology on E-Records Management: Snapshot 2008

- **A universe of proprietary products exists in the marketplace: document management and records management applications (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***

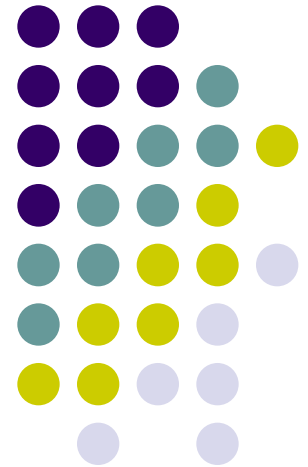
# Hot topic: Electronic Archiving



- 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
- NARA Bulletin 2008-5

# The Intersection of the Public Record Laws and E-Discovery

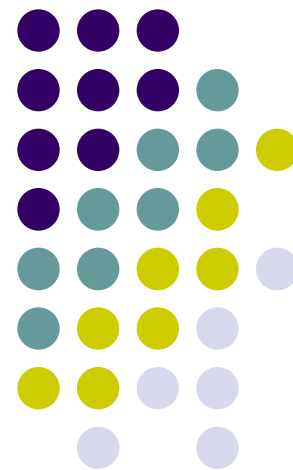
- + As a baseline, both federal and state statutes require appropriate preservation measures are taken for electronically stored information which falls within the public record definition
- + The existence of a valid record retention policy is a factor used by courts in considering whether to impose 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*

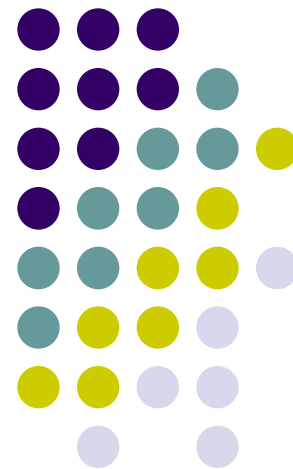


# Selected Changes to the Federal Rules of Civil Procedure: Discussing ESI at the Rule 26(f) Initial “Meet and Confer” and at the Rule 16(b) Pre-Trial Conference

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:

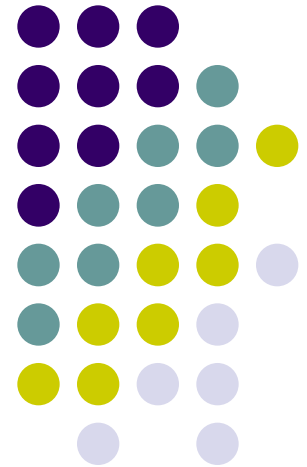
- + Scope of ESI holdings
- + Preservation issues
- + Formatting issues
- + Access issues

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”

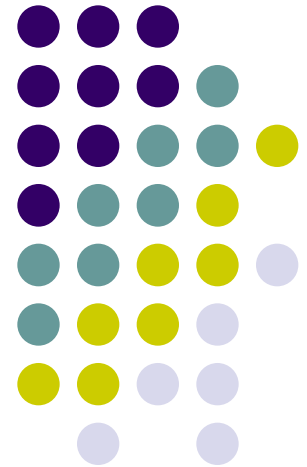
- Rule 26(b)(2)(B) – Parties need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably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



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

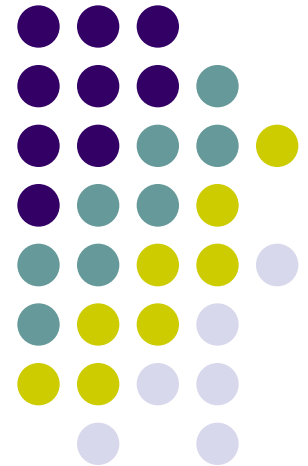
- Rule 37(f): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

-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.

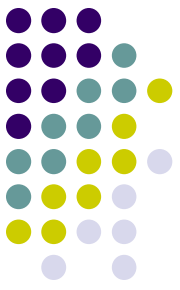


# What does this mean for agency management of public records?

- + 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
- + Public record 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





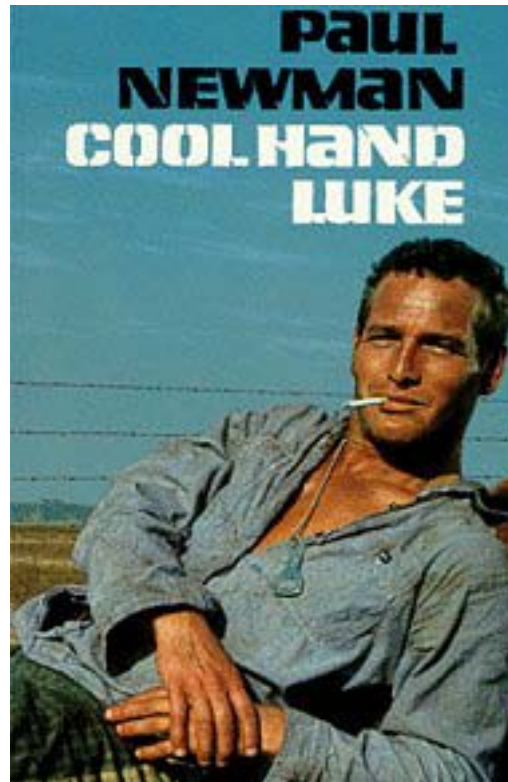
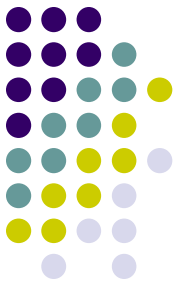


# Preservation Order

- **"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).**

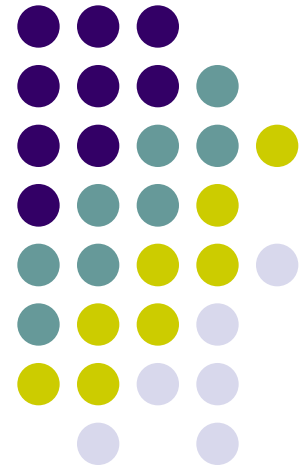
# *Zubulake V:*

“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

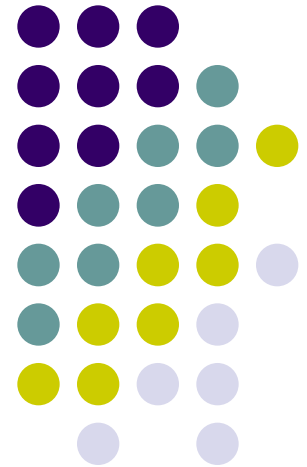


# Two Cautionary Tales ...

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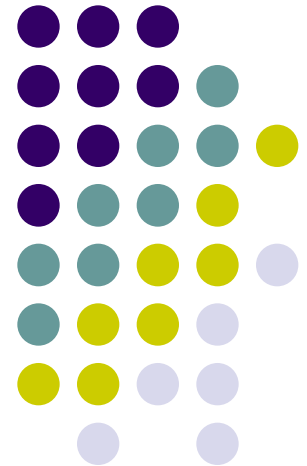
*Qualcomm Inc. v. Broadcom Corp.*, 2007 WL 2296441 (S.D. Cal. Aug. 6, 2007) (opinion recommending sanctions, involving underlying failure of a party to disclose 200,000 emails prior to trial)

*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)

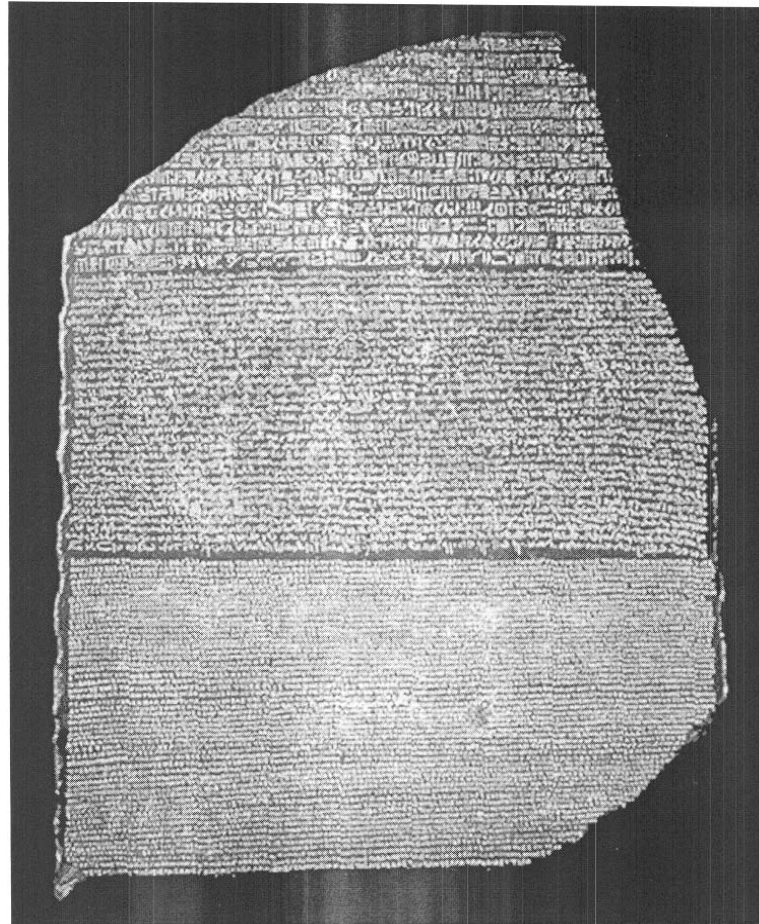
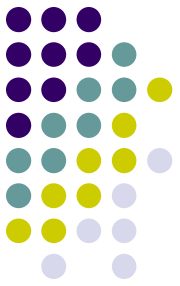


# Selected Case Law from Canada and U.K

- + case law involving email and backup tapes
- + case law involving keyword searching
- + The Sedona Conference® / The Sedona  
Canada Principles Addressing Ediscovery



# Rosetta Stone Approach



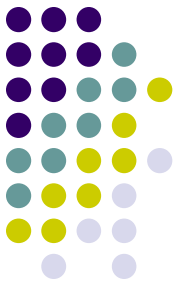
# What's an Agency Lawyer to Do?



## 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

# NARA's New ERA: Electronic Records Archives

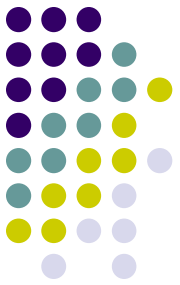


- NARA's vision for the Electronic Records Archives:
  - *The ERA will authenticate, preserve and provide access to any kind of electronic record, free from dependency on any specific hardware or software, enabling NARA to carry out its mission into the future*

[http://www.archives.gov/electronic\\_records\\_archives/index.html](http://www.archives.gov/electronic_records_archives/index.html)

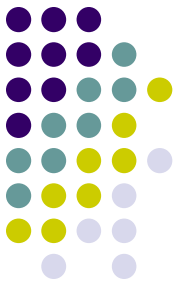


# NARA's E-Records Challenge Under ERA



- 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.





- Jason R. Baron  
Director of Litigation  
Office of General Counsel  
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