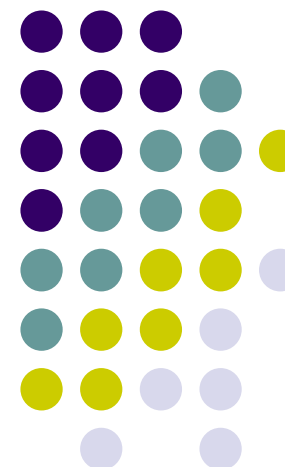


# Cutting Edge Issues in Information Governance: A Lawyer's Perspective

ARMA NOVA Chapter Meeting  
West Vienna, VA  
September 21, 2011

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



# A New Era of Government

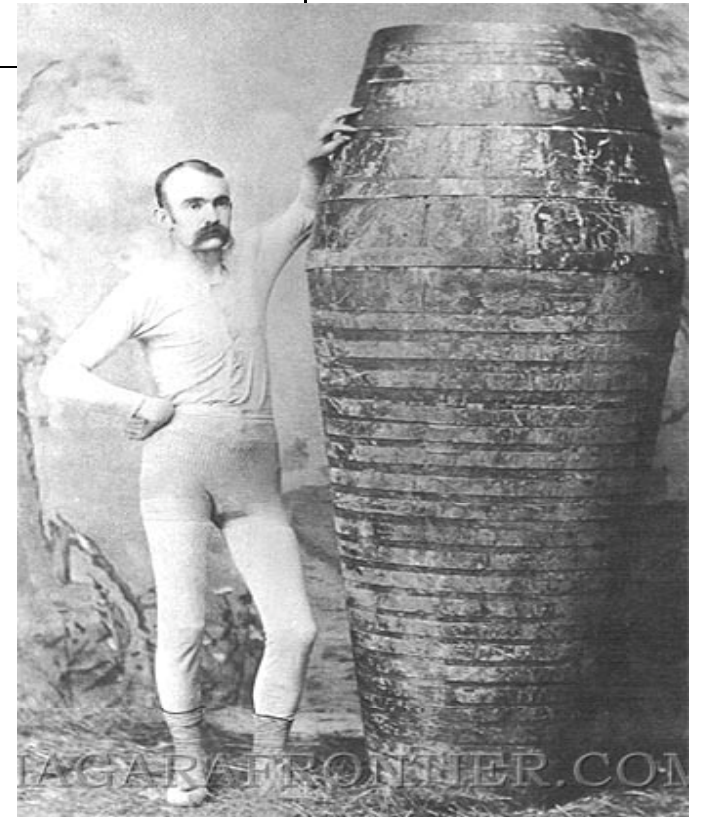
President Obama's Memorandum dated  
1/21/09 on Transparency and Open  
Government

[http://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment/](http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/)



....The ever increasing volume of ESI is a problem

**In a world of limited tools and resources.....**



LAGARATRONNER.COM



Hradcany Castle and Charles Bridge, Prague

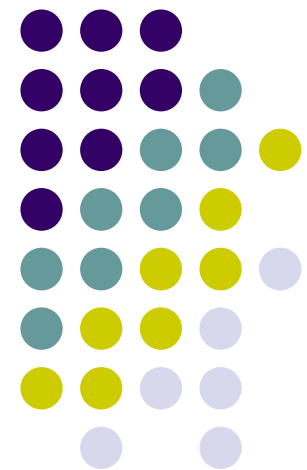
# Information Governance: definition

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*From Gartner:*

**Information governance** is “the specification of decision rights and an accountability framework to encourage desirable behavior in the valuation, creation, storage, use, archival and deletion of information. It includes the processes, roles, standards and metrics that ensure the effective and efficient use of information in enabling an organization to achieve its goals.”

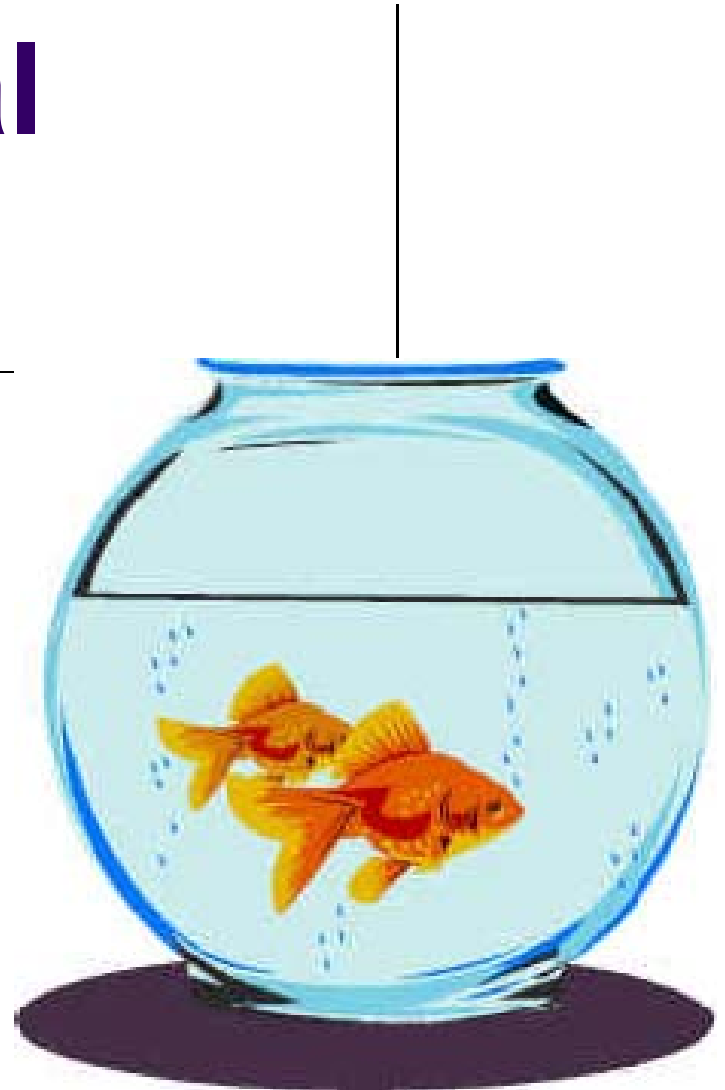
It is derived from a definition of IT governance which “may be defined as the processes that ensure effective and efficient use of IT in enabling an organization to achieve its goals.”



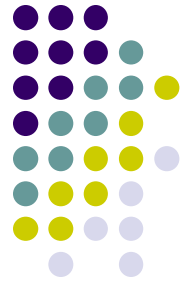
# Life in the Federal fishbowl

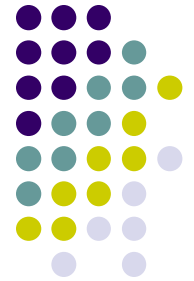
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FOIA  
Federal Records Act  
Privacy Act  
Federal Advisory Committee Act  
Government in the Sunshine Act  
E-Government Act of 2002  
Clinger-Cohen Act (formerly IT Mgmt Reform Act)  
Government Paperwork Elimination Act  
OMB Circular A-130  
Etc.



# E-Discovery: The New Reality





# The Litigation Minefield

- U.S. litigation increasingly demands the preservation of and access to all relevant documents, including in the form of “electronically stored information” or “ESI”
- Courts impose sanctions on parties for failing to preserve evidence under the “spoliation” doctrine
- Absent saving everything, often it is only with 20/20 hindsight that one can determine what *should* have been preserved in response to a lawsuit
- Recordkeeping solutions that rely on human judgment are prone to being second-guessed by litigants and judges.



Email is still  
the 800 lb.

---

gorilla of  
ediscovery

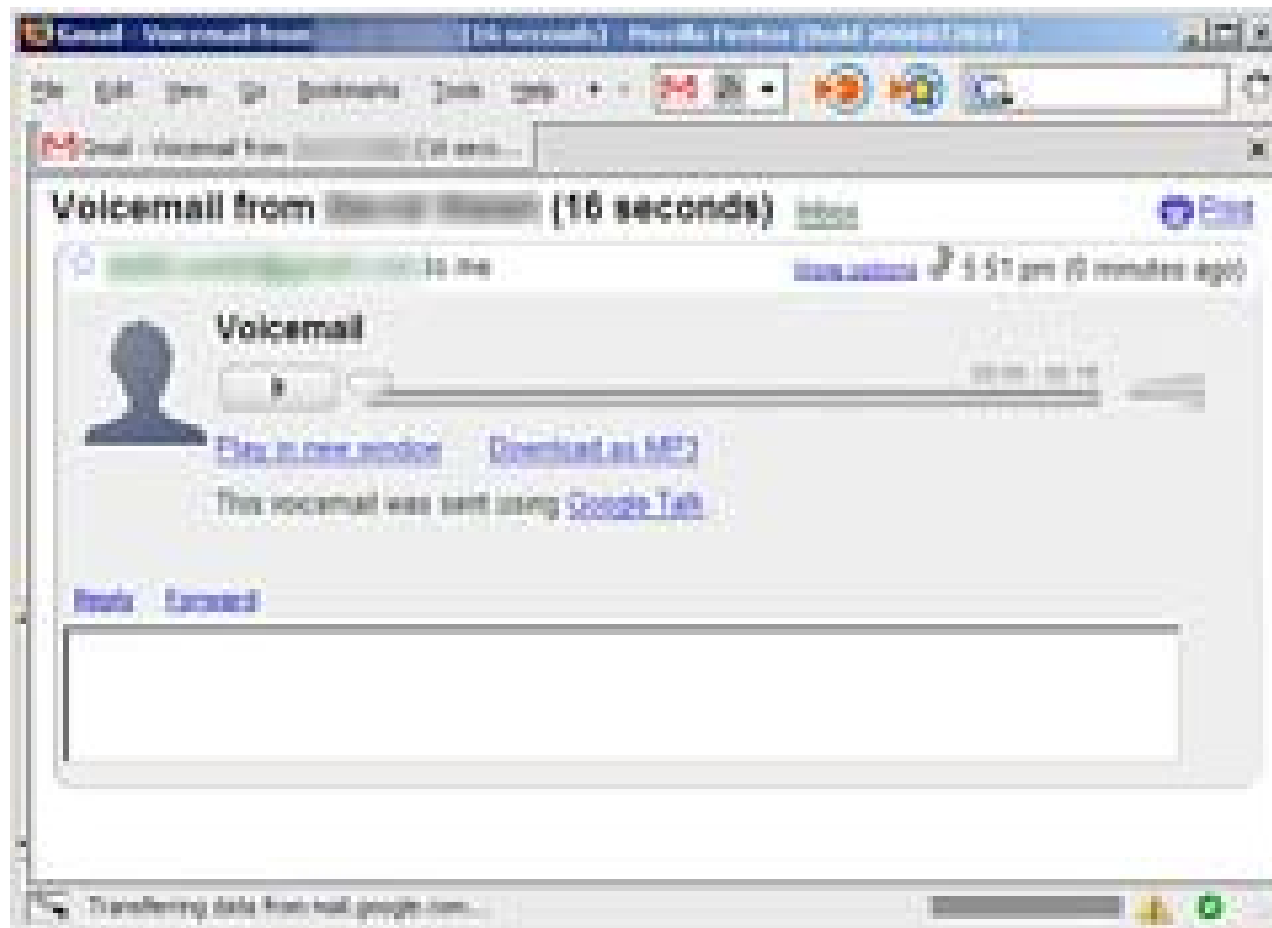
(see 36 CFR  
1236.22  
(2009))



# Beyond email: text messaging



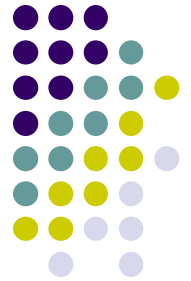
# Voice mail captured in “Unified Messaging Systems”



# Emergence of Web 2.0 Social Media



# The Future: Public Records in the Clouds?



# Cloud Computing Definition



- From **Wikipedia**: “Cloud computing is a style of computing in which dynamically scalable and often virtualized resources are provided as a service over the Internet. Users need not have knowledge of, expertise in, or control over the technology infrastructure in the "cloud" that supports them.

\* \* \*

The term *cloud* is used as a metaphor for the Internet, based on how the Internet is depicted in computer network diagrams and is an abstraction for the complex infrastructure it conceals.”

# Obama Administration commitment to cloud architecture

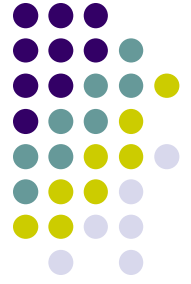


- Vivek Kundra, Chief Information Officer in the White House Office of Science and Technology, announces launch of Apps.gov:
  - [https://apps.gov/cloud/advantage/main/start\\_page.do](https://apps.gov/cloud/advantage/main/start_page.do)
  - With links to Business apps, Productivity apps, Social media apps, Cloud computing services
- Peter Orszag, OMB, Open Government Initiative Memorandum to Federal Agencies (Dec. 9, 2009)
  - <http://www.whitehouse.gov/open/documents/open-government-directive>



## Four Prior Recordkeeping “Paths”

- **Print to paper (General Records Schedule 20, Item 14)**
- **Backup tapes (GRS 24, Item 4)**
- **Online user-based foldering in proprietary live systems**
- **Electronic recordkeeping under DoD 5015.2 version 3**



# 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

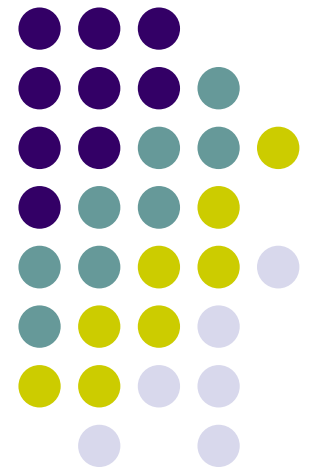
# Recent Cautionary Tales

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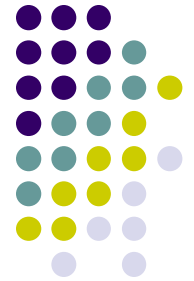
1) *In re Fannie Mae Litigation*, 552 F.3d 814 (D.C. Cir. 2009) (backup tapes)

2) *Aguilar v. ICE Division of US Dept of Homeland Security*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008) (metadata)

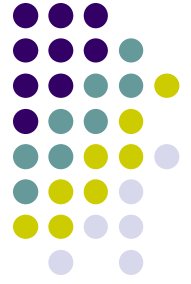
3) *NDLON v. U.S. ICE*, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (metadata) (opinion withdrawn by Judge Scheindlin)

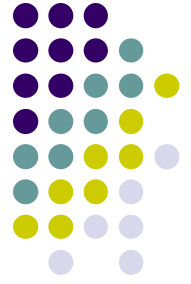


# The transactional toll of user-based recordkeeping schemes



**.... and the need for better,  
automated solutions ....**





# 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*
- NARA Bulletin 2008-05




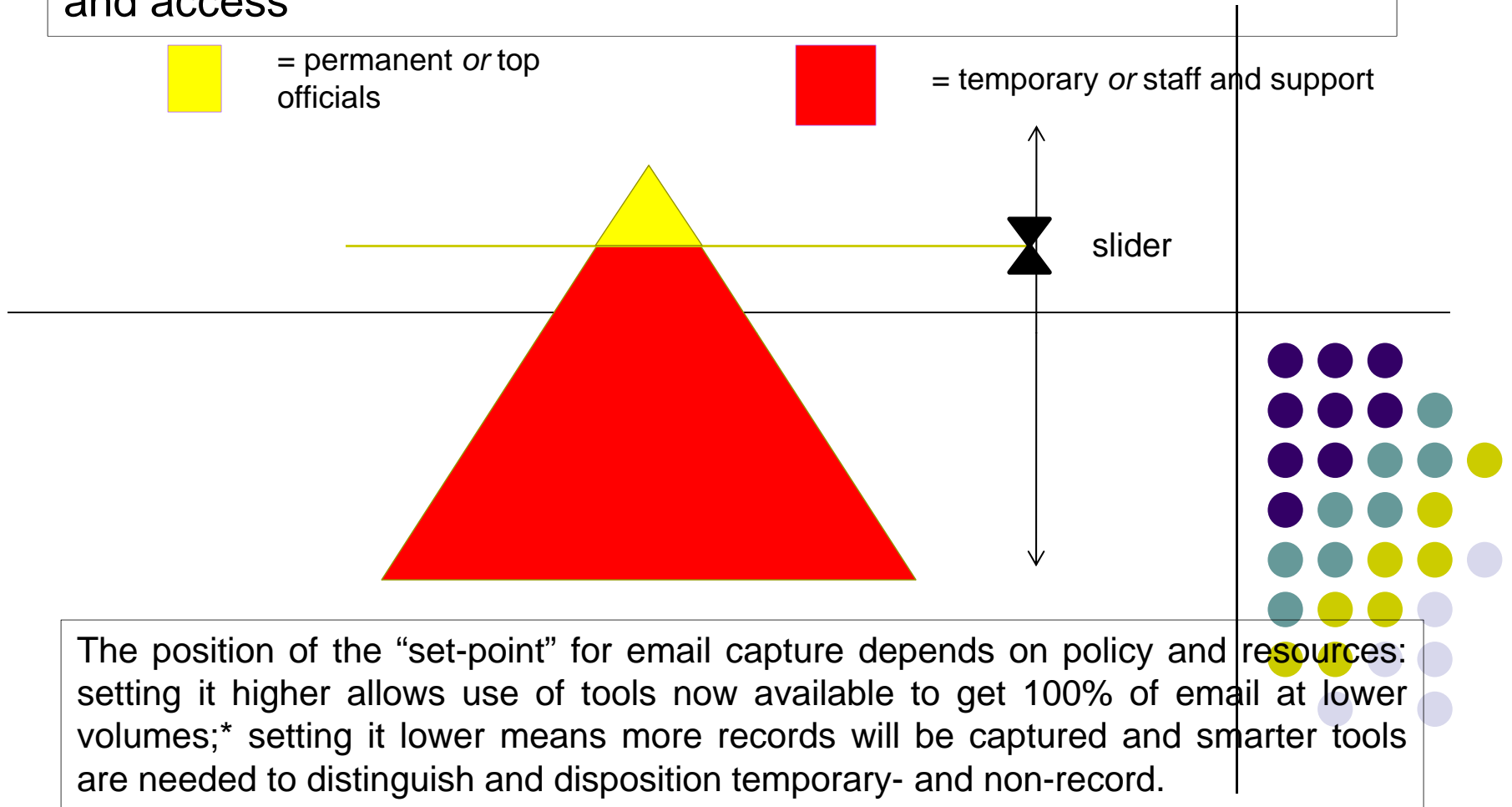
# A Possible Path Forward?

- Email archiving in short term, synced to existing proprietary software on email system
- Designation of key senior officials as creating permanent records, consistent with existing records schedules
- Additional designations of permanent records by agency component
- “Smart” filters/rules built in based on content, to the extent feasible to do
- Default are records in designated temporary record buckets, disposed of under existing records schedules.

A pyramid approach combines disposition policy with automated tools to bring FRA email under records management, preservation, and access

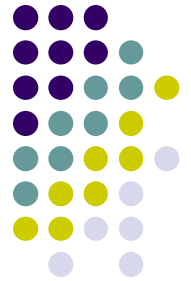
 = permanent *or* top officials

 = temporary *or* staff and support



Implementing an email archiving policy is feasible now, since tools are readily available to capture 100% of email traffic at the individual or organizational level, in formats that can be archived.

# How To Avoid A Train Wreck With Email Archiving....



Capture E-mail But Utilize Records Management!

## Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes*, 261 F.R.D. 44 (S.D.N.Y. 2009)



- “In [a prior case] the Court notes its dismay that the party opposing discovery of its ESI had organized its files in a manner which seemed to serve no purpose other than ‘to discourage audits. . .’ Similarly, in this case, [the party] host[ed] no ediscovery software on their servers and apparently are unable to conduct centralized email searches of groups of users without downloading them to a separate file and relying on the services of an outside vendor.”

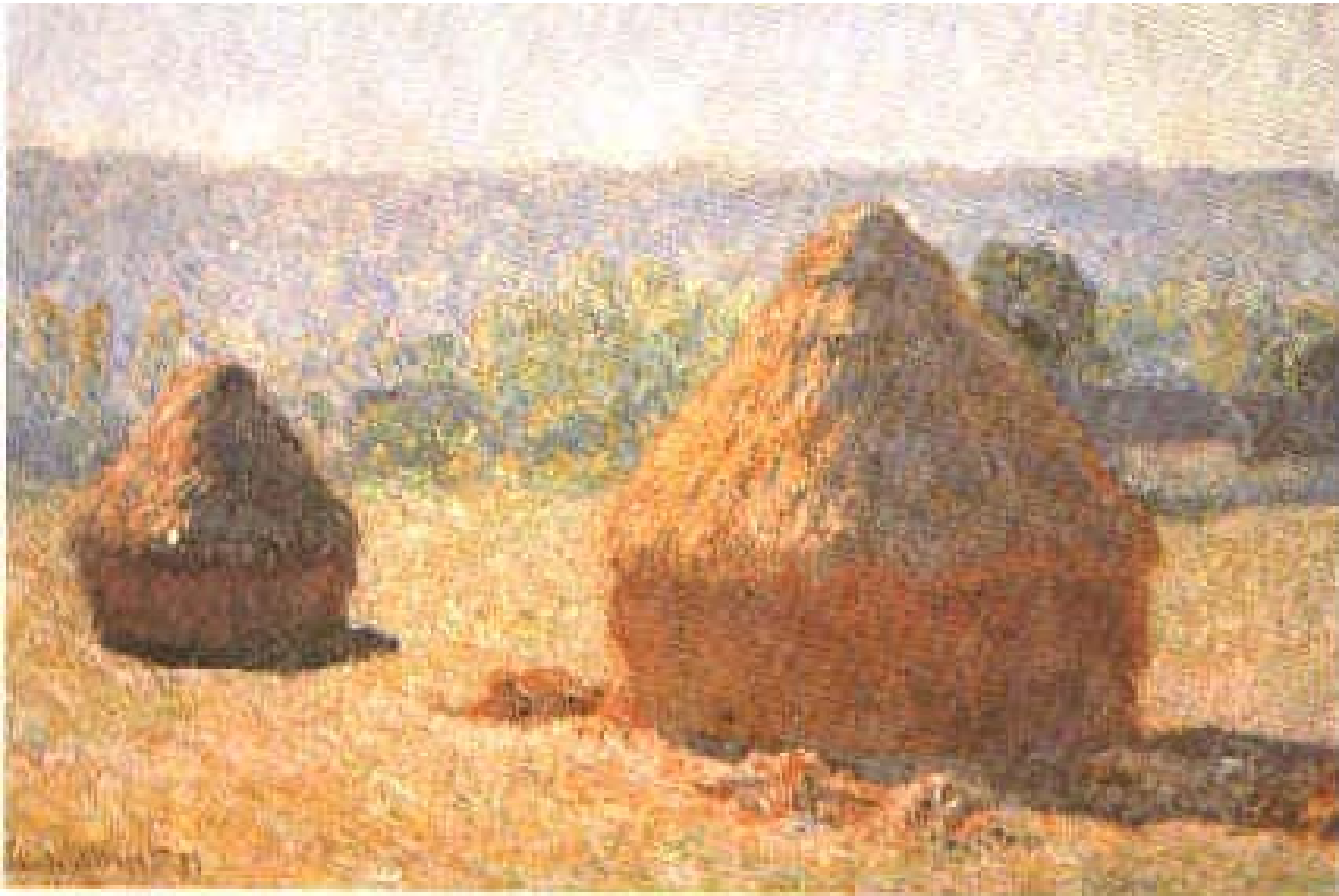
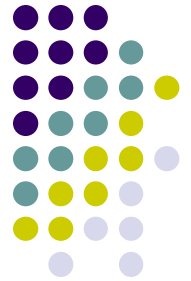
## Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes* (con't)



Court went on to add:

“The day will undoubtedly will come when burden arguments based on a large organization’s lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices.”

# Searching the Haystack....



**to find relevant needles...**



**ends up like searching in a  
maze...**

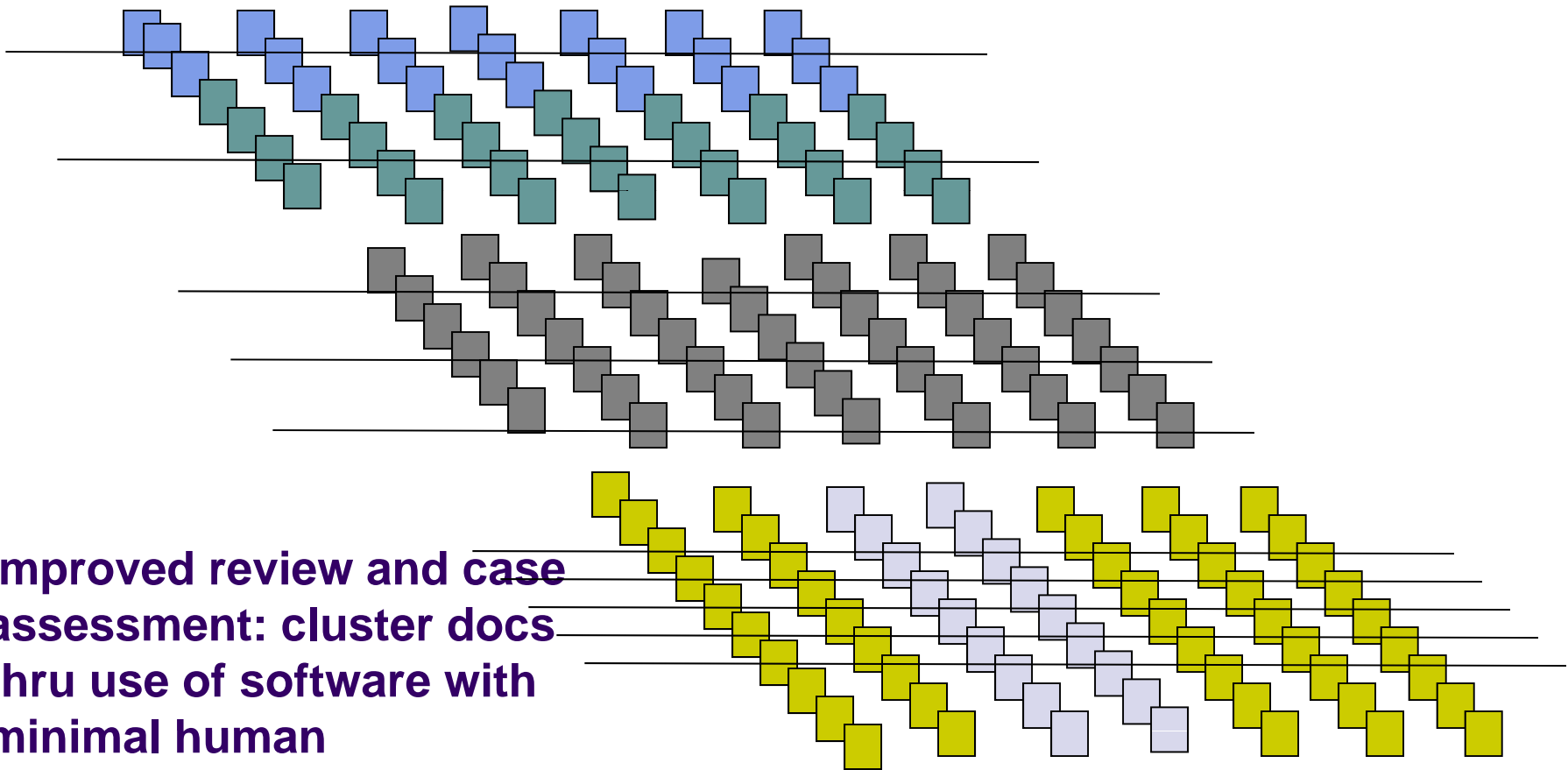




## Example of Boolean search string from *U.S. v. Philip Morris*

- **((master settlement agreement OR msa) AND NOT (medical savings account OR metropolitan standard area)) OR s. 1415 OR (ets AND NOT educational testing service) OR (liggett AND NOT sharon a. liggett) OR atco OR lorillard OR (pmi AND NOT presidential management intern) OR pm usa OR rjr OR (b&w AND NOT photo\*) OR phillip morris OR batco OR ftc test method OR star scientific OR vector group OR joe camel OR (marlboro AND NOT upper marlboro)) AND NOT (tobacco\* OR cigarette\* OR smoking OR tar OR nicotine OR smokeless OR synar amendment OR philip morris OR r.j. reynolds OR ("brown and williamson") OR ("brown & williamson") OR bat industries OR liggett group)**

# Emerging New Strategies: “Predictive Coding”



**Improved review and case  
assessment: cluster docs  
thru use of software with  
minimal human  
intervention at front end to  
code “seeded” data set**

Slide adapted from Gartner  
Conference  
June 23, 2010 Washington, D.C.

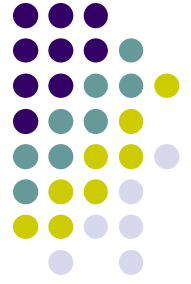


# Preservation Order

- **"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).**

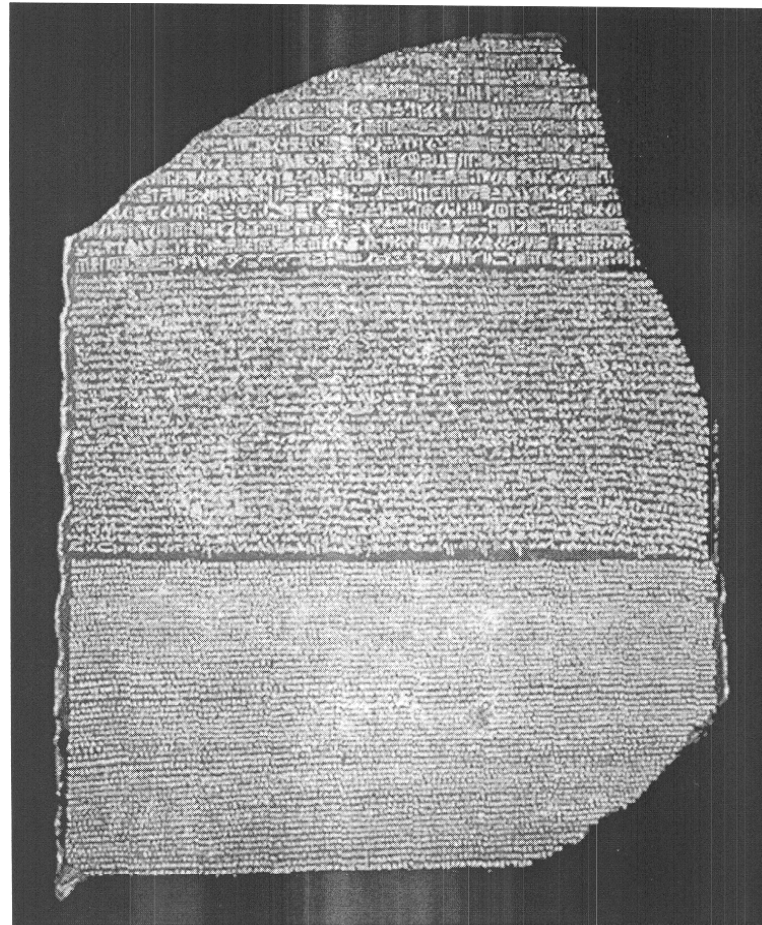
# What are lawyers and records keepers, supposed to do?



## Best practices at the erecords/ediscovery nexus:

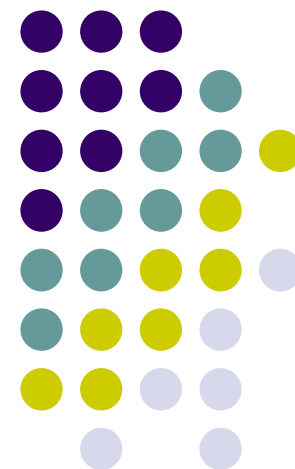
- \* Inventorying for the purpose of obtaining intellectual control over your institution's electronic systems (network applications, backups & legacy media)
- \* Understanding existing records schedules & retention periods for your institutions records (and consider updating & simplifying schedules in anticipation of transition to electronic recordkeeping)
- \* Consider appointing "Knowledge Counsel" working with CIOs and records officers
- \* Formulating explicit e-records guidance on what constitute records, and including holds guidance
- \* Providing training on recordkeeping and e-discovery obligations

# Rosetta Stone Approach: The Need To Master 3 Languages: Legal, RM, IT



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**The Sedona Conference®  
Commentary on Finding the Hidden  
ROI in Information Assets**





## Parts 1 and 2



### **Current State of Information Governance From an Option Value Perspective**

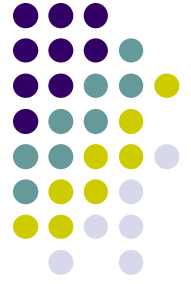
### **The Business Case for Adopting an Option Value Approach to Information Governance**

# Option Value Approach



**Option Value =  
Long-term strategic value of  
Information assets**

**To be contrasted with  
“actuarial value,”  
focusing on short-term risks**



## Part 3

# Using Interdisciplinary Teams and

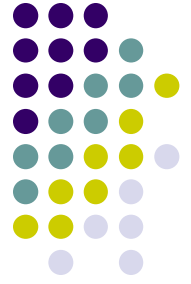


## Sample Charts

**Project Management Structure**

**Governance Structure**

## Part 4



# Identifying and Assessing Option Value Opportunities

## Key Team Focus

**How well does the organization gather, share, and use the data it already creates?**

**Where else might the organization extract or generate more value?**



## Part 5

### **A Framework for Calculating the Option Value of Information Assets**

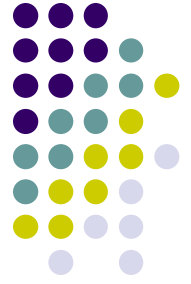
**Step 1. Map the sources of potential value.**

**Step 2. Identify loci and dimensions of value and determine how much value can be quantified through leveraging information for other purposes.**

**Step 3. Compute the net potential value by factoring in costs associated with managing assets.**

**Step 4. Compute option value currently being left on the table.**

## Part 6

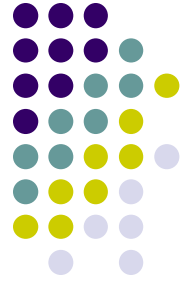


# Implementing An Option Value Governance Initiative Within the Organization

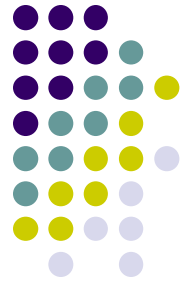


## Executive Sponsorship in the C Suite

# What does the road ahead for information governance look like?



# Additional Resources (NARA)



- **Title 44 U.S. Code, Chaps 21, 29, 31, 33**
- **36 C.F.R. Part 1236 E-Records Mgmt**
- **NARA Bulletin 2008-05 – Guidance concerning the use of email archiving applications to store email**
- **<http://www.archives.gov/records-mgmt/>  
(comprehensive records management website, with bulletins and a toolkit of best practice white papers, including on transitioning to electronic recordkeeping; FAQs on many subjects, including scanning documents, instant messaging, wikis, RSS feeds, cloud computing)**



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

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