

## ESI-Related Amendments to the FRCP and Records Management

VAGARA – 2008 Legal Eagles of Records Management  
Staunton, VA  
November 14, 2008  
Stephani L. Abramson  
Assistant General Counsel  
Office of General Counsel  
National Archives and Records Administration



## Overview

- Records statutes in the 21<sup>st</sup> Century
- ESI-related Dec. 2006 Amendments to the Federal Rules of Civil Procedure and Virginia rules
- Focus on Preservation orders & legal holds
- A Word About Search and Retrieval
- Additional Sources



## 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.)



## Virginia Definition of Record

- “Public Record” or “record” “means recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business. **The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.** Code of Virginia, §42.1-77.

## Virginia Definition of Record con't



- “Electronic record” “means a public record whose creation, storage, and access require the use of an automated system or device. Ownership of the hardware, software, or media used to create, store, or access the electronic record has no bearing on a determination of whether such record is a public record.” Code of Virginia, §42.1-77.

National Archives and Records Administration

7

## Foundational elements of recordkeeping in government

- + Records Management Program administered by the Library of Virginia.
- + The Library of Virginia issues records retention and disposition schedules.
- + Public records may not be destroyed unless: 1) covered by an approved records retention and disposition schedule; 2) a certificate of records destruction has been properly completed and approved by agency's records officer; and 3) no litigation, audit, investigation, etc. pending.
- + Code of Virginia, §42.1-76, *et seq.*



## Lifespan of Records



- The definition of what constitutes a record 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

National Archives and Records Administration

9

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

--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.

National Archives and Records Administration

11

## Electronic records in Virginia law



- The definition of public record in the Virginia Public Records Act clearly includes email and other electronic records – it even has a specific definition of “electronic records.”
- Email Retention Guidance and Policies:
  - E-Mail Management Guidelines
  - Q&A about E-Mail Retention
  - Records Schedules for Electronic Records
- 36 C.F.R. 1234.24 – NARA regulation regarding email
- NARA Bulletin 2008-05, Guidance concerning the use of e-mail archiving applications to store e-mail

National Archives and Records Administration

12

## 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 (new Federal Rule of Evidence 502 and proposed changes to VA Rules of Court 4.1)

National Archives and Records Administration

13

## 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***

National Archives and Records Administration

14

## The Intersection of the Records Statutes and E-Discovery

- + As a baseline, Virginia law already requires appropriate preservation of all electronically stored information which falls within the definition of public record (Code of Virginia, §42.1-86.1)
- + 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.



## Amended Federal Rules (Over) Simplified

- Electronically Stored Information (**ESI**) now explicitly included
  - Management prior to discovery impacts costs of eDiscovery
- Very early **meet and confer**
- Word “**preserving**” appears in the rules for the first time
- Requirement to understand the **sources** of ESI
- Less obligation to produce “**inaccessible**” content
  - But you still may have to hold it (can be just as burdensome)
- Limited “**safe harbor**” for good faith inadvertent destruction of content
  - Best protection through solid r/m program, including litigation hold
- Some protection for **inadvertent waiver** of a/c/p materials



## In Virginia....



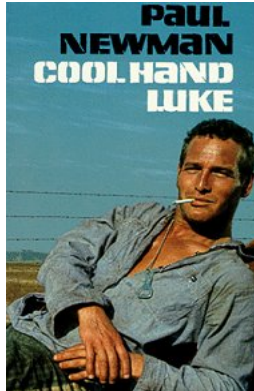
- Proposed changes to the VA Rules of Court – awaiting approval of VA Supreme Court.
- Tentative Draft of Electronic Discovery Rules for Virginia
  - Changes to Rules:
    - 4.1
    - 4.9
    - 4.13

## What does this mean for agency management of 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
- + 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



## **Zubulake V:** “What we’ve got here is a failure to communicate”



National Archives and Records Administration

19

## **Rosetta Stone Approach**



National Archives and Records Administration

20

## 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).

## 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 records 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>

## Cases of interest



- DE Technologies, Inc. v. Dell, Inc., 2007 WL 128966 (W.D. Va. 2007) – production of ESI “as kept in usual course of business” or “in a reasonably useable format”
- Victor Stanley, Inc. v. Creative Pipe, Inc., et al., -- F.Supp.2d. --, 2008 WL 2221841 (D. Md. 2008) – Search and Retrieval
- Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (D. Md. 2007) – Evidentiary issues related to ESI

## NARA's New ERA: Electronic Records Archives



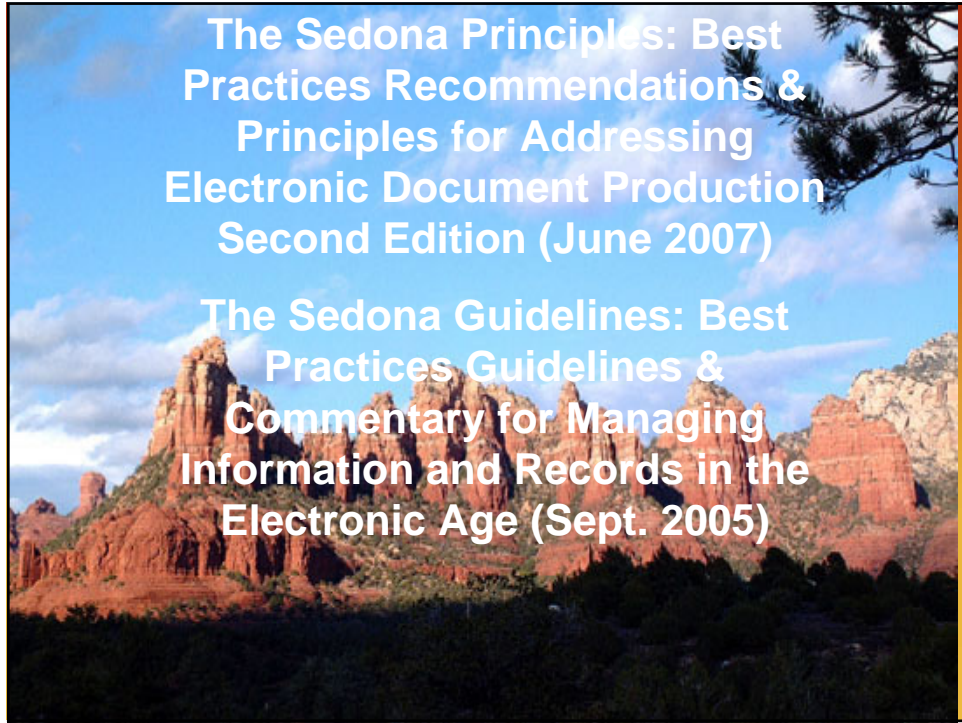
- NARA's vision for the Electronic Records Archives:
  - *The ERA will authenticate, preserve and provide access to any kind of electronic record, free from dependency on any specific hardware or software, enabling NARA to carry out its mission into the future*

[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.



## 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](http://www.archives.gov/records-mgmt/resources)
- [www.thesedonaconference.org](http://www.thesedonaconference.org) (Sedona Guidance and Sedona Principles white papers)



- Stephani L. Abramson  
Assistant General Counsel  
Office of General Counsel  
National Archives and Records  
Administration

8601 Adelphi Road Suite 3110  
College Park, MD 20740  
tel. (301) 837-1888  
Email: [stephani.abramson@nara.gov](mailto:stephani.abramson@nara.gov)