

Document Management & Litigation Risk in the Age of E- Discovery: Cautionary Tales & the Road Ahead

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Current Legal Landscape

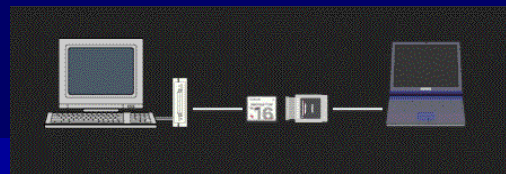
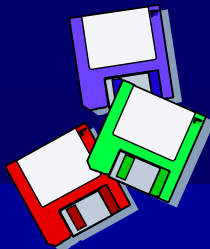
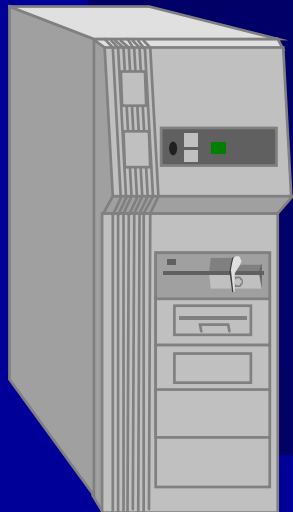
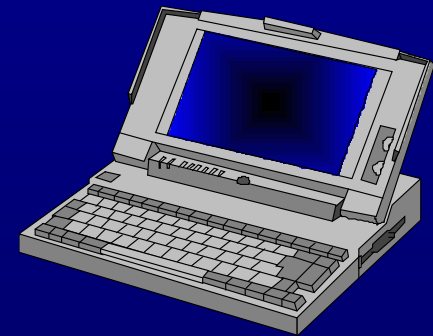
Document Retention: Legal Requirements

- ◆ Preserve and produce relevant print and electronic documents
- ◆ Judicial focus is on relevant content rather than the format or container



Weapons of Mass Discovery

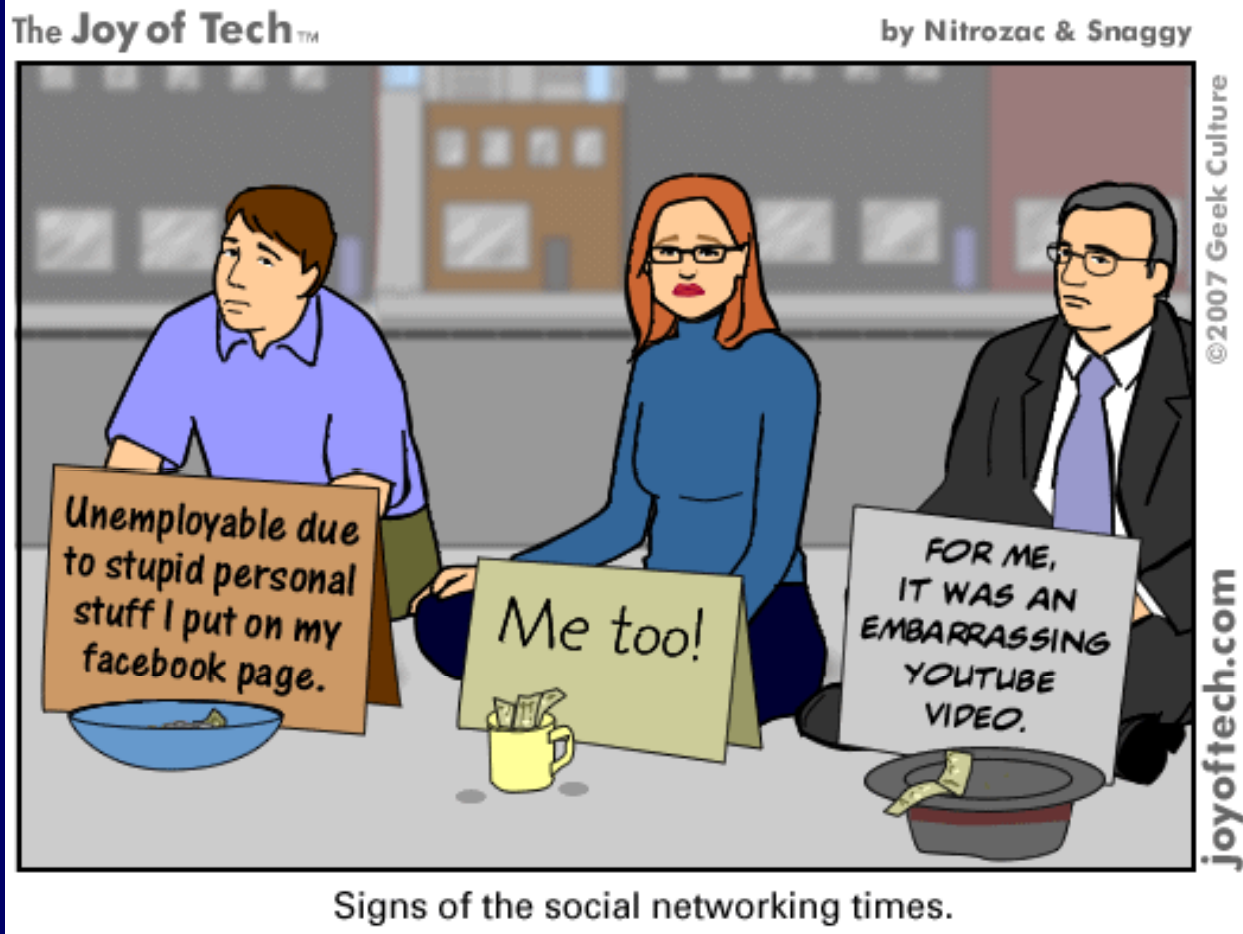
- All forms of print and electronic documents are being targeted



The Shifting Document Retention Landscape

- ◆ New Federal Rules impacting e-records retention and production
- ◆ Proliferation of laws regulating retention and protection of electronic data
- ◆ Sanctions are frequently sought for failure to preserve (spoliation) and failure to produce electronic documents
- ◆ Increase in frequency and severity of records retention process attacks (and significant costs) not limited to “big” cases

Social Networking: A New Challenge to Document Retention



An International “Catch 22”

Data Privacy & Protection vs. Records Retention

- ◆ U.S. Courts are face with increasing demands for discovery of information abroad
- ◆ U.S. Courts have little familiarity with foreign data privacy and protection laws
- ◆ Foreign regulators do not accept that U.S. document preservation law trumps their legal frameworks

The Shifting Document Retention Landscape

- ◆ U.S. federal e-discovery rules create new obligations and some guidance yet leave important questions open
- ◆ Management of unstructured information is complex and challenging
- ◆ Increasing noise and confusion about requirements and vendor solutions

Federal Rule Amendments: Key Changes

- ◆ A party must be prepared to address e-discovery very early in the litigation process [Rules 16 and 26(f)]
- ◆ A party must have comprehensive understanding of locations of potentially relevant ESI [Rules 16 and 26(f)]
- ◆ A party must identify and describe “not reasonably accessible” sources of potentially relevant ESI [Rule 26(b)(2)(B)]

Federal Rule Amendments: Key Changes

- ◆ A party must describe the form in which they will produce information and the form in which they would like to receive information from the opposing party [Rule 34]
- ◆ A party may need to suspend routine operation of systems in order to prevent the loss of relevant information [Rule 37(f)]
- ◆ A party may be subject to sanctions for failure to preserve potentially relevant ESI [Rule 37(f)]

Why Focus on Document Retention?

- ◆ Civil Sanctions
- ◆ Criminal Sanctions
- ◆ Regulations & Standards
 - SEC Rules
 - Patriot Act
 - GLBA
 - FACTA – Red Flag Rules
 - DoD 5015.2 / ISO 9000
 - HIPAA / HITECH ACTS
 - International Data Protection



Sanctions

- ◆ The Stakes are high
 - Monetary Sanctions (Prudential)
 - Adverse Inference Instruction (Linnen)
 - Exclusion of Evidence (Trigon; Philip Morris)
 - Dismissal or Default Judgment (Metro Opera)
 - Responsible Corporate Office Liability (Danis)
 - Striking Pleadings
 - Criminal Obstruction of Justice (Enron)
 - Criminal Privacy Law Conviction (Google Italy)
 - Disqualification and Decertification of Business

Sanctions

- ◆ Laura Zubulake (\$29M; settled)
- ◆ Morgan Stanley (Fla.: \$1.45B; on appeal)
 - \$15 million administrative sanction
- ◆ BofA Securities (\$10 million admin. sanction)
- ◆ Merrill Lynch (\$2.5 admin. sanction)
- ◆ Criminal exposure
 - E.g., Quattrone (verdict reversed; 5+ years litn.)
 - Arthur Andersen (verdict reversed after firm demised)
 - S-Ox; revised 20-year sentence possible

Adverse Inferences

“The lack of a written **document retention and litigation hold policy** and procedures for its implementation ...exemplifies Defendants’ **lackadaisical attitude** with respect to discovery of these important documents.”

- ◆ Court awarded sanctions including adverse inference instruction

» *Keithley v. The Home Store.com, Inc.*, 2008 WL 3833384 (N.D. Cal. August 12, 2008)

Top Five E-Records Retention Challenges and Targets

1. E-Mail & Attachments
2. Instant Messaging
3. Embedded Data and Metadata
4. Digital Voice Mail / Universal In Boxes
5. Web Content (Intranet / Extranet)

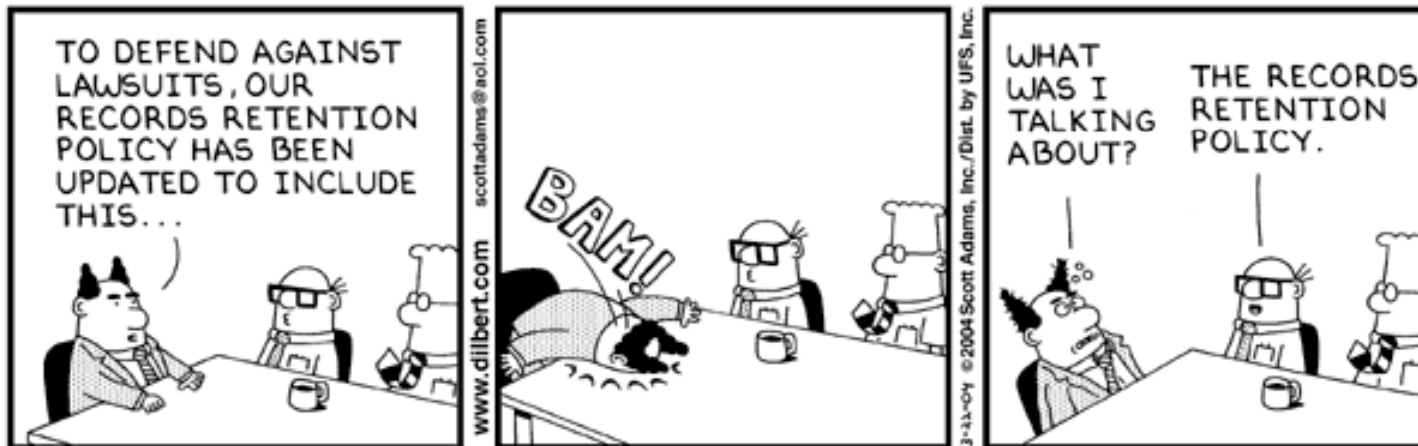
Risky Practices

- ◆ “Cleaning” your files in anticipation of suit
- ◆ Assuming employees will self-select without monitoring or enabling technology
- ◆ Not promptly sending legal hold notices
- ◆ No process for review of legacy media
- ◆ No off-boarding process

A New World of E-Records Retention

Dilbert

by Scott Adams



Factors Driving the Change - Risks

- ◆ Qualcomm v. Broadcom
 - Sanctions against in-house and outside counsel
 - Increased pressure to contain costs vs. judicial expectations
- ◆ Columbia Pictures v. Bunnell
 - Increased scope of electronically stored information (ESI) to include RAM data
 - Cross-border discovery conflicts
- ◆ French Blocking Statute case
 - Criminal conviction for removal of information from France for purposes of U.S. based litigation

Factors Driving the Change - Risks

- ◆ State Courts are adopting federal e-discovery rules and procedures
- ◆ Increased awareness = increased frequency and severity of challenges (& accountability)
- ◆ Trend toward even earlier depositions of records managers and IT professionals

The Risks and Costs of a Reactive Response to Document Management in this Age

- ◆ Increased e-discovery and legal response costs
- ◆ Increased risk of litigation failures (i.e., inability to preserve and produce documents, including documents necessary to prove claims or defenses)
- ◆ Wide range of litigation sanctions
- ◆ Harm to corporate reputation and net value

Real World Concerns

- ◆ Costs – understanding and controlling them
- ◆ Need for specialized knowledge
- ◆ Need for preparation in advance
- ◆ Recognizing lawyers' new duties and evolving standard of care

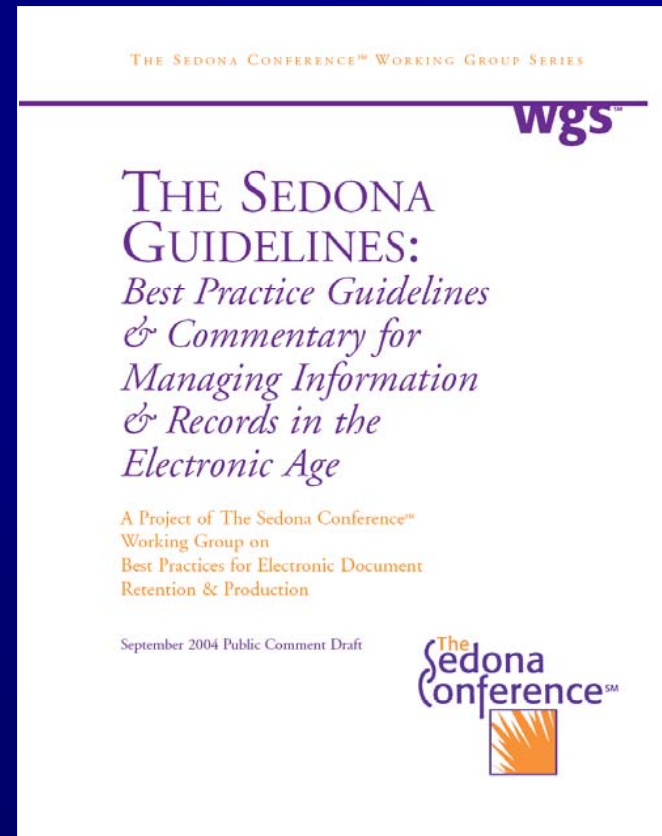
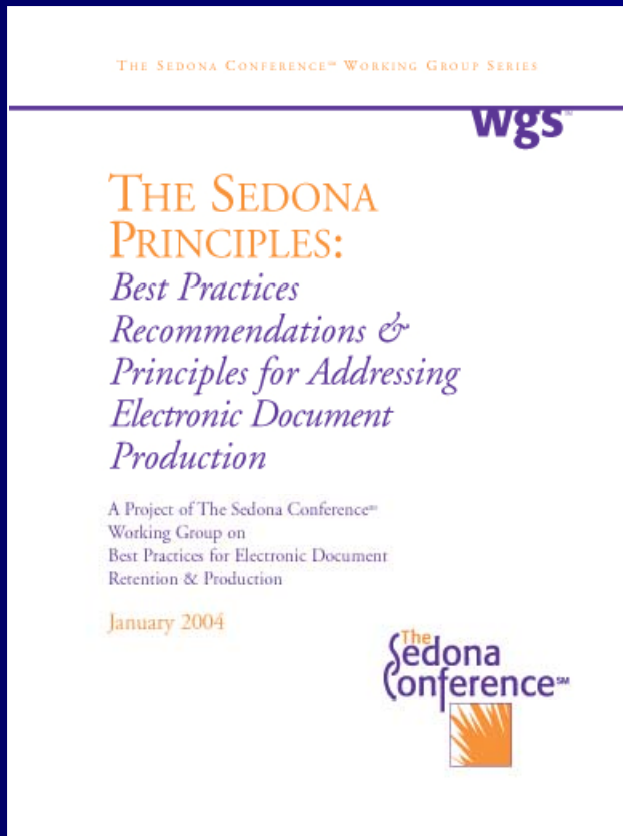
ROI: Show Me The Money!



Options for Corporate America

- ◆ Do nothing
- ◆ Continue to be reactive
- ◆ Be proactive
- ◆ Be proactive and proficient

Sedona Conference: Best Practices



Sedona E-Records Management Guidelines

From *The Sedona Guidelines* (2005)

1. Reasonable policies and procedures for managing information.
2. Policies and procedures should be realistic, practical and tailored to the circumstances of the organization.
3. No need to retain all electronic information.

Sedona E-Records Management Guidelines

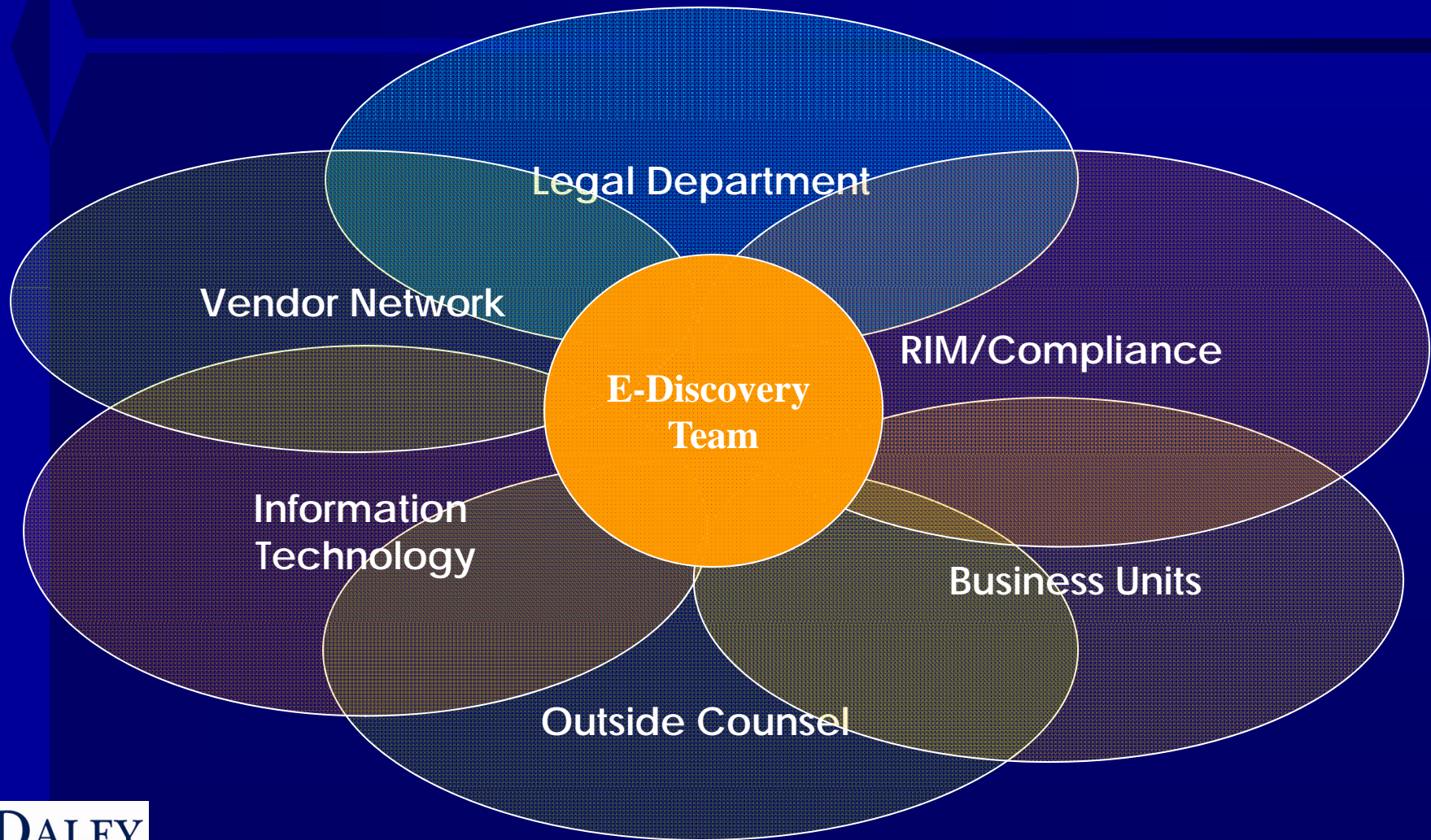
From *The Sedona Guidelines* (2005)

4. RIM policy should include guidance on creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.
5. Policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with legal preservation obligations.

Steps to being Proactive

- ◆ Understand the IT, Legal and RIM environment
- ◆ Comply with new rules by explaining challenges and capabilities to counsel, opposing parties, and courts
- ◆ Ensure a repeatable, reasonable legal hold process, with notices, reminders, training, tracking and compliance monitoring
- ◆ Investigate technology to help meet legal needs
- ◆ Undertake RIM initiatives for proper classification and disposal of ESI to reduce future volumes and costs

Coordinated Team Approach



Assessment of RIM Landscape

Assess and identify the organization's potential for:

- Elevated risks of regulatory noncompliance
- Unnecessary/extraordinary costs meeting regulatory or litigation requests
- Inefficient business processes related to information management

The assessment should include:

- Regulatory & criminal exposures (including Sarbanes-Oxley)
- Civil litigation exposure (*e.g.*, spoliation sanctions & excess discovery costs)
- Excess regulatory compliance costs
- Privacy law and security gaps
- Potential positive ROI from deploying proactive RM policies & procedures

Striking the Right Balance

- ◆ Business Value
- ◆ Legal and Compliance Requirements
- ◆ Technology and Operational Realities and Opportunities



A Cautionary Tale: Avoid a Reactive Approach and Stay Alert!



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