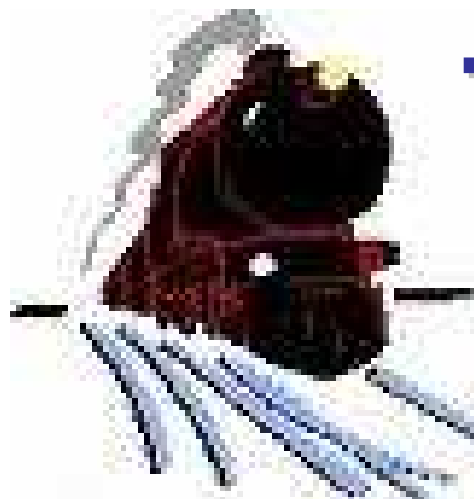




## 2008 Florida Gulf Coast ARMA

*Elevating Records Management  
from the  
Basement to the Board Room*



## The Sedona Guidelines

*Riding the Electronic Discovery Train  
to Get Electronic Information on Track*





# Litigation American Style

## *America's Longstanding Legal Obsessions*

- ***Money***
- ***Power***
- ***Sex***
- ***Truth***

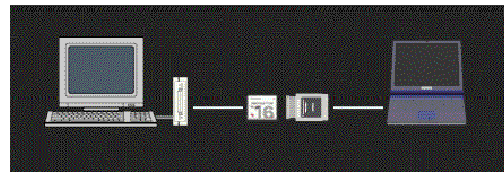
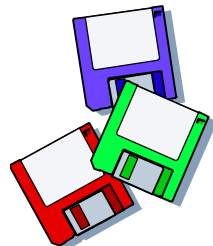
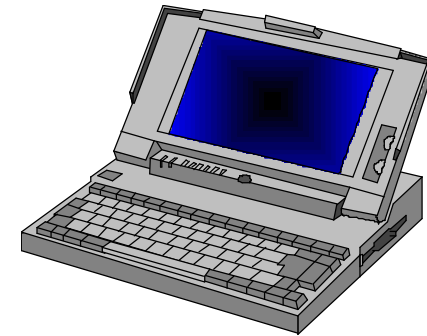
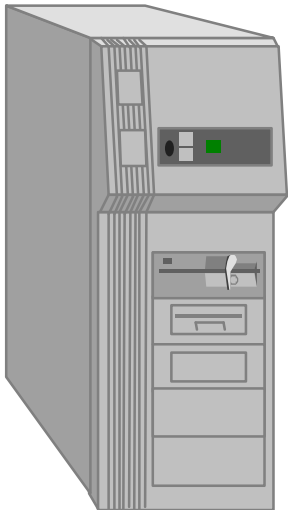
## *America's Current Legal Obsession*

- ***Electronic Discovery***

*(Legal Holds, Spoliation, Back-up Media, E-mail Native Production, Metadata, Transient Formats, etc.)*



# Weapons of Mass Discovery





# What Do You Get For All Your Troubles?

- ❖ *Increased litigation response costs*
- ❖ *Litigation sanctions including:*
  - *Monetary sanctions (fines)*
  - *Evidentiary sanctions*
  - *Default*
  - *Civil contempt*
  - *Criminal contempt*
- ❖ *Obstruction of justice & criminal liability*





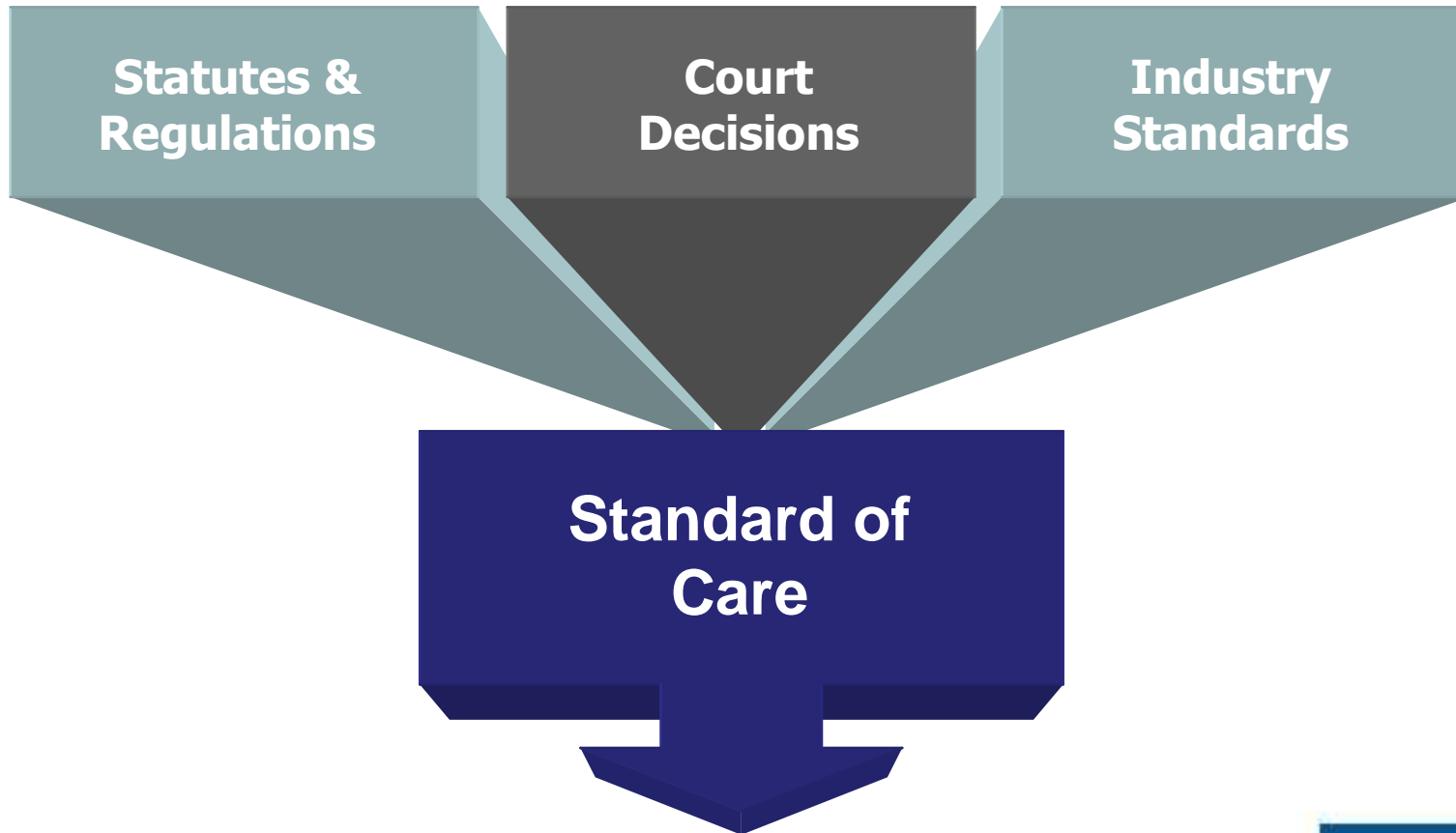
# E-Discovery Train Wrecks

- ❖ *Arthur Andersen*
- ❖ *Morgan Stanley*
- ❖ *Zubulake*
- ❖ *Metropolitan Opera*
- ❖ *Wal-Mart*





# Framework for Attack





# Framework for Attack

## ***Arthur Andersen v. United States,* 125 S. Ct. at 2129, 2135 (2005)**

“‘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.”





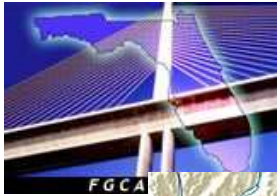
# Framework for Attack

## The lesson from Arthur Andersen:

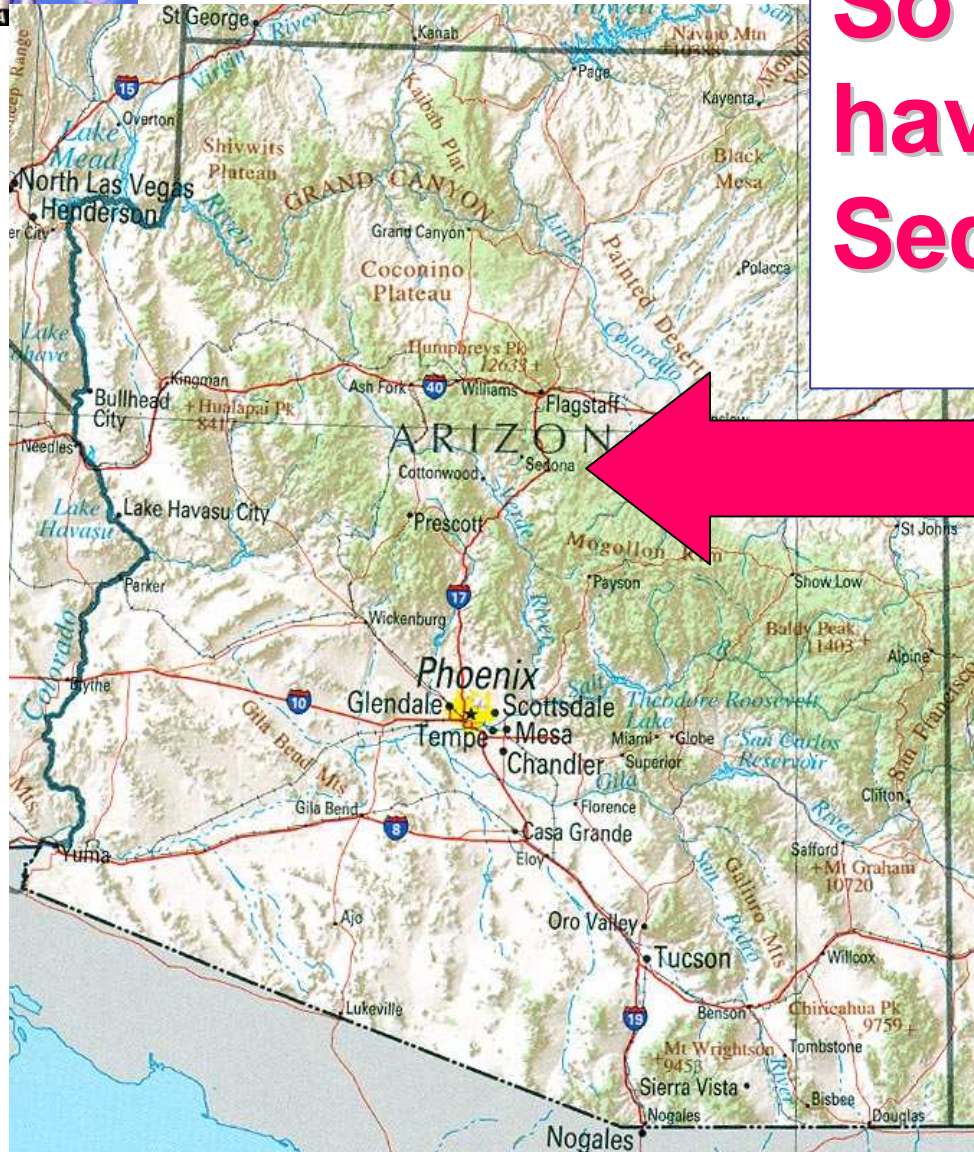
Destruction of data and documents should be acceptable if it is done -

1. in compliance with a
2. valid
3. policy
4. under ordinary circumstances.





**So what does this  
have to do with  
Sedona, AZ?**





# What is “Sedona?”

## The Sedona Conference:

- ❖ A nonprofit research and educational institute, dedicated to the advanced study of law and policy in the areas of antitrust, intellectual property, and complex litigation founded in 1997.

## Working Group on Best Practices for Electronic Document Retention and Production:

- ❖ WG1 founded in 2002
- ❖ Collaborative discussion—not debate
- ❖ Evolving—not static
- ❖ Currently 600+ members, participants and observers
  - in-house & outside counsel
  - consultants (including RIM)
  - technology vendors
  - judges





# What is “Sedona?”

## ❖ The Sedona Model

- Discussion, not Debate

## ❖ The Sedona Objective

- Defensibility
- Practicality (*Reasonableness*)
- Predictability
- Integrity





# The Sedona Conference

❖ [www.thesedonaconference.com](http://www.thesedonaconference.com)

- *The Sedona Principles*
- *The Sedona Guidelines*
- *The Sedona Glossary*
- Whitepapers and commentaries: legal hold, email management, search & retrieval sciences, etc.





# The Sedona Guidelines

- ❖ **Public comment version - September 2004**
  - a two-year gestation period
- ❖ **Final publication – September 2005**
  - another year of struggling to get it right
- ❖ **Revised version – to be published soon**
  - less angst, more updating





# The Sedona Guidelines

1. An organization should have reasonable policies and procedures for managing its information and records.

## Key words:

- Reasonable
- Policies and Procedures
- Managing
- Information *and* Records





# The Sedona Guidelines

**2. An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.**

## **Key words:**

- Policies and Procedures
- Realistic
- Practical
- Tailored to the Circumstances of the Organization





# The Sedona Guidelines

**3. An organization need not retain all electronic information ever generated or received.**

**Key words:**

- Destruction
- Disposal
- Reasonableness
- Good Faith





# Routine Destruction

- ❖ **Comment 3.c.** – “*Absent a legal requirement to the contrary, organizations may adopt programs that routinely delete certain recorded communications, such as electronic mail, instant messaging, text messaging and voice-mail.*”
- ❖ **Amended FRCP 37(f)** - “Absent exceptional circumstances, a court may not impose sanctions under these Rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”





# Metadata

- ❖ **Comment 3.f. revised -“Absent a legal requirement to the contrary, organizations are not required to preserve metadata, but may find it useful to do so in some instances.”**

## **Recognizes:**

- ❖ Usefulness for operational or organizational purposes (e.g., ensure trustworthiness & authenticity, assist with culling and organizing, allow for auditing & tracking).
- ❖ May not always provide the complete picture.
- ❖ If retained in ordinary course of operations, may be discoverable in complete and original form.
- ❖ If not retained in ordinary course, must consider how would retain if required to do so in legal action.





# The Sedona Guidelines

4. An organization adopting an information and records management policy should consider including procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.

## Key words:

- Adopting
- Policies and Procedures
- Creation, Identification, Retention, Retrieval, Disposition or Destruction
- Information and Records





# Metadata

- ❖ **Comment 4.f. -“An organization should consider the impact (including potential benefits) of technology on the creation, retention and destruction of information and records.”**

## **Recognizes:**

- ❖ Metadata should be examined from the perspective of how it can benefit the organization in its ordinary & ongoing operations.
- ❖ Searching capabilities for selecting and/or classifying data can be enhanced through “rich, consistent metadata.”
- ❖ Need to protect metadata when transmitting information so as not to divulge protected information.





# Routine Destruction

- ❖ **Comment 4.f. - “An organization should consider whether, and to what extent, automated tools may be useful in managing the information and records contained in its e-mail and other systems.”**

## **Recognizes:**

- ❖ E-mail tools (e.g., “janitor,” “filtering,” “archiving”) may be reasonable RIM tools with two caveats:
  - Routine destruction of e-mail based on date or account size alone may result in loss of valuable information
  - Tools must account for legal holds.
- ❖ Rule 37(f) noted, as are limitations





# The Sedona Guidelines

5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, governmental investigation or audit.

## Key words:

- Must
- Suspension
- As necessary
- Preservation obligations
- Reasonably anticipated





# Sedona, Arizona



**Red Rocks . . .**





# Sedona, Arizona



**Peaceful Skies . . .**





# Sedona, Arizona



**Beautiful Scenery . . .**





# Sedona, Arizona



... Fewer Gators





# What Can RM Do?

- ❖ **Get involved**
- ❖ **Engage IT and Legal**
- ❖ **Help develop defensible, practical, predictable solutions**

