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REPORTERS AND ELECTRONIC EVIDENCE

By Nancy J. Hopp

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December 1, 2006, is a date that changed the world of litigation for judges and lawyers alike. You didn't notice the earth shaking? Maybe we didn't feel anything because those tremors are only now manifesting in the court reporting world.

On that date, amendments to the Federal Rules of Civil Procedure[1] were adopted to accommodate a relatively new form of evidence not contemplated when the original rules were first enacted. This rule has changed the definition of "original document" and established a new class of evidence, most commonly referred to as "electronically stored information," "ESI," or "e-discovery." It encompasses not only document images and digital photos but also file formats commonly used in our everyday lives.

Indeed, immediately preceding the adoption of the FRCP amendments, U.S. District Judge Shira A. Scheindlin of the Southern District of New York wrote an article for the Federal Judges Association's newsletter, *In Camera*, "Every reader of this article knows that on December 1, 2006, the Federal Rules of Civil Procedure will embrace the 21st century world, where 95 percent of records are electronically created and stored and all discovery is now e-discovery."[2]

As more and more attorneys use electronic evidence to establish their cases, you may wonder, "How exactly should I mark that thumb drive?"

Native Format and Metadata

Still, what's the big deal? Why not just print out a computer file and attach an exhibit sticker to it? In fact, such a scenario is addressed in Federal Rule of Evidence 1001(3), which states, in part, "If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'"[3]

However, a true original ESI document actually exists in the form in which it was created, also known as "native format," such as the .doc file for a Microsoft Word document. Embedded within these native files is information called metadata that are not accessible on the printout of a native file.

This embedded information can be invaluable in proving who knew what when or in authenticating ESI. For example, metadata associated with a Word document could include the date the file was created, the identity of the author, and the date the file was last saved. (See figure on page 38 for an example.) In the case of an e-mail message in its native format, metadata can reflect the date and time the e-mail was sent, received, and opened, as well as who received blind carbon copies. Spreadsheet metadata would reveal the formulae underlying calculated cells. Now imagine the repercussions of being able to use this potentially relevant evidentiary information.

Put another way, attorney and technologist Craig Ball, Esq., states in discussing the definition of metadata: "Metadata is discoverable evidence that our clients are obliged to preserve and produce. Metadata sheds light on the origins, context, authenticity, reliability, and distribution of electronic evidence, as well as provides clues to human behavior. It's the electronic equivalent of DNA, ballistics, and fingerprint evidence, with a comparable power to exonerate and incriminate."[4]

The Federal Rule Amendments and ESI Production

Attorneys and judges are now grappling with ESI in producing documents. Federal Rule 34(a)(1)(A) states, in part, that, "A party may serve on any other party a request … to produce … any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly

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or, if necessary, after translation by the responding party into a reasonably usable form."[5] In addition, Federal Rule 34(b)(1)(C) provides that a production request "may specify the form or forms in which electronically stored information is to be produced."[6]

According to Federal Rule 26(f)(3)(C), "A discovery plan must state the parties' views and proposals on any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[7] In additional, Federal Rule 34(b)(2)(E)(iii) states, "A party need not produce the same electronically stored information in more than one form."[8]

Of necessity, then, the character of "meet and confer" conferences is changing to accommodate ESI issues. Attorneys need to know from the outset what type of information will be most helpful in building their case and what they will need to do to provide compelling arguments for their preferred form of production, because they will most likely have to live with whatever form is agreed on and produced. Indeed, information technology personnel increasingly play a pivotal role in these discussions.

Harnessing Metadata: A Question of Relevance

Not all document production requests, however, ask for files in native format. According to Ball, "You will never face the question of whether a file has metadata — all active files do. Instead, the issues are what kinds of metadata exist, where it resides, and whether it's potentially relevant such that it must be preserved and produced."[9]

Ball provides a helpful analogy regarding the judgment of whether to use metadata:

> Once we understand what metadata exists and what it signifies, a continuum of reasonableness will inform our actions. A competent police officer making a traffic stop is expected to collect certain relevant information, such as the driver's name, address, vehicle license number, driver's license number and date, time and location of offense. We wouldn't expect the traffic officer to collect a bite mark impression, cheek swab, or shoeprint from the driver. But make the matter a murder investigation, and the investigator is far more interested in a DNA sample than a driver's license number. The crucial factor isn't burden. It's relevance, assessed by those with the knowledge and experience to recognize and gauge relevance.[10]

If metadata is not an issue, documents can be produced in image formats, such as .tiff, .jpeg, or .pdf. An image format is essentially a picture of ESI. Among the advantages of using documents in image format are the ability to redact, to offer Bates-numbering, and handling documents efficiency, although the ESI metadata will be lost in the conversion process.

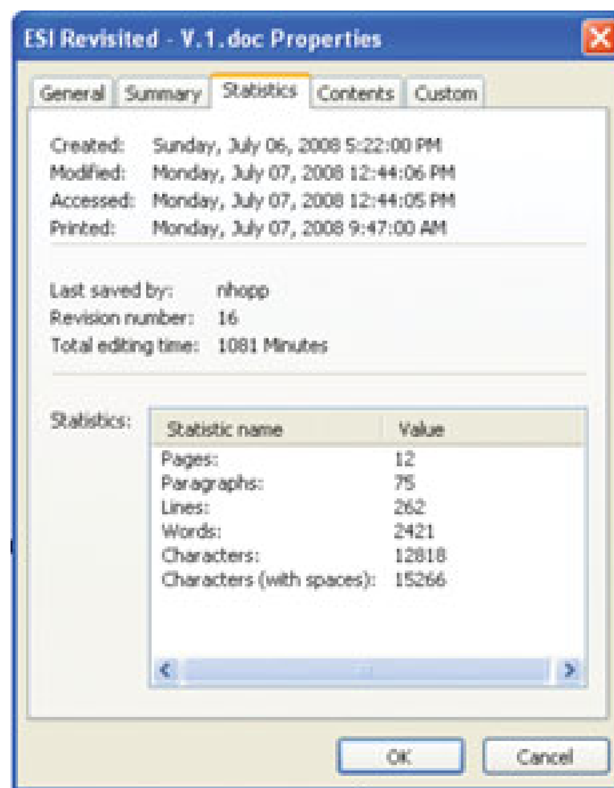
In contrast, native files allow one to access a document's metadata, cost less to produce than image files, and are searchable for review purposes. If an ESI document must be redacted, however, it first has to be converted to an image file.

ESI Exhibit-Marking Scenarios

So, bottom line, what does the prevalence of electronically stored information mean for court reporters? More to the point, how does one go about marking such exhibits?

Unfortunately, the Federal Rule amendments were not written with enough specificity to cover the nuts and bolts of exhibit-marking. However, attorneys and judges have been devising various methods for accommodating ESI as deposition and trial exhibits. The following are a few anecdotal examples from the Merrill Corporation of how the marking of ESI exhibits is evolving.

- An attorney brings electronic files on a thumb drive and electronically presents them at deposition. The thumb drive is marked, and the court reporter is instructed to print the documents from the drive and to include these paper exhibits with the original transcript and certified copies. It is stipulated that the producing attorney must retain the original thumb drive. The index page of the transcript bears the notation "Exhibits Retained by Counsel."
- A CD containing Excel spreadsheet files is marked as the official exhibit. The other counsel have the same spreadsheet on their own computers as well. An attorney shows the



Here is an example of metadata for the Microsoft Word document for this article. You'll notice that it shows both a creation date and last modified date, shows who last saved it (me), and how many times I've been in the document to revise it (16).

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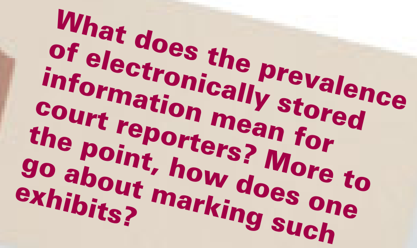

witness the document on the computer and gives a copy of the CD to opposing counsel.

- An attorney shows the witness an electronic file containing photographs and requests that the court reporter print, mark, and include with the transcript any of the screen shots that the witness can identify.
- An attorney displays for the witness and opposing counsel documents contained on a peripheral drive on his notebook computer. The hard drive is marked as an exhibit, and the producing attorney retains possession.
- Exhibits on CD are introduced, and a description of the CD contents is read into the record. The CD jacket is marked as an exhibit.
- An attorney displays for the witness an Excel spreadsheet loaded from a CD. The court reporter marks the CD and its cover as an exhibit. The attorney retains possession of the material. The attorney distributes a copy of the CD to the other counsel. Before leaving the deposition, the court reporter makes a copy of the CD cover bearing the sticker and includes it with the deposition exhibits. The transcript index indicates that the original CD was retained by the attorney.

In light of the variety of approaches used in these examples, the best practice for court reporters is to request specific direction from the offering attorney at the time of the proceeding on how electronic exhibits are to be marked, copied, and distributed. Recitation of such direction on the record serves a two-fold purpose: (a) preserving the exhibit-handling instructions for later reference and (b) protecting the court reporter from claims of inadvertent spoliation.

"Whoa. Wait a minute," you might be thinking. "*Inadvertent spoliation*?"

ESI Evidence-Handling Considerations

To add to the complexity of this discussion, ESI metadata can be changed each time a native file is opened, saved, or even copied; thus, special care must be taken if metadata is pivotal to document authentication in a case.

As Ball explains,

> Proper evidence handling entails a sound chain-of-custody, even in civil matters. Metadata functions as the tag attached to evidence in a police property room. The preservation of a file's external system metadata, in particular its name, system origins and dates of creation, last access and modification, is as fundamental to meeting chain of custody obligations as Bates numbering or the elements of the business records exception — perhaps more important because metadata is so fluid. Fail to preserve metadata at the earliest opportunity, and you may never be able to replicate what was lost.[11]

Because native files exist in a relatively intangible form – and can be unknowingly altered — how can court reporters mark, reproduce, and distribute such

CONSIDERATIONS IN USING ESI AS EXHIBITS:

Native file format
- Preservation of metadata
- Cost reduction
- Ease of review

Image file format
- Redaction
- Trial presentation
- Removal of metadata

BEST PRACTICES FOR MARKING CDS

- Mark the disk so it can be identified without its cover.
- Use a special CD or DVD marker (available from Sanford, Sharpie, Bic, and others).
- Allow the ink to dry before handling further so that the ink doesn't smear.
- Don't use a sticker, because it can detach and gum up a computer drive.
- Request that the presenting attorney describe the CD contents on the record.
- Consider making a photocopy of the marked disk to include with paper exhibits.

WHERE TO LEARN MORE

- American Bar Association, Legal Technology Resource Center, Litigation and Courtroom Technology Information Center: *http://www.abanet.org/tech/ltrc/courttech.html*
- *Law Technology News*: *www.lawtechnologynews.com*
- *Litigation Support Today*: *www.litigationsupporttoday.com*
- NCRA
  - *JCR* (*http://NCRAonline.org/NewsInfo/JCR/*)

    Hopp, Nancy J., and Samantha L. Miller: "The Electronic Evolution of Evidence," *JCR*, 65, No. 10, September 2004.

    Hopp, Nancy J., and Samantha L. Miller: "The Electronic Evolution of Evidence, Part II," *JCR*, 66, No. 1, October 2004.

    Hopp, Nancy J.: "Electronic Evidence and the Court Reporter: A Conversation with an Expert," *JCR*, 66, No. 2, November 2004.
  - Technology Community of Interest: *http://technology.ncraonline.org/*
- The TechnoLawyer Community: *http://technolawyer.com/*
- Yahoo Groups Lit Support Listserv: *www.groups.yahoo.com*

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exhibits without inadvertently stepping on a spoliation landmine?

Bruce Olson, Esq., is a litigator at Davis & Kuelthau, s.c., in Milwaukee, Wis., as well as a frequent speaker and author on electronic discovery. He sees most ESI exhibits converted to paper or .pdf format by the time they're introduced at deposition. He explains, "Normally, we would mark the paper copy directly or mark an entire read-only CD, and then make specific reference to the file name being referenced — e.g., Exhibit 12 –123.doc."

As for embedded information, Olson says, "If there is to be some sort of discussion of metadata associated with the document, there is also a demonstrative created. I've never seen someone try to work with a file in native format and manipulate it to look at metadata 'live' at a deposition. If it's a video clip of some sort, the file would also be on the CD."

Olson sees potential danger for the questioning attorney if he or she includes more files on a CD than the attorney ultimately introduces at deposition. If marked as evidence, the entire CD — rather than just those portions that were covered during the proceeding — could end up being turned over to opposing counsel. "That might not matter, but it might disclose attorney thought processes in terms of what is selected that would be of concern. This concern can be eliminated if you use something like TrialDirector or Sanction [trial presentation software] to present the exhibit. You can use the feature that copies the presented item as an exhibit — saved to an exhibit folder — and that can then be copied and distributed at the end of the deposition."

According to Olson, the ultimate best practice is for the attorneys to hash out such issues ahead of time:

> To avoid problems, you should try to reach an agreement among counsel that any electronic item that is referenced is copied to a CD by the questioning attorney — in the presence of everyone else — and then the attorney can give the CD to the court reporter to be duplicated or produced as part of the package of transcript and exhibits. You could also stipulate that the copy can be made to the court reporter's thumb drive to cut out the bother of producing a CD. I think it would be prudent to reach agreement on the methodology prior to the deposition, letting everyone know how you intend to present materials so they can raise any objections in advance.

William T. Kellermann, Esq., is the electronic discovery manager at the Palo Alto, Calif., law office of Wilson Sonsini Goodrich & Rosati and is a frequent speaker on e-discovery topics. He states, "In my opinion, the rules and procedures regarding the use of photos and film (e.g., movies or video) governs here regardless of media used for delivery, whether on a disc or on videotape."

Kellerman's law firm uses CDs for delivery:

> We burn a lot of single files to CD to create exhibits for discovery productions, depositions, and trials. It is just an alternate form of media compared to videotapes or film canisters. You need your chain of custody and processing audit trail as with any other ESI. If done correctly, you can generate appropriate metadata to match to reflect source and processing.

Kellermann has also heard of firms using electronic "briefcases," which are created in litigation support software and then burned to CD. In such instances, each CD or DVD has a master exhibit label affixed to it, and the files are referenced by their document identification number.

In Kellermann's experience, "Our attorneys don't have burners on their [computer] tablets, and we log all activity to and from the USB ports. I know a lot of big firms lock down the laptops even further. So the reporter has to be prepared to accommodate those situations."

Like Olson, Kellermann says, with electronic evidence, "an appropriate method should be determined at the outset and the stipulation put on the record to protect the court reporter."

Neil E. Aresty, Esq., is a senior vice president for Merrill–Lextranet, in Boston, Mass., and is an internationally recognized expert in the application of computer technology to the practice of law. He shares the following insight, "The comments go into some of the cutting-edge issues relating to new forms of ESI that are making their way into the record. Imagine what this stuff will look like in a few years!"

In Aresty's view,

> The most overlooked way to authenticate any evidence and to get it into an admissible format is to get the parties to stipulate to its authenticity. One of the goals of a deposition is to get the documents (in this case, ESI) authenticated for purposes of getting them admitted into evidence at the trial. Under FRCP 26(f) and the case management order issued under FRCP 16, today parties to federal litigation are going to be urged, pressed — almost required — to deal with these issues early on so that they don't become expensive sideshows prior to or during the trial of the substantive issues in the case.

Conclusion

As technology relentlessly marches forward, litigation practices are evolving and legal professionals are scrambling to keep up. Although most of the foregoing discussion centers on e-discovery issues that attorneys should address directly before a deposition or trial, prudent court reporters need to stay abreast of these changes affecting the way they work. ■

END NOTES

1. "These rules govern the conduct of all civil actions brought in Federal district courts. While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions." Legal Information Institute, Cornell Law School, www.law.cornell.edu/rules/frcp/.
2. Shira A. Scheindlin, "FAQs of E-Discovery," *In Camera*, November 29, 2006, www.fjc.gov/public/pdf.nsf/lookup/FAQEDisc.pdf/$file/FAQEDisc.pdf.
3. Legal Information Institute, Cornell Law School, Federal Rules of Evidence, www.law.cornell.edu/rules/fre/rules.htm#Rule1001.
4. Craig Ball, "Beyond Data about Data: The Litigator's Guide to Metadata," 2005, www.craigball.com/metadata.pdf.
5. Legal Information Institute, Cornell Law School, Federal Rules of Civil Procedure, http://www.law.cornell.edu/rules/frcp.
6. Ibid.
7. Ibid.
8. Ibid.
9. Craig Ball, "Beyond Data about Data."
10. Ibid.
11. Ibid.