

Electronic Discovery

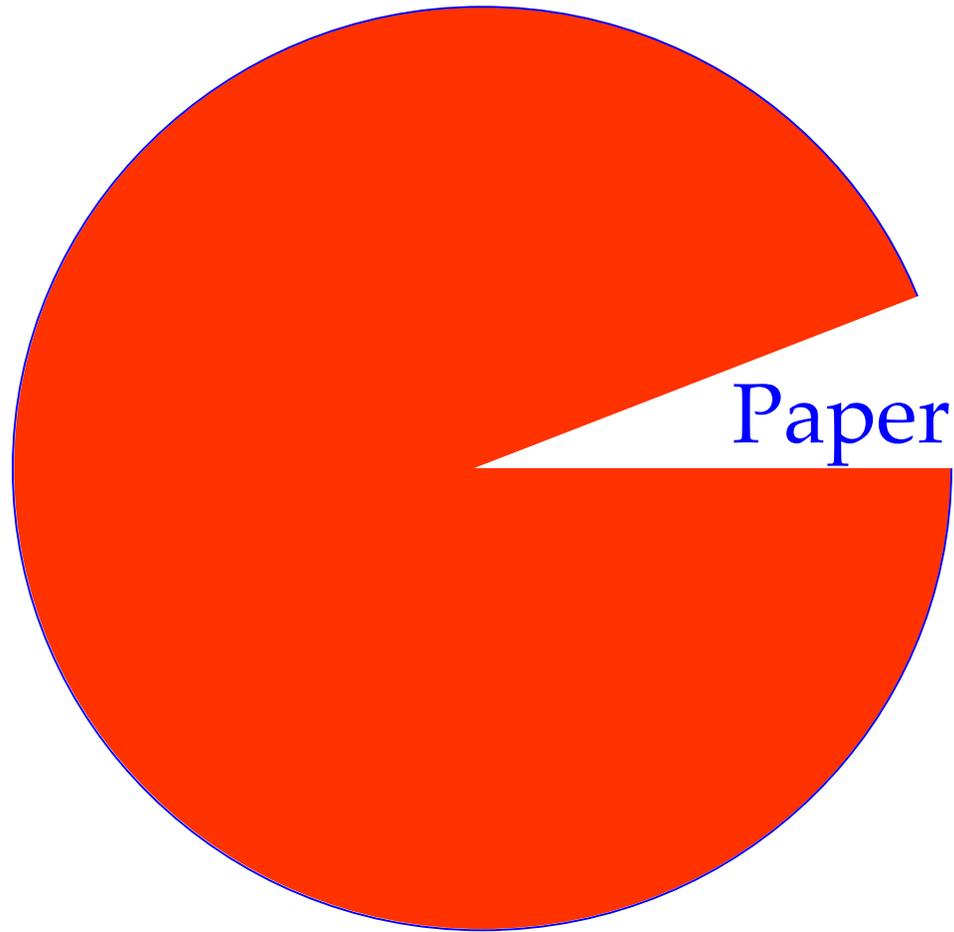
National Workshop for
United States Magistrate Judges
June 12, 2002

Kenneth J. Withers
FJC Research Division



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93% of all information generated in
1999 was in DIGITAL form





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Social and legal forces driving “digitization”

- Nearly ALL conventional documents and business activities are now computerized
- Federal government activities must be computerized, per GPEA
- Email traffic has surpassed telephone and postal communication
- Millions of transactions with legal significance are taking place using computer-based communications



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2000 ABA Litigation Section survey

- 40% believed that their clients had significant electronic records collections
- 22% *didn't know*
- 83% said their clients did *not* have established protocols to answer discovery requests
- 75% said their clients were *not* aware that electronic records were discoverable



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Issues we will explore today

- Differences between electronic and conventional discovery
- Management issues for judges
- Current framework under the rules
- Significant case law
- Federal rules activity



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What are “electronic documents”?

- Information created, stored, and / or utilized using computer technology
- Business applications, such as word processing and databases
- Internet applications, such as e-mail and web traffic
- Information on peripheral and mobile devices
- Computer-based record storage, such as disks, tapes, and drives



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What are “electronic documents”?

- Differences in degree
- Differences in kind
- Differences in costs



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What are the differences *in degree* between paper and electronic documents?

- Volume
- Location
- Volatility



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Volume

- One printed word-processing document
- How many electronic documents?

1 hard drive + 12 monthly backups	13
3 internal recipients	40
5 drafts reviewed by recipients	184
Email used to circulate drafts and final	364 to 1444



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Volume

- Hypothetical email system
 - 100 employees
 - 25 messages / employee / day
 - 250 full working days / year

625,000 messages

- 12 monthly backups

7,500,000 total messages



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Location

- Hard drives
- Servers
- Backup media
- Email servers
- Other hard drives and email servers in organization
- Outside recipients (hard drives, servers, backups)
- Laptop computers
- Home computers
- Palm Pilots
- Future: digital phone records, car systems, smart cards, toaster ovens...



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Volatility

- Ease of undetectable alteration
- Alteration through routine handling
- Automatic overwriting and recycling
- Mishandling data in the discovery process
- “Unintentional spoliation”
- Gates Rubber v. Bando Chemical Industries, 167 F.R.D. 90 (D. Colo. 1996)



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What are the differences *in kind* between paper and electronic documents?

- Metadata / hidden data
- Databases and spreadsheets
- System data
- “Deleted” data
- “Ghost” or residual data



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Metadata

- Email headers and routing information
- Word processing profiles and editing history
- Spreadsheet data sources and formulae
- Database structure and relationships



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TO: Hon. David Levi <david_levi@caed.uscourts.gov>
FROM: Ken Withers <kwithers@fjc.gov>
DATE: 6 Mar 2002
SUBJECT: Pike & Fischer/BNA Slides

Judge Levi:

I am preparing some slides for you to use at the upcoming Pike & Fischer/BNA conference on electronic discovery. Did you want to include any discussion of the Magistrate Judges Survey or other Rules Committee activities?

////////////////////////////////////

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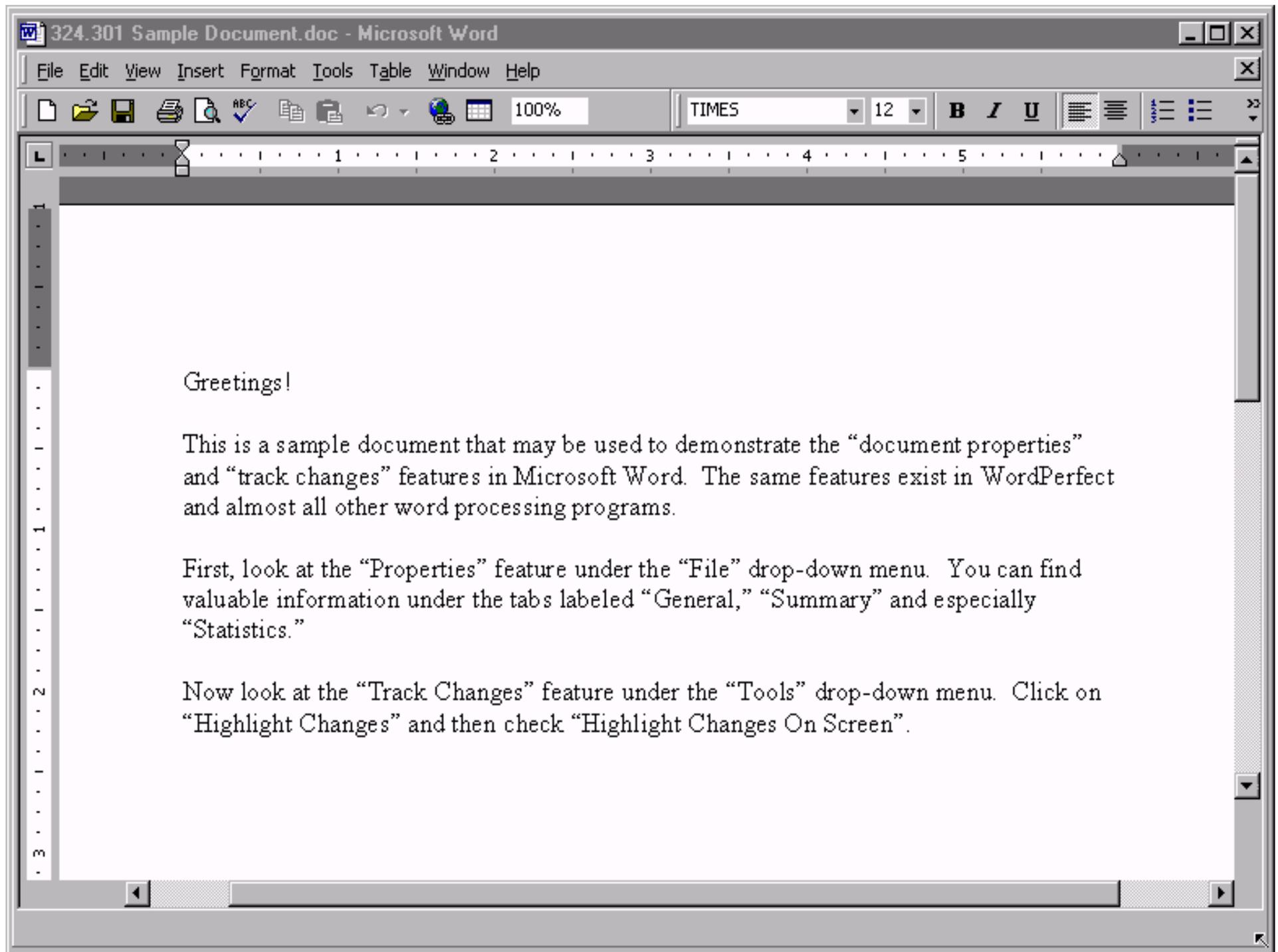
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Received: from rain.fjc.dcn by cloud.fw; Wed, 06 Mar 2002 21:28:48 GMT
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X-Mailer: Lotus Notes Release 5.0.8 June 18, 2001
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04:20:33 PM
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324.301 Sample Document.doc Properties

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Revision number: 17
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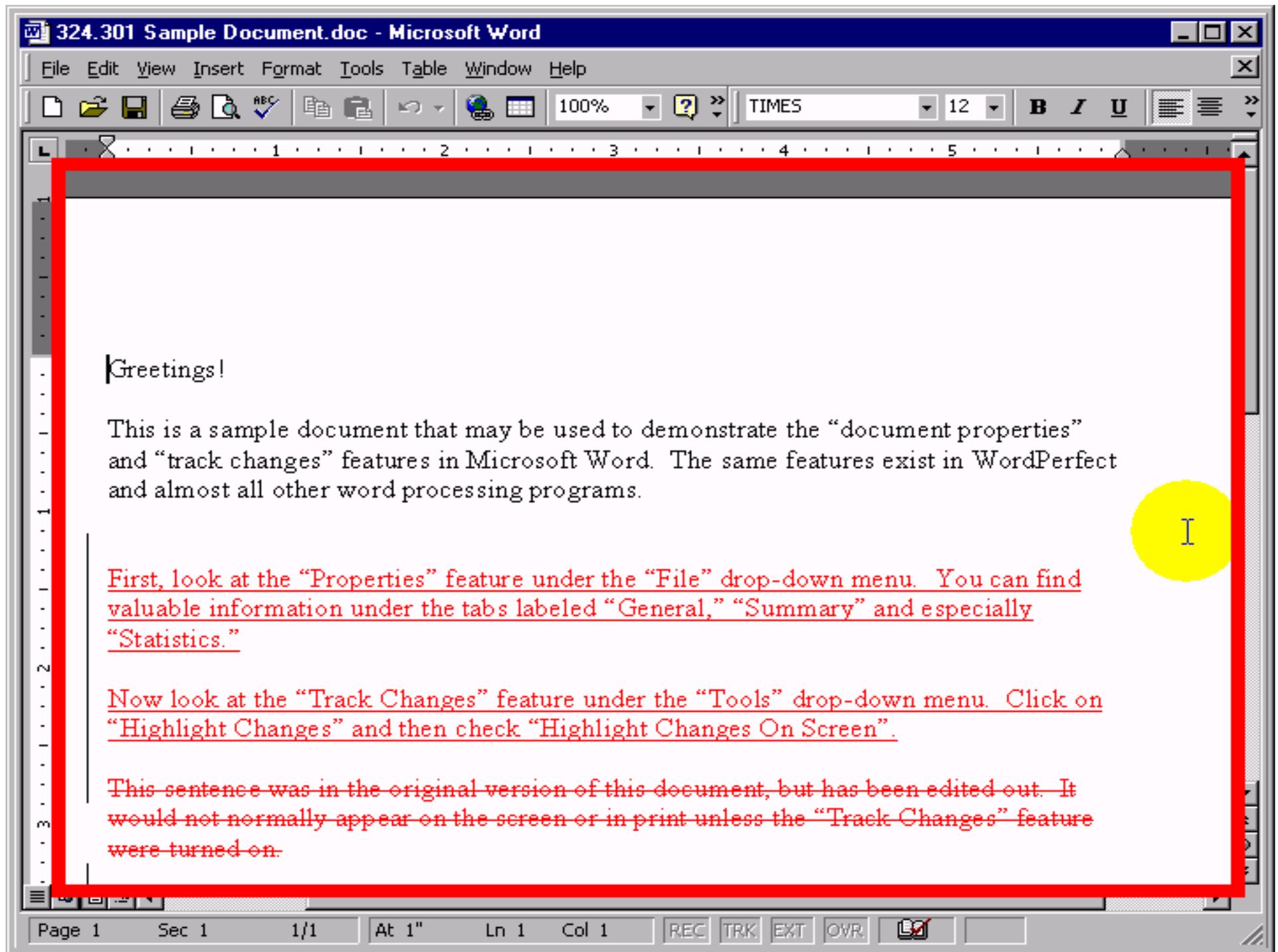
Page 1 Sec 1 1/1 At 1" Ln 1 Col 1 REC TRK EXT OVR

Greetings!

This is a sample document and "track changes" feature and almost all other word processing features.

First, look at the "Properties" dialog box. It provides valuable information under the "Statistics" tab.

Now look at the "Track Changes" dialog box. It provides information on the "Highlight Changes" and "Track Changes" options.





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“Transient compound documents”

- Web-based interface
- Information from various databases and other sources
- Template for presentation on screen
- Record of computer use
- No permanent document (unless screen is printed)
- How would this be treated under Rule 34?



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Examples of “transient compound documents”

- Computer-based retail transactions
- Online securities and commodities trading
- “Enterprise solutions”
- Loan officer’s decision in housing discrimination case
- Nuclear technician’s decision in power plant shutdown



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System data

- No real counterpart in paper world
- Access to computers (log-in files)
- Access to network resources
- Use of printer, fax, and other peripherals
- Use of email
- Use of World Wide Web



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“Deleted” data

- “Delete” does not mean destroy, it means ignore
- “Federal witness protection program for bad documents”
 - Joan Feldman, Computer Forensics, Inc.
- Computer forensics view
 - Deleted files
 - Residual data (slack space, ghost files, .swp files, etc.)
- Practical view
 - Other computers
 - Backup media
 - Packrat-ism



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“Ghost” or residual data

- Computers, like nature, abhor a vacuum
- “Digital packing material” used to fill ends of sectors
- Data left behind from previous files or randomly taken from other working files
- Data not necessarily “saved”
- Can remain for years
- Can get transferred to other computers



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What are the differences *in cost* between paper and electronic documents?

- Natural shift in cost allocation
- Need for experts
- Extraordinary up-front costs (before actual production)
- BUT, the potential for long-term savings



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Natural shift in cost allocation

Typical cost allocation in the “big document case”

- Respondent’s cost of production (searching, reviewing, making records available) is usually less than
- Requester’s cost of discovery (reviewing, selecting, copying, transport)

Typical cost allocation in the “big electronic case”

- Cost of production (searching, reviewing, making records available) is usually greater than
- Cost of discovery (reviewing, selecting, copying, transport)



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The need for experts

- System experts who know the system in question
- Electronic discovery experts who can organize vast collections
- Forensic experts to find deleted and residual data
- Trial preparation consultants v. testifying experts
- Partisan experts v. neutral experts
- FRCP 53? FRE 706? “Officer of the Court?”



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Costs from recent case law

- Murphy Oil USA v. Fluor Daniel, Inc., 2002 WL 246439 (E.D. La.)
 - \$6.2 million to restore and print email from 93 backup tapes



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Costs from recent case law

- Rowe Entertainment v. The William Morris Agency, 205 F.R.D. 421 (S.D. N.Y., 2002)
 - \$395,944 to restore 8 selected backup tapes, or \$9,750,000 to restore total of 200
 - \$43,110 - \$84,060 for retrieval, plus \$247,000 for review of 200,000 email messages
 - \$395,000 to restore and \$120,000 to review 523 backup tapes
 - \$403,000 to restore 47 backup tapes retrieve email from 126 desktop PCs before attorney review



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Costs from recent case law

- In re Bristol Myers Squibb, 205 F.R.D. 437 (D. N.J., 2002)
 - \$432,219.16 for scanning 3,085,994 pages (14¢ / page)
 - Virtually no copying costs (cost of burning CDs)
 - Virtually no transport costs



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Cost savings with electronic documents

- Reduced photocopying costs
- Reduced transportation and storage costs
- Ability to search using computers
- Ability to segregate, identify, index, authenticate
- Integration into electronic case filing and management system
- Paper production may be considered discovery abuse



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Survey of magistrate judges (Summer 2000)

- Did you have any cases involving electronic discovery disputes?
- What types of cases?
- What types of disputes?
- Any local rules or standing orders?
- Any cases suitable for “case study?”

Types of cases in which judges report electronic discovery disputes

Case Type	% of judges reporting at least one case involving electronic evidence
Employment – individual plaintiff	59
General commercial litigation	55
Patent/Copyright	44
Employment – class action	25
Product liability	24
Other	23
Construction litigation	10
Securities litigation	10
Antitrust	8

Types of electronic discovery issues judges experience

Issues/Experiences	% of judges with at least one case with this issue	% of total cases reported involving this issue
Involvement of computer experts	69	25
Privilege waiver	49	15
On-site inspection	48	15
Sharing of discovery costs	48	15
Alleged spoliation	47	13
Data preservation order	35	10
Sharing of production costs	35	9
Increased efficiency	21	13



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Survey of magistrate judges (Summer 2000)

- Results should not be taken as “scientific,” only informative
- Novel data collection technique may have affected results
- Judges can’t report on cases in which there is no dispute that comes before them



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Judicial management of electronic discovery: the rules framework

- Scope as a legal concept, Rule 26 (b)(1)
- Scope as a practical or logistical concept, Rule 26 (b)(2) and Rule 26(c)
- Rule 34 definition of “document”



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Legal definitions of “scope”

- Party-managed discovery of information relevant to the “claims and defenses of the parties”
 - Word processing, email, primary data
- Judicially supervised discovery of information relevant to the “subject matter of the dispute”
 - Records keepers, metadata, system data
- Reminder: Rule 26(b)(2)(i), (ii), (iii)
“proportionality” considerations govern all discovery



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Logistical or practical definitions of “scope,”
in ascending order of difficulty

- Active data
- Metadata
- System data
- Backup tapes
- Deleted files
- Legacy data



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Approaches to defining “scope”

- Rule-based definitions of scope
- Practice-based definitions of scope
- Case-based definitions of scope early in discovery
 - Rule 16(b) pretrial conference
 - Rule 26(f) initial disclosure conference



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Texas Rules of Civil Procedure 196.4

- Requesting party must specify form
- Responding party must produce data “readily available... in its ordinary course of business”
- Responding party may object
- If further discovery ordered, court must order requesting party to pay expenses for any “extraordinary steps required to retrieve and produce information”



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The ABA Civil Discovery Standards

- Duty to preserve documents, including computer data
- No duty to restore data deleted in the regular course of business
- Court should weigh benefits and burdens of proposed discovery
- Requesting party should bear “special expenses”
- Parties should stipulate to authenticity



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Eastern District of Arkansas Local Rule 26.1

- Under Rule 26(f), the parties are to meet and confer, and file a report discussing:
 - Whether there will be electronic discovery
 - Anticipated cost and time
 - Format and media
 - Data preservation
 - Any other anticipated problems



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District of Wyoming Local Rule 26.1

- Under Rule 26(f), the parties are to meet and confer regarding:
 - Data preservation
 - Scope of email discovery
 - Inadvertent production of privileged email
 - Need and cost of discovery of deleted data
 - Need and cost of discovery of backup data



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Judicial management of electronic discovery

- Question of management style
- Early intervention under Rule 16 and Rule 26
- Press for expert communication
- Be fully informed about costs and logistics
- Set reasonable deadlines and stick to them
- Be available to settle questions as they arise

Propulsid Pretrial Order #10

<http://propulsid.laed.uscourts.gov/orders/order10.pdf>



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Protecting privacy and privilege

- *Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla Ct. App. 1996) (“Strasser I”)
- *Northwest Airlines v. Local 2000 Teamsters*, 00-CV-8 (D. Minn. 2000)
- *Playboy v. Terri Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999)
- *Rowe Entertainment v. The William Morris Agency, et al.*, 205 F.R.D. 421 (S.D. N.Y. 2002)



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Data preservation and spoliation

- Linnen v. A.H. Robins, 10 Mass. L. Rep. 189 (Mass. Super. Ct. 1999)
- GTFM v. Wal-Mart Stores, 2000 WL 335558 (S.D.N.Y.)
- Danis v. USN Communications, 2000 WL 1694325 (N.D. Ill.)
- Strasser v. Yalamanchi, 783 So.2d 1087 (Fla Ct. App. 2001) (“Strasser II”)



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Data retrieval by experts

- Fennell v. First Step Designs, 83 F. 3d 526 (1st Cir. 1996)
- McPeck v. Ashcroft, 202 F.R.D. 31 (D. D.C. 2001)
- Stallings-Daniel v. Northern Trust Company, 2002 WL 385566 (N.D. Ill.)
- Playboy v. Terri Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999)
- Rowe Entertainment v. The William Morris Agency, et al., 205 F.R.D. 421 (S.D. N.Y. 2002)



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Form of production

- McNally Tunneling v. City of Evanston, 2001 WL 1568879 (N.D. Ill.)
- In re Bristol-Myers Squibb Securities Litigation, 205 F.R.D. 437 (D. N.J., 2002)



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Authentication and chain of custody

- Gates Rubber v. Bando Chemical Industries, 167 F.R.D. 90 (D. Colo. 1996)



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Costs and cost allocation

- *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 360526 (N.D. Ill.)
- *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 634 (E.D. Mich. 1989)
- *Rowe Entertainment, Inc., et al. v. The William Morris Agency, et al.*, 205 F.R.D. 421 (S.D. N.Y. 2002)



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Law review articles and commentary

- Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 *Law & Contemporary Problems* 253 (Spring/Summer 2001, Nos. 2 & 3).
- Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 *Duke L. J.* 561 (2001).
- Hon. James M. Rosenbaum, *In Defense of the Delete Key*, 3 *Green Bag 2d* 393 (2000); *In Defense of the Hard Drive*, 4 *Green Bag 2d* 169 (2001).
- Hon. Shira A. Scheindlin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 *B.C.L. Rev.* (2000).



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<http://www.kenwithers.com/articles>

- Recent articles, seminar presentations, bibliography, case citations
- Caulfield and Svihra, *Requiring the Losing Party to Pay*
- Redgrave and Hiser, *Fishing in the Ocean*
- Debate: *Should the rules be amended?*
 - Tom Allman v. New York State Bar Association
- Proposal: *Model State Discovery Rule*



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Discovery Subcommittee of the Civil Rules Advisory Committee

- “Mini conferences” in San Francisco and New York
 - No formal proposals considered
 - Consensus for no immediate action
- Summer 2000 survey of magistrate judges
 - Not scientific, but instructive
 - More disputes in smaller cases
- 2001 / 2002 in-depth case studies
 - May 2002 preliminary findings
 - October 2002 final report



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“Mini conferences”

- San Francisco: March 2000
- New York: October 2000
- Invitations extended to:
 - Judges
 - Plaintiff, defendant, and in-house counsel
 - Academics
 - Technologists
- No formal proposals considered
- “Information gathering”



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“Mini-conferences”: No consensus for immediate action

- December 1, 2000 amendments had just been adopted
- Strong support for position that no changes were needed
- Rules amendment process (3-4 years) could be overtaken by technological advances



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Research questions from the Discovery Subcommittee

- What, if any, aspects of electronic media discovery are unique and distinct from conventional discovery?
- If there are distinctions, should these be addressed in the rules of discovery?



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Electronic discovery case study research

- Approximately 20 cases selected
- All discovery-related filings being analyzed
- Interviews being conducted with judges, attorneys
- Preliminary report issued in May 2002
- Final report due in October 2002