



September 6, 2008
10th Circuit Judicial Conference

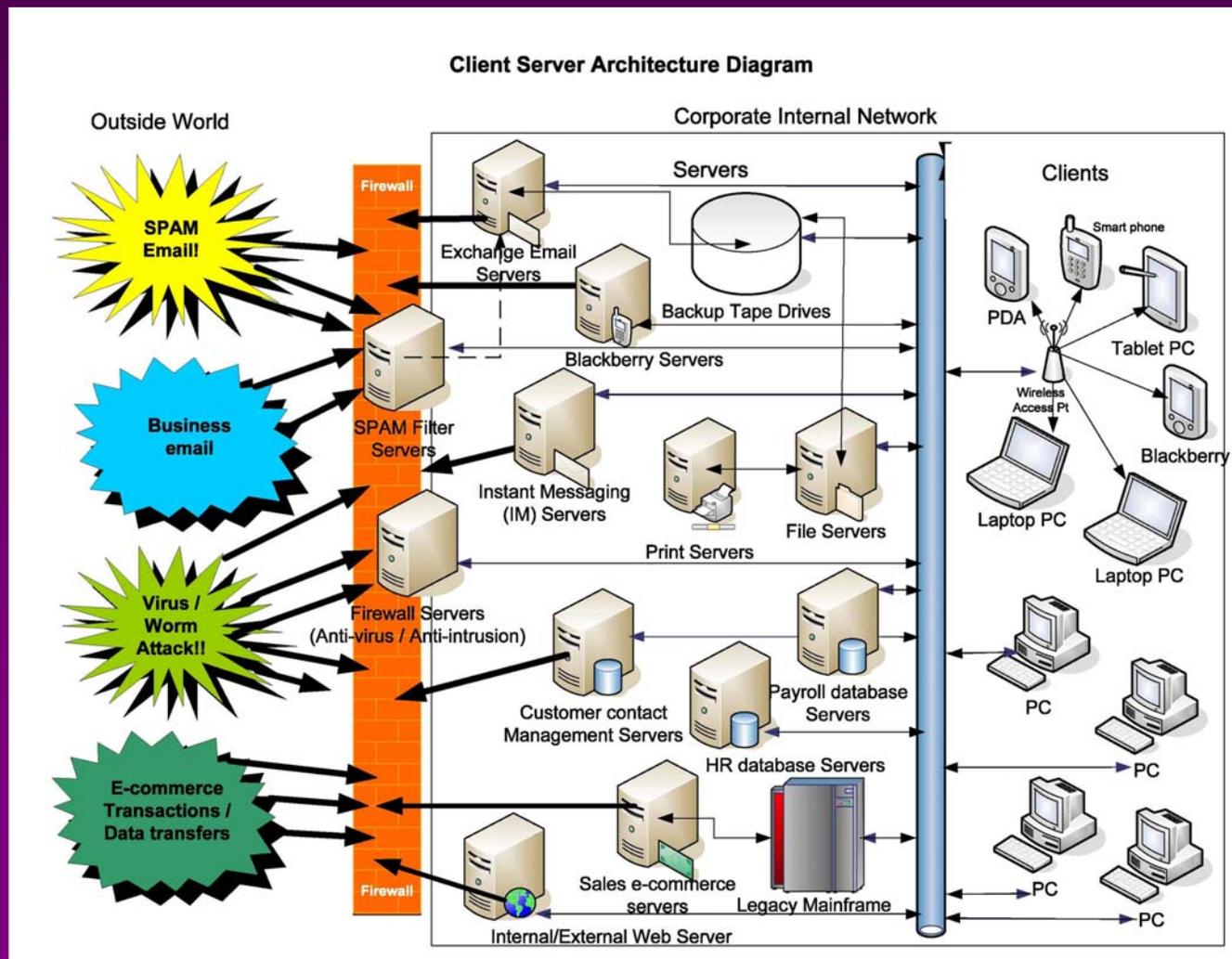
E-Discovery:
Preservation and Form of Production

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Sources of data

- ❖ Databases
- ❖ Network servers
- ❖ Computer systems
- ❖ Backup and archival media
 - ❖ Tapes
 - ❖ Discs
 - ❖ Drives
 - ❖ Cartridges
- ❖ Removable media
- ❖ Desktop computers
- ❖ Laptop computers
- ❖ Handheld devices
 - ❖ PDAs
 - ❖ Mobile telephones
 - ❖ Pagers
- ❖ Audio systems
 - ❖ Voicemail
- ❖ Legacy systems
 - ❖ Hardware & software

Complex environments





Paper-based business process

- ❖ Each stage of the business process generates or modifies paper, which becomes “the record”



Digital business process

- ❖ Each stage of the business process modifies the enterprise database; there is no “record”



All computer data is ephemeral

- ❖ Files are edited and overwritten routinely
- ❖ Temporary backups are routinely created and overwritten
 - ❖ “Permanent” backup media is recycled
- ❖ Routine operations depend on data streaming through Random Access Memory (RAM) and “swap” files (SWP)

Data is routinely destroyed

- ❖ Automatic purging and overwriting of data necessary for the efficient operation of an electronic information system
 - ❖ Temporary system files
 - ❖ Data backups
 - ❖ Real-time and streaming operations (web sites, video, audio, Instant Messaging, VOIP)
 - ❖ Email

Preservation issues

Complex environments +

Ephemeral data +

Automatic purging =

Preservation issues

that should be discussed with opposing
counsel and the court

The duty of preservation

- ❖ *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 216 (S.D.N.Y.)
 - ❖ “The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”
- ❖ *See also U.S. v. Koch Industries*, 197 F.R.D. 463, 482 (N.D. Okl. 1998)

But we also have Rule 37(e)

- ❖ “Electronically stored information. 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.”

2006 Committee Note

- ❖ The “routine operation” of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness.... Such features are essential to the operation of electronic information systems.”

2006 Committee Note

- ❖ “Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”

2006 Committee Note

- ❖ “The good faith requirement of Rule 37(e) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”

Required reading

- ❖ *The Sedona Conference[®] Commentary on Legal Holds: The Trigger & The Process* (August 2007 Public Comment Version)
 - ❖ Available at www.thesedonaconference.org
 - ❖ Condensed version in your materials
 - ❖ Look particularly at Guidelines 6-11

Preservation analysis

- ❖ Is litigation reasonably foreseeable?
 - ❖ See Guidelines 1-5
- ❖ What are the facts supporting both the foreseeable claims and defenses?
 - ❖ Subject matters
 - ❖ Time frames
 - ❖ Locations
 - ❖ Actors

Preservation analysis

- ❖ What types of data evidence those facts?
 - ❖ Sales transactional records
 - ❖ Financial records
 - ❖ Contracts
 - ❖ Correspondence
 - ❖ Business reports
 - ❖ Email
 - ❖ Telephone records
 - ❖ Etc...

Preservation analysis

- ❖ Where will this data be found?
 - ❖ Desktop computers
 - ❖ Network servers
 - ❖ Disks and tapes
 - ❖ Backup media
 - ❖ Laptops
 - ❖ Blackberries
 - ❖ Home computers
 - ❖ Etc...

Preservation analysis

- ❖ Who will have this data?
 - ❖ Officers and employees
 - ❖ Contractors
 - ❖ Business partners
 - ❖ Former employees
 - ❖ Customers
 - ❖ Foreign subsidiaries or parents
 - ❖ Etc...

Preservation analysis

- ❖ Who is “custodian” of:
 - ❖ Databases?
 - ❖ Collaborative work spaces?
 - ❖ Corporate intranets?
 - ❖ “Legacy” application data?
 - ❖ “Legacy” system data?
- ❖ Records/Information Management (RIM) and Information Technology (IT) people may need to be identified as “custodians”

Preservation analysis

- ❖ How volatile is this data?
 - ❖ “Persistent” data on storage media (tapes, optical disks, CDs, etc)
 - ❖ User application data on hard drives
 - ❖ Email on users’ hard drives
 - ❖ Email on email servers
 - ❖ Data in active databases
 - ❖ System data
 - ❖ Etc...

Preservation analysis

- ❖ What are the costs and burdens associated with preserving this information?
- ❖ Do the costs and burdens outweigh the value (relevance) of the data to the litigation?
 - ❖ Can you demonstrate that to the satisfaction of opposing counsel? (cost/benefit analysis)
 - ❖ Are you willing to accept a sanction if you figure wrong? (risk analysis)

An exemplar case

- ❖ *Cache La Poudre Feed, LLC v. Land O' Lakes Inc.*, 244 F.R.D. 614 (D. Colo. 2007)
 - ❖ Trademark infringement suit
 - ❖ Land O'Lakes had 400 servers backed up daily
 - ❖ Weekly for five weeks
 - ❖ Monthly for a year
 - ❖ Annually forever

Land O'Lakes

- ❖ General Counsel testified:
 - ❖ Depended on employees to preserve and produce data based on general instructions
 - ❖ Unaware of backup policies
 - ❖ Believed backup data would be redundant
 - ❖ Allowed hard drives of departing employees to be “wiped”

Land O'Lakes

- ❖ *Zubulake V** litigation hold guidelines
 - ❖ Suspend routine data destruction
 - ❖ Become fully aware of data environment
 - ❖ Communicate with “key players”
 - ❖ Take reasonable steps to monitor compliance with litigation hold
 - ❖ Retain relevant information and produce if responsive to requests

* 229 F.R.D. 422, 431-433 (S.D.N.Y. 2004)

Land O'Lakes

- ❖ Rule 26(g)(1):
 - ❖ “By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry [the disclosure] is complete and correct as of the time it is made.”
- ❖ Rule 26(g)(3) authorizes sanction for violation “without substantial justification”

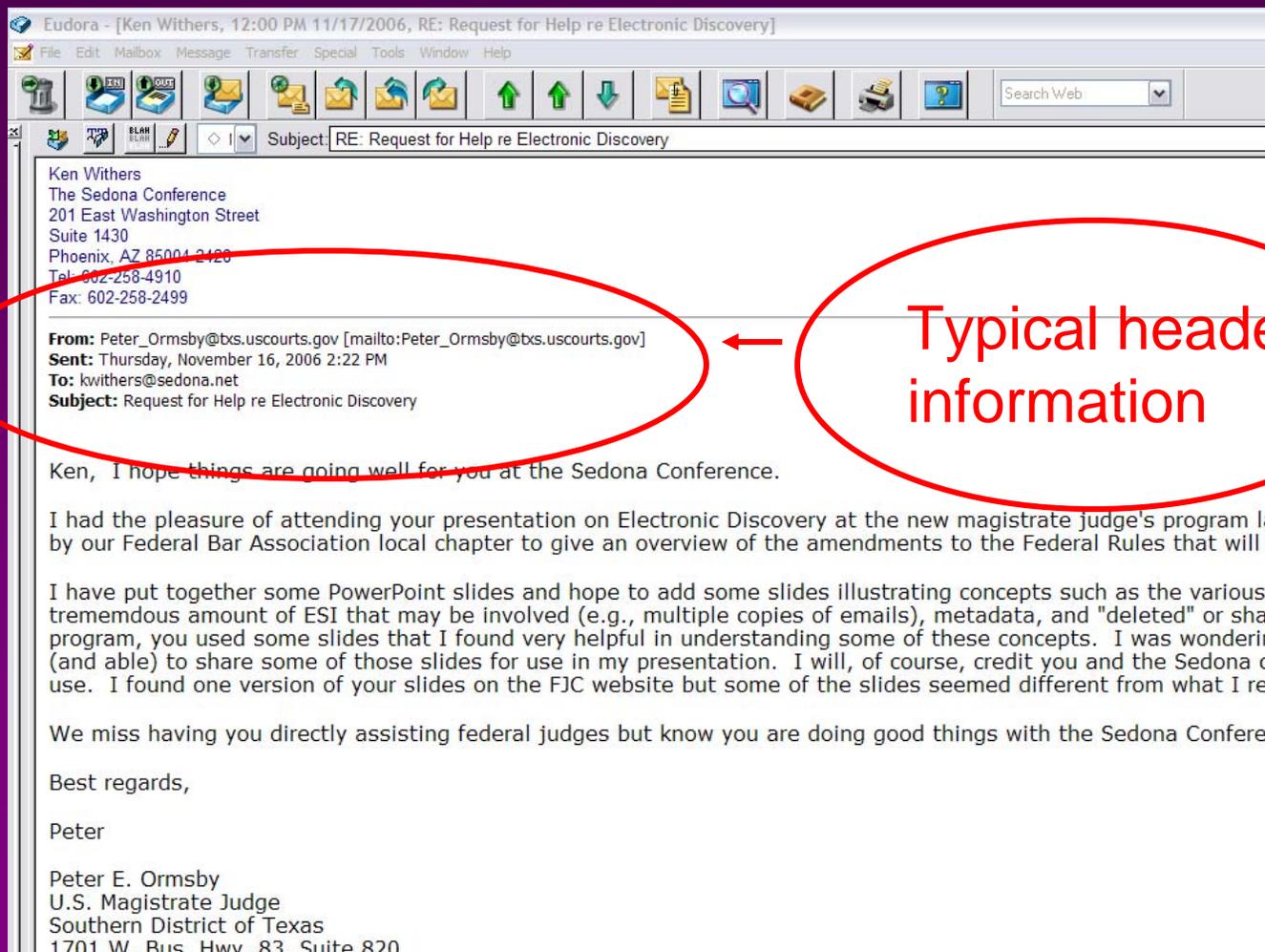
Land O'Lakes

- ❖ Land O'Lakes ordered to pay \$5,000 monetary sanction plus deposition costs
- ❖ Land O'Lakes ordered to certify within 30 days that specific searches had been made
- ❖ Plaintiff's request for adverse jury instructions and further sanctions denied for failure to establish willful misconduct

Forms of Production

- ❖ Different forms provide different information
 - ❖ Apparent content
 - ❖ Non-apparent content
 - ❖ Metadata
 - ❖ System context
- ❖ Choice of form has consequences
 - ❖ Relevance
 - ❖ Cost of processing
 - ❖ Integrity and authenticity

“Metadata”



Typical header information

“Metadata”

```

Metadata .mbox - Notepad
File Edit Format View Help
From ???@??? Fri Nov 17 14:35:26 2006
Received: from london.bitwise.net (smtp.bitwise.net [204.97.222.15])
  by mailbox.bitwise.net (8.9.3/8.9.3) with ESMTMP id OAA18124
  for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:15 -0500
Received: from localhost (localhost [127.0.0.1])
  by london.bitwise.net (Postfix) with ESMTMP id c2698511d1
  for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:15 -0500 (EST)
Received: from london.bitwise.net ([127.0.0.1])
  by localhost (smtp.bitwise.net [127.0.0.1]) (amavisd-new, port 10024)
  with LMTP id 24989-01-15 for <ken@kenwithers.com>;
  Fri, 17 Nov 2006 14:00:12 -0500 (EST)
Received: from mpls-qmqp-04.inet.qwest.net (mpls-qmqp-04.inet.qwest.net [63.231.195.115])
  by london.bitwise.net (Postfix) with ESMTMP id 6E89951189
  for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:12 -0500 (EST)
Received: from mpls-pop-14.inet.qwest.net (mpls-pop-14.inet.qwest.net [63.231.195.14])
  by mpls-qmqp-04.inet.qwest.net (Postfix) with QMQP
  id 91FBA22DC4E; Fri, 17 Nov 2006 19:00:11 +0000 (UTC)
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  by mpls-pop-14.inet.qwest.net with SMTP; 17 Nov 2006 19:00:11 -0000
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Message-ID: <002501c70a7a$aad433820$0500a8c0@SEDCON1>
From: "Ken Withers" <kwithers@sedona.net>
To: Peter_Ormsby@txs.uscourts.gov
Cc: "Kenneth J. Withers" <ken@kenwithers.com>
Subject: RE: Request for Help re Electronic Discovery
MIME-Version: 1.0
Content-Type: multipart/alternative;
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In-Reply-To: <OFB1E53FBF.146E2976-0N86257228.00723CCB-86257228.00755C1E@uscmail.uscourts.gov>
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Thread-Index: AccJxUmEk5EufJvSK6bOf+aZFEjngAtAmcg
X-Virus-Scanned: amavisd-new at bitwise.net
X-Spam-Status: No, score=-0.69 required=5 tests=[BAYES_00=-2.599,
  DNS_FROM_RFC_ABUSE=0.2, DNS_FROM_RFC_POST=1.708, HTML_MESSAGE=0.001]
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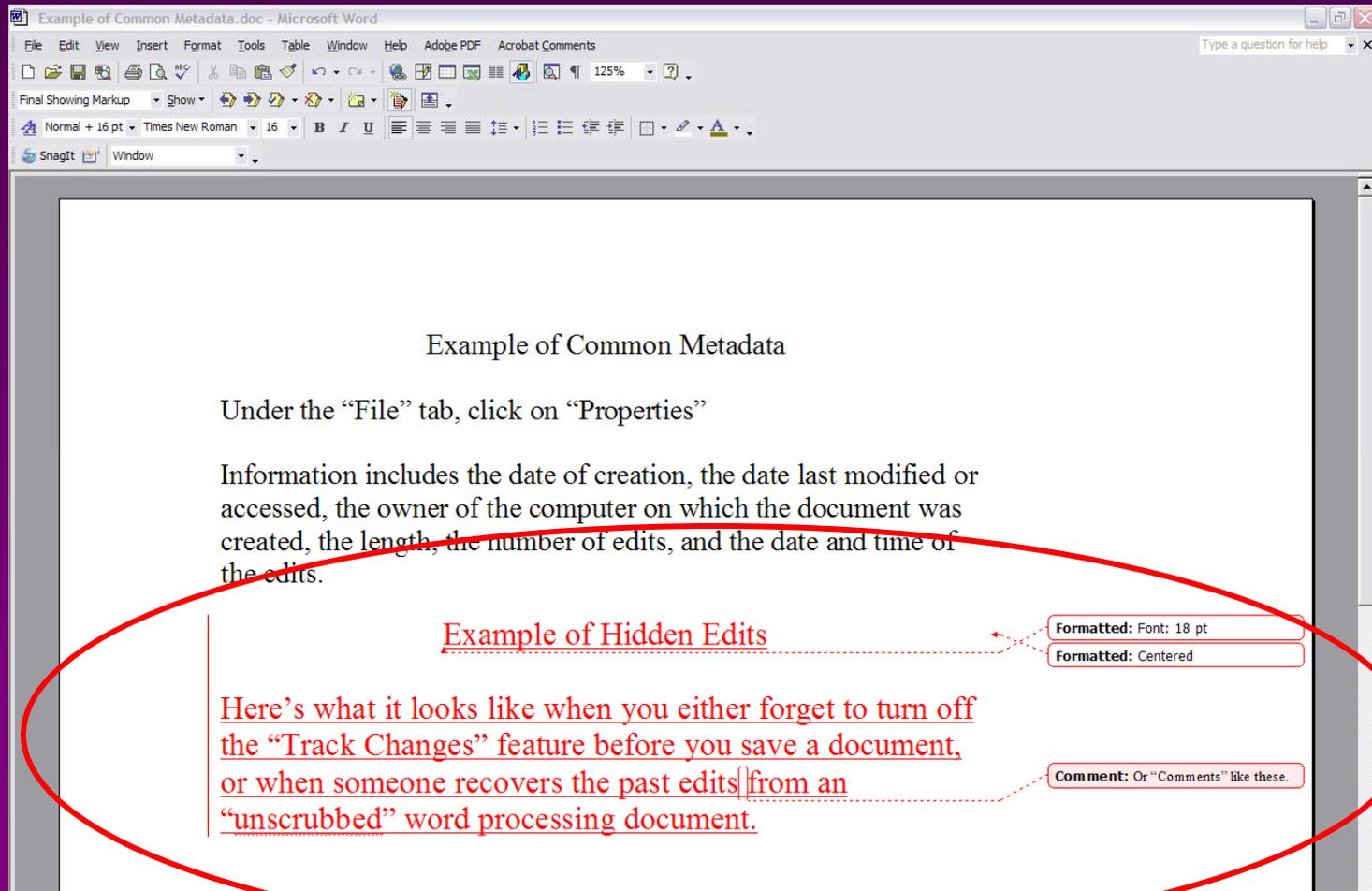
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<meta name=Generator content="Microsoft word 11 (filtered medium)">
<!--[if !mso]>
<style>

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Expanded header information

Embedded edits



Non-apparent information

Microsoft Excel - Bensinger Excel Cross.xls

File Edit View Insert Format Tools Data Window Help Adobe PDF

100% Arial 12 B I U

039

	A	B	C	D	E	F	G	H	I	J
1	XYZ Corp. Supervisor Candidate Evaluations 2004									
2										
3	Candidate:	Jones, Bill								
4										
5	Date Hired:	2/16/1998								
6										
7	Current Position:	District Manager								
8										
9	Evaluator	Attitude	Intellectual Ability	People Skills	Writing	Total				
10										
11	Baker	65	50	45	60	220				
12										
13	Johnson	75	65	50	55	245				
14										
15	O'Neil	80	70	70	80	300				
16										
17	Rosen	65	55	65	65	250				
18										
19	Average:	71.25	60	57.5	65	63.438				
20										
21										
22	Evaluation Score:	63.4375								
23										
24										

Non-apparent information

Microsoft Excel - Bensinger Excel Cross.xls

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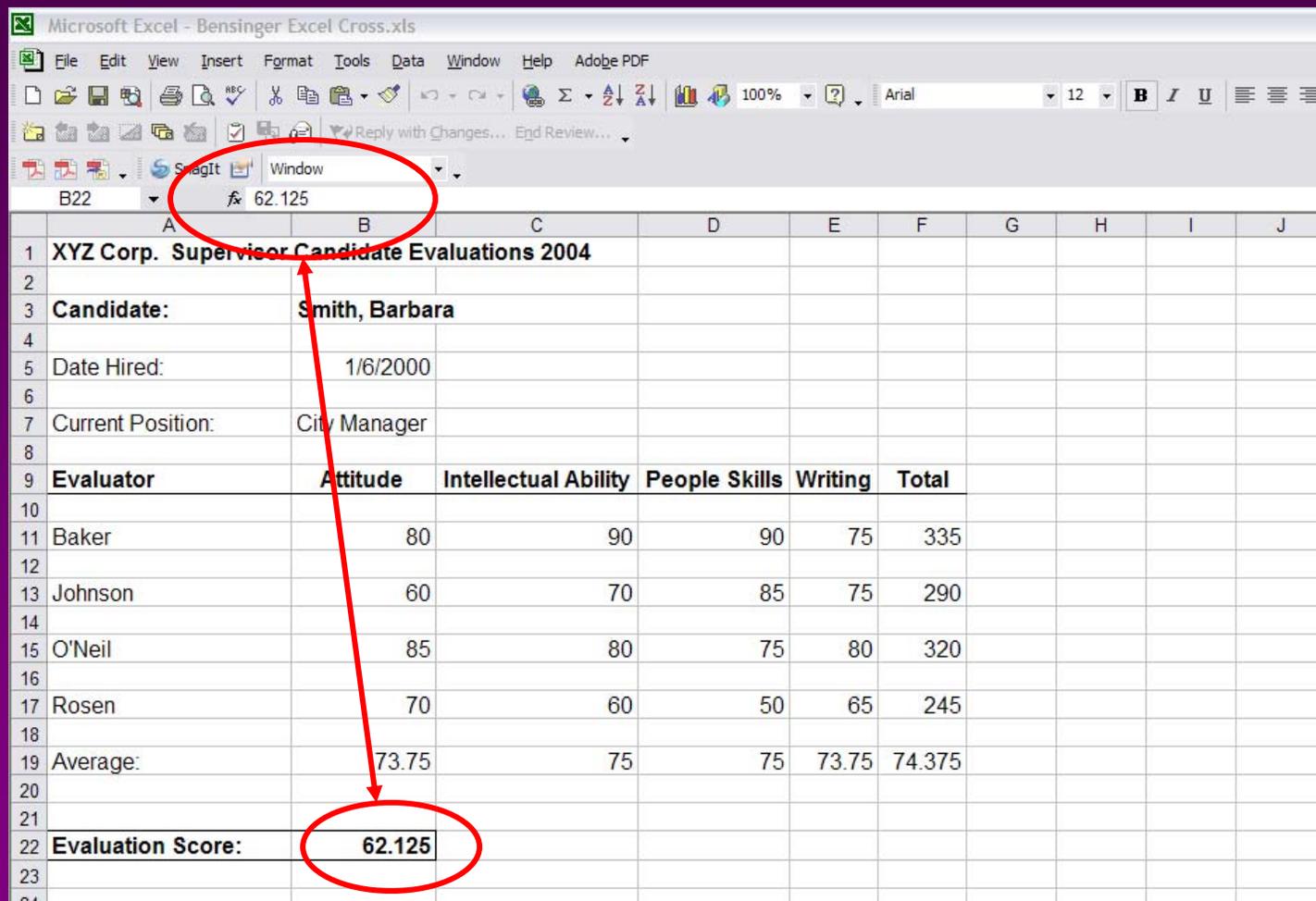
100% Arial 12 B I U

Window

B22 =F19*WeightIB\$6

	A	B	C	D	E	F	G	H	I	J
1	XYZ Corp. Supervisor Candidate Evaluations 2004									
2										
3	Candidate:	Jones, Bill								
4										
5	Date Hired:	2/16/1998								
6										
7	Current Position:	District Manager								
8										
9	Evaluator	Attitude	Intellectual Ability	People Skills	Writing	Total				
10										
11	Baker	65	50	45	60	220				
12										
13	Johnson	75	65	50	55	245				
14										
15	O'Neil	80	70	70	80	300				
16										
17	Rosen	65	55	65	65	250				
18										
19	Average:	71.25	60	57.5	65	63.438				
20										
21										
22	Evaluation Score:	63.4375								
23										
24										

Non-apparent information



XYZ Corp. Supervisor Candidate Evaluations 2004						
Candidate:	Smith, Barbara					
Date Hired:	1/6/2000					
Current Position:	City Manager					
Evaluator	Attitude	Intellectual Ability	People Skills	Writing	Total	
Baker	80	90	90	75	335	
Johnson	60	70	85	75	290	
O'Neil	85	80	75	80	320	
Rosen	70	60	50	65	245	
Average:	73.75	75	75	73.75	74.375	
Evaluation Score:	62.125					

Forms of production

❖ Paper

- ❖ Easy to read
- ❖ Easy to manage, in small volumes
- ❖ Not searchable
- ❖ Needs extrinsic authentication

Forms of production

- ❖ Digital images (.tiff or .pdf)
 - ❖ Much like paper
 - ❖ Easier to physically manage
 - ❖ Can't be searched
 - ❖ Loses context
 - ❖ Needs extrinsic authentication

Forms of production

- ❖ Digital images with “load file”
 - ❖ Provides bibliographic management information
- ❖ Digital images with searchable text
 - ❖ Provides searchable text

Forms of production

- ❖ Native format
 - ❖ Provides non-apparent information
 - ❖ Provides metadata
 - ❖ May be self-authenticating
 - ❖ Difficult to protect from alteration
 - ❖ Difficult to Bates stamp
 - ❖ Difficult to review for privilege

Forms of production

- ❖ Bitstream image of hard drive
 - ❖ Provides historical and environmental context
 - ❖ Provides deleted and fragmented data
 - ❖ Provides system data
 - ❖ Allows for forensic analysis
 - ❖ Highly intrusive
 - ❖ Mostly irrelevant
 - ❖ Privilege nightmare

Forms of production

- ❖ *Williams v. Sprint/United Management Co.*, 2005 WL 2401626 (D. Kan. Sept. 29, 2005)
 - ❖ Native format production of Excel spreadsheets relevant and necessary
- ❖ *Cf. Williams v. Sprint/United Management Co.*, 2006 WL 3691604 (D. Kan. Dec. 12, 2006)
 - ❖ Native format production of email with attachments not relevant or necessary