

BUSINESS & CAREERS

While defending a client against someone claiming damages for having become disabled, Dera Nevin's case took a strange turn when a photograph surfaced: It was "of a guy jumping across the finish line, hands in the air, after a half-marathon," she recalls.

"The photo clearly showed his bib number and his last name, which was quite unique, and the name of the race," says Nevin, senior director for litigation support at McCarthy Tétrault LLP.

Not so long ago, such evidence might have been supplied by old-fashioned gumshoe work of a private investigator staking out the race with a 35mm camera, and who might be called upon to swear over a bible to the photo's legitimacy in a court of law.

Not quite so today: In an age when the minutiae of people's lives — written and visual, imperfect and pluperfect — often finds its way onto the Internet or an electronic gadget, all Nevin's legal team had to do was put someone's mousing hand to work.

Trolling websites or devices for incriminating evidence would seem as easy as shooting fish in a barrel. But photos, audio and video clips collected online or from phones or tablets might not hold up during legal proceedings.

"Challenging how counsel identifies, collects and preserves evidence is becoming standard practice in Canadian courts," says Philip Fodchuk, principal of Urgentis Digital Crisis Solutions Inc. "The more you handle a file, the more you change its attributes."

Changing a file's attributes raises a red flag for anybody seeking to challenge it. Such a scenario made the news in December involving Pakistani model Veena Malik who appeared on the cover of FHM India apparently naked and with a tattoo on her arm of ISI, the initials of Pakistan's intelligence agency. It stirred controversy and now her lawyers are suing the men's magazine, alleging the photos were doctored. Their likely first line of attack? The chain of custody of the photos.

"If I take a photograph off the web, I don't have true chain of custody back to the moment of creation," Nevin says. "The chain of custody is implicitly flawed."

As it turned out, the photo that Nevin's team found of the alleged disabled man didn't need to go to court — she was able to rely on it another way.

"The clerk I was working with discovered [that] photo using Google three days before a significant trial in which this individual claimed he was permanently disabled," she recalls. "We called the company [that sponsored this race] and got his waiver form in which he said he was not aware of any physical, mental or emotional difficulty that would prevent him from participating in the race."

"We had conversations with his attorney and arrived at a good result."

People and businesses create more multimedia — photos, audio and video — than ever, and lawyers increasingly need to handle it as effectively as they do text. But multimedia analysis remains outside most lawyers' bailiwicks in part because of a dearth of widely available technology and a lack of expertise handling the technology.

People usually make such changes inadvertently, especially since each application used to manipulate a file adds its own metadata to that file.

For instance, consider a photograph taken on a digital camera: It might have the date the picture was snapped stamped on it. But there is a lot more information that is associated with the image in the background file — from aperture setting to resolution (some cameras can even record GPS location). More data is generated when the image is transferred to a computer, and if any application is used to manipulate the image — or, in modern parlance, if it has been 'Photoshopped.'

See **Photo** Page 27

When a picture leaves 1,000 clues

PART 1 OF A 2-PART SERIES

STORY BY LUIGI BENETTON



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Discovery involves much more than words

Photo
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But the search for metadata doesn't end with the basic photo and file and any of its versions. For example, certain Adobe Systems Inc. software products save specific metadata in a separate XML text file called a sidecar file. Certain file types don't allow metadata to be added to them.

"It could be a licensing issue, the format might need to be resaved and recompressed to save that information [in the file]," explains Colin Smith, senior solutions architect for Adobe.

You sometimes just can't bring a file to a legal proceeding in its original format—it may be lost or not even exist, and the best you can do is rely on a copy of it.

But there is a workaround.

In his book *Video Evidence: a Practitioner's Manual*, Toronto-area lawyer Elliott Goldstein explains that workaround by quoting "Legal Ramifications of Digital Imaging in Law Enforcement", a 2000 article by Erik C. Berg.

The workaround essentially entails answering the following questions:

- Who captured the image and when?
- Who had access to the image between the time it was captured and the time it was introduced into court?
- Has the original image been altered in any way since it was captured?
- Who enhanced the image and when?
- What was done to enhance the image and is it repeatable?
- Has the enhanced image been altered in any way since it was first enhanced?

"Whenever an image is altered, the alteration must be disclosed to the court," Goldstein writes. "The party seeking admission of the 'enhanced' (altered copy) image must also tender the 'original' (unretouched, source) image."

Philip Fodchuk, principal of Urgentis Digital Crisis Solutions Inc., uses a straightforward technique to inform the court how he captures video.

"If we can't get a video file, we can play it back on-screen and record it using [screen-recording] tools like Camtasia," he explains.

"It lets me record everything that's happening on my screen, including everything

we're doing on screen—changing settings, running the tool—so it's very clear how we're doing this."



Web pages aren't just 'pages'

Lawyers may need to show photos, audio and video clips in the context of a web page to which they were posted. That's when they must capture entire web pages and not just the elements they want to show.

It's easier said than done. "These pages are not just like pages of paper," says Nevin at McCarthy Tétrault. "They're a collection of small bits that are displayed together. A Facebook wall, for instance, consists of a number of photographs and links to other places. It's a great big digital scrapbook."

"One webpage we captured had 96,000 elements. It would load into Summation as 96,000 records. Capturing all that information in a way that you can rebundle it as it appears to the user is a technological challenge."



Never work off the original file

If you want to dissect or examine a file, do your work using a copy. Computers might change file metadata even if you make a copy but you aren't likely to compromise the chain of custody of the original to an extent that you couldn't explain during legal proceedings.



Don't 'prepare' multimedia files

"If a client or lawyer sends me a video clip saying 'these are the 12 minutes we're interested in,' I ask: 'So where are the other 400 hours?'" Fodchuk says.

"They're just trying to be helpful," he explains. "It might be okay if they explained what they did, what tools they used, so we can understand what they changed, but nine times out of ten, they don't."

In other words, the remaining time might not be germane to the case, but if you don't disclose all the video to opposing counsel, the other side might complain that you're hiding something. ■

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PICTURE THIS INSIDE THE IMAGE

Disputing or defending the authenticity of a multimedia file can hinge on knowledge of the file's metadata. For instance, seeing one creation date in an image and another in that image file's metadata ought to raise eyebrows. / What's in a picture? A lot more than smiling faces. Here's a sampling of metadata to check in various types of multimedia files.

- creation date + method of creation + source + aperture setting (F-number) + pixel height and width + colour representation + flash mode + creation software + exposure time (shutter speed) + ISO speed (sensitivity) + compression + GPS location + resolution + metering mode + exposure program + exposure compensation + frame count + focal length + format + date of conversion from analog + initial source + copyright information and descriptions + thumbnail for previewing a picture