

Legal Ethics of Metadata or Mining for Data About Data

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Overview

- What is Metadata?
- Why care about Metadata?
- What is Confidential or Privileged Information?
- Litigation Discovery
- Case Law
- Ethics Opinions
- Senders' Duties and Responsibilities
- Recipients' Duties and Responsibilities
- Summary

What is Metadata?

- Embedded data in an electronic document
 - Not readily visible and/or available
 - Data about data
 - “Document DNA”
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- Examples?

Examples of Metadata

- Author
- Author's initials
- Name of law firm or company
- Name of computer
- Name of the network server or hard disk where document saved
- Other file properties and summary information
- Non-visible portions of embedded OLE objects
- Names of previous document authors
- Document revisions
- Document versions
- Template information
- Hidden text
- Comments
- Time spent editing the document
- File numbers, case numbers, etc.

Where is Metadata?

- **O**bject **L**inking and **E**mbedding, (“OLE”)
- OLE travels with document

Legitimate Uses of Metadata:

The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age

- Proving the authenticity of the content of electronic documents
- Identify and exploit the structural relationships that exist between and within electronic documents, such as versions and drafts
- Track the many layers of rights and reproduction information that exist for records and their multiple versions.
- Document other legal or security requirements that have been imposed on records; for example, privacy concerns, privileged communications or work product, or proprietary interests.

How is Metadata Revealed?

- Within Word Processing Program
- “Metadata Viewers”
 - Low-level, binary file editor

Electronic Documents

- Word Processing documents
 - Word Perfect
 - Word
- Spreadsheets
 - Excel
- Databases
- Presentation
 - PowerPoint

Word Processing Programs

- Advances and sophistication in what programs may do
- And, by default, will do
- Including keeping track of information you did not know was being stored in the electronic document
- And, that data is referred to as “Meta Data”

Word Processing Documents

- Examples
 - Pleadings
 - Stipulations
 - Settlement Agreements

Why Should We Concerned

- Inadvertent disclosure of:
 - Work Product
 - Confidential Information
- Due Diligence in Formal Discovery
 - Seeking documents

Government Lawyers: Who is the Client?

- Government?
- Agency within government?
- Director of agency?
- Employees of agency

- General Rule: **Agency**

Confidential Information

- Model Rule 1.6
- Information obtained by attorney relating to representation of the client
- Broad concept

- Pre-Ethics 2000
- Post-Ethics 2000
- State variations

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Pre-Ethics 2000)

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Pre-Ethics 2000)

- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) **To establish** a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, **to establish** a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or **to respond** to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (3) To comply with other law or a court order

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Ethics 2000)

- RULE 1.6: CONFIDENTIALITY OF INFORMATION
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Ethics 2000)

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Ethics 2000)

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

RULE 1.6: CONFIDENTIALITY OF INFORMATION (Ethics 2000)

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) **to establish** a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, **to establish** a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or **to respond** to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Confidentiality vs. Attorney/ Client Privilege

- Attorney/ client privilege
 - Evidence Code 503
 - Evidentiary privilege
 - May be asserted or waived by client

Work Product

- "The work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege." In re Grand Jury, 106 F.R.D. 255, 257 (D.N.R. 1985).

Hickman v. Taylor, 329 U.S. 495 (1947),

- "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant go from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.... This work is reflected of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways...."

Opinion Work Product

- In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982):

“To the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification.”

Federal Rule of Civil Procedure 26

- **(3) Trial Preparation: Materials.**

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
(Emphasis added)

Formal Discovery vs Informal Document Review

- Formal Discovery
- Exchange of draft documents
- Electronic transmission of final documents

Federal Rule of Civil Procedure 34

- “[a]ny party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono records, and **other data compilations** from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form).”

1970 Amendment Advisory Committee Note to Rule 34

- “Rule 34 applies to electronics data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form.”

1972 Proposed Rules Advisory Committee Note to Federal Rule of Evidence 803(6)

- “The expression ‘data compilation’ is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.”

Federal Rule of Civil Procedure 34 (Effective December 1, 2006)

- Rule 34(a) adds “electronically stored information” as a separate category along with “any designated documents.”

Federal Rule of Civil Procedure 34 (Effective December 1, 2006)

- Rule 34(b) adds the following language about the production of electronically stored information:
 - “Unless the parties otherwise agree, or the court otherwise orders,. . .
 - (ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable.”

Proposed Committee Note to Rule 34(b) (Effective December 1, 2006)

- “Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.”

Case Law on Meta Data

Nova Measuring Instruments Ltd. v. Nanometrics, Inc., 417 F.Supp.2d 112, (ND Cal 2006)

- “So there is no confusion, if it has not already done so, it must produce the documents in their native file format, with original metadata. See *In re Verisign*, 2004 WL 2445243 at *1 (N.D.Cal.2004)(upholding discovery orders requiring production of documents in native format with metadata as not clearly erroneous: ‘ [t]he electronic version must include metadata as well as be searchable’). See also *In re Honeywell International, Inc.*, 230 F.R.D. 293, 296 (S.D.N.Y.2003).” (Emphasis added)

Hopson v. Mayor and City Council of Baltimore 232 F.R.D. 228 (D.Md. 2005)

- “At a minimum, they should discuss: the type of information technology systems in use and the persons most knowledgeable in their operation; preservation of electronically stored information that may be relevant to the litigation; the scope of the electronic records sought (i.e. e-mail, voice mail, archived data, back-up or disaster recovery data, laptops, personal computers, PDA's, deleted data) the format in which production will occur (will records be produced in “native” or searchable format, or image only; is metadata sought)”

Williams v. Sprint/United Management Co., 230 F.R.D. 640(D.Kan.2005)

- “Defendant admitted that it had scrubbed the metadata from and locked certain data on the spreadsheets prior to producing them. It argued that the spreadsheets' metadata is irrelevant and contains privileged information. Defendant further argued that Plaintiffs never requested the metadata be included in the electronic Excel spreadsheets it produced and that metadata was never discussed at any of the discovery conferences.”

Williams v. Sprint/United Management Co., 230 F.R.D. 640(D.Kan.2005)

- “In an attempt to justify its actions, Defendant contends that emerging standards of electronic discovery articulate a presumption against the production of metadata, which is not considered part of a document, unless it is both specifically requested and relevant. Defendant next argues that Plaintiffs never sought the production of metadata.”

Williams v. Sprint/United Management Co., 230 F.R.D. 640(D.Kan.2005)

- “Based on these emerging standards, the Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order.”

Analogy: Misdirected Fax or Letter

- ABA Formal Opinion 05-437: Lawyer who receives a document, and knows or reasonably should know that the document was inadvertently disclosed, should promptly notify the disclosing party to permit the sender to take some action to deal with the situation.
- ABA Ethics 2000 Rule 4.4: Recipient only obligated to notify sender of receipt

Inadvertent Disclosure as Waiver

- Majority of Courts generally apply a multi-factor analysis that considers:
 - (1) the reasonableness of the precautions taken to prevent inadvertent disclosure
 - (2) the amount of time taken to remedy the error
 - (3) the scope of discovery
 - (4) the extent of the disclosure, and
 - (5) whether the interests of justice would be served by relieving the party of its error.

Ethics Opinions on Meta Data

New York State Bar Opinion 782

- “...Lawyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets.”
- "Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

New York State Bar Opinion 749

- "A lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail."
- Intent of sender was to transmit only visible content

What You Should Do as Sender

- Metadata scrubber software
 - Considerations: Pro and Con
- Disable features
 - “Track Changes”
 - “Create Versions”
 - Fax document
 - Send document as PDF document
 - **P**ortable **D**ocument **F**ormat

What You Should Do as Recipient

- Review produced documents
 - Preliminary designation of potential privileged or confidential documents
- Avoid “end justifies the means” argument
- If conduct not sufficient
 - Potential disqualification of lawyer

Summary of Your Duties

- Caution as sender or recipient
- Production and Non-Production
- Context of production
- Candor to counsel and Court