Metadata: PDFs, Electronic Redaction and Track Changes
Managing Legal and Ethical Risks When Removing Sensitive Information

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
Robert D. Brownstone, Law and Technology Director; Chair, EIM Group, Fenwick & West, Mountain View, Calif.

Thursday, August 5, 2010

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Metadata: Track Changes, PDFs, Electronic Redaction

Managing Legal and Ethical Risks

Webinar – August 5, 2010

Robert D. Brownstone

William E. Hoffman

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To Scrub or Not To Scrub?

Hamlet Prince of Denmark Properties

Title: Hamlet Prince of Denmark

Subject:

Author: fbacon

BIZARRO

![Binary Shakespeare](Bizarrocomic.blogspot.com)
I. Three Key Metadata Threats

Problems, cautionary tales & risk mitigation for each of:

- A. Tracked Changes
- B. Conversions to .pdf
- C. Electronic redaction

II. Ethical Obligations

- A. Sending Lawyer
- B. Receiving Lawyer
- C. Discovery is Different – Usually
I. Metadata – Introduction

- Data about data
- Information describing the history, tracking, or management of an electronic document

- *File System Data* = atmospherics (incl. fields in Windows Explorer)
- *Document (Embedded) Data* = results of revisions in drafts of a file
I. Metadata Intro (c’t’d) — Embedded Data

- Generally embedded/document data can yield more surprises, including:
  - inserted comments
  - white text
  - text in very small font
I. Key Threats –
A. Tracked Changes

1. The Problem

- Embedded data can track/capture:
  - changes made
  - reviewers’ name
  - order in which changes made
- Especially in Word when creator/modifier did not accept/reject tracked changes
Embedded data’s biggest threat — "90[%] of documents in circulation began as something else"

(citing Vanson Bourne study, "Cost of Sharing")

Hot button issue because recipient can manipulate files to peel back onion layers by using either:

1) low-tech
   - basic tools (drop-down-menus & tabs) in Word, Excel, PowerPoint and/or Adobe Acrobat

2) higher-tech
   - scrubbing/cleaning software, by clicking on "analyze"

3) highest-tech
   - eDiscovery software to extract – from one file or a batch of files – metadata in searchable form
I(A)(1). Tracked Changes – Lawyers (c’t’d)

- LAWYER-created files . . . concerns:
  - Documents drafted by one side
  - Documents drafted by both sides
- Proposed Order e-mailed to Judge in Word or WordPerfect format
- Written discovery and/or discovery responses might (HAVE TO BE) be exchanged in Word or WordPerfect
I(A)(1). Tracked Changes – Lawyers (c’t’d)

- E-mail attachment to client
  - Draft of pleading or agreement
  - Bill for services rendered

- Confidentiality Concerns for Legal and Sales:
  - Identity of other client/buyer/seller
  - Fees charged other client/buyer

- Municipalities
  - Publicly posted Agenda, Minutes or Ordinance
I(A). Tracked Changes (c’t’d) – 2. Cautionary Tales

- UN (Lebanese PM assassination), British PM’s Office ("Downing Street Memo"), Republican Social Security Administration, Democratic National Committee, California AG’s Office, MPAA and SCO Group. . .


- Brian Bergstein, *Bigger efforts made against embarrassing ‘metadata’*, AP (2/3/06) <http://Bergstein-2-3-06.notlong.com>


Litigators representing SCO chagrined when metadata (tracked changes) in Word version of Complaint revealed thought process re: which Linux users to target as Δ’s

Stephen Shankland, *Hidden text shows SCO prepped lawsuit against BofA* (c/net 3/18/04)

I(A). Tracked Changes (c’t’d) — 3. Mitigating Risks

■ DO any or all of these steps:
  
  ● properly accept/reject tracked changes one by one or all at once
  
  ● use metadata scrubbing software
  
  ● scrub before or during conversion to portable document format (.pdf)

■ DON’T

  ● hide them by choosing "Final" from Word’s "Display for Review" toolbar
I(A)(3). Tracked Changes – Mitigating Risks (c’t’d)

- Microsoft menus and the like are inadequate
  - See Appendix A, Brownstone Bibliography, § A

- So, especially for e-mail attachments, use software that works for tracked changes and other metadata. Examples:
  - Payne Consulting Group's (PCG's) Metadata Assistant
    <www.payneconsulting.com/products>
  - Workshare Professional 5.2 suite; or Workshare Protect 6.0
    <www.workshare.com/products/wsprofessional>
  - Esq Inc.'s Iscrub
    <esqinc.com/section/products/2/iscrub.html>
  - Litera’s Metadact
    <www.litera.com/products/metadact.html>
I(A)(3). Mitigating Risks (c’t’d) – Other Soft-/Hard- ware

- **Macs**
  - 3BView’s 3BClean

- **WordPerfect’s built-in features**
  - Laura Acklen, *Saving WordPerfect Files Without Metadata*, Corel (last visited 7/28/10)
day&sid=1047024315119&gid=1047024331836&cid=1144159894033>
  - Richard M. Georges, *Saving WordPerfect Files Without Metadata*, FutureLawyer (7/23/10)
I(A)(3). Tracked Changes – Mitigating Risks (*c’t’d*)

Goalkeeper Prompts – Examples:

![Workshare Professional interface](image)

Double-click to apply and preview
I(A)(3). Mitigating Risks (c’t’d) – Goalie Prompts (c’t’d)

- Also, “Reply to All” warnings
  - See, e.g., <www.sperrysoftware.com/outlook/Reply-To-All-Monitor.asp>
I(A)(3). Tracked Changes – Mitigating Risks (c’t’d)

- **CAVEAT: "Mind the [Mobile] Gap"
  - Attachments created and sent – or forwarded – via: web access to e-mail system, e.g., Outlook Web Access (OWA); OR smartphones/PDA’s
  
- **See generally** these Microsystems items:
  - *Cathy Brode, The Often Overlooked Mobile Security Gap*, 3BView (12/15/09)

- **See also**
I(A)(3). Tracked Changes – Mitigating Risks (c’t’d)

- For law firms and others, far better to scrub outgoing copies day to day than to try to batch-scrub after the fact

  - Technological limitations
  - Ethical issues

  - Public records issues

  - Other pertinent decisions – including one from 2010 – in Bibliography, § B
I. B. Conversions Into .PDF

1. The Problem

- Some metadata migrates
- Just press *Ctrl*+D to see pre-conversion:
  - Title
  - Author, *etc.*
I(B). Conversions Into .PDF – 2. Cautionary Tales

- **Alabama Ethics Opinion**

- **Corn Growers letter**

  

I(B). Conversions (c’t’d) — 3. Risk Mitigation

- Best to scrub metadata BEFORE or DURING conversion to .PDF
- Or AFTER. Some help is here in Adobe 8 & 9 ("Examine Document")
1. The Problem

- When is redaction needed?
  - Protective Order (incl. multi-tier/AEO)
  - Government inquiry responses
  - ECF/CM . . . PERSONAL DATA IDENTIFIERS:
    - Now nationwide . . . via FRCP 5.2 (eff. 12/1/07)

<www.law.cornell.edu/rules/frcp/Rule5_2.htm>
I(C)(1). Redactions—The Problem (c’t’d)

- Out of sight . . . out of mind?
- May just be an overlay
- "Hidden" text may be search-able and copy-able for pasting into another document
- "Under seal" information or PII may be exposed by a friend, foe or neutral (court, e.g.)
I(C). Redactions \((c't'd)\) – 2. Cautionary Tales

- **NEW! TSA redaction gaffe**
  - **PDF Itself with black boxes removed**
    - \(<\text{http://cryptome.org/tsa-screening.zip}>\)
  - **Articles:**
    - \(<\text{http://www.betanews.com/article/The-PDF-redaction-problem-TSA-may-have-been-using-old-software/1260466899}>\)
    - \(<\text{www.wanderingaramean.com/search/label/Screening%20Management%20SOP}>\) (linking to related posts)
  - **Satirical Video:**
    - \(<\text{www.thedailyshow.com/watch/wed-december-9-2009/theory-v--practice---tsa-leak}>\)
I(C)(2). Redactions – SNAFUS (c’t’d)

- **25 Things Facebook Couldn't Keep Secret In Court, Information Week (2/12/09)**  
  <www.informationweek.com/shared/printableArticle.jhtml;jsessionid=PVULRFVJRLLOT0QSNDLRSKHSCJUNN2JVN?articleID=214000046>  
  - linking to <http://docs.justia.com/cases/federal/district-courts/california/candce/5:2007cv01389/189975/474/0.pdf>  
    [may not open in Internet Explorer; will open in Mozilla Firefox]

- **GE Suffers a Redaction Disaster, Conn. L. Trib. (5/28/08)** ("sensitive information easy to access behind black veil")  
  <www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202421717785>

- **Error by FTC Reveals Whole Foods' Trade Secrets, AP (8/15/07)**  
  <www.washingtonpost.com/wp-dyn/content/article/2007/08/14/AR2007081401784_pf.html>
I(C)(2). Redactions – SNAFUS (c’t’d)


  - Linking to

  - IRONY . . . .

  Redacting with Confidence: How to Safely Publish Sanitized Reports Converted From Word to PDF

  Architectures and Applications Division of the Systems and Network Attack Center (SNAC)

  Information Assurance Directorate

  National Security Agency
  ATTN: 1333
  9800 Savage Rd, STE 6704
  Ft. Meade, MD 20755-6764
  (410) 854-6191 commercial
  (410) 854-6510 facsimile
  W2Kguides@nsa.gov

I(C)(2). Redactions – SNAFUS (c’t’d)

- **More PDF Blackout Follies**, Slashdot (6/22/06)  
  <http://it.slashdot.org/article.pl?no_d2=1&sid=06/06/22/138210>
  linking to <www.sfgate.com/c/acrobat/2006/06/22/BALCO_quash_subpoena_sfchronicle.pdf>

- **Copy, Paste and Reveal**, Legal Times (1/30/06) (U.S. report re: fatal shooting of Italian intelligence officer; secret details revealed re: manning of security checkpoints)  <http://Lesemann-1-30-06.notlong.com>

- **See R. Brownstone, et al., Exposing Redaction**, 9 No. 10 E-Commerce L. Rep. 7 (West Oct. 2007)  
  - Expanded version – **Secrets Easily Leaked by Friend or Foe In Publicly Filed .PDF Documents**, 13 No. 1 Cyberspace Lawyer 1 (West Jan./Feb. 2008) – available from presenter
I(C). Redactions \((c't'd)\) – 3. Risk Mitigation

- **DO’s:**
  - **High Tech:**
    - MS Word redaction tool; OR
    - Acrobat Pro 8.0 or 9.0 redaction tool
  - **Low Tech:**
    - print then black-out (or vice versa)
    - then scan
    - then OCR
I(C)(3). Redaction – Mitigating Risks (c’t’d)

- DON’T’s:
  - Microsoft Word’s borders/shading
  - Microsoft Word’s highlighter

[UNLESS YOU THEN PRINT, SCAN & OCR]
I(C)(3). Redaction – Mitigating Risks (c’t’d)

TO LEARN MORE:

- Summary of changes from Acrobat 7; Top Features for Legal Professionals, Adobe (9/8/08) [http://blogs.adobe.com/acrolaw/A9_7-8-9-comparison.pdf]
II. Ethical Obligations – Inadvertent Disclosure of Confidential Metadata

- Metadata ethics = subset of broader area of inadvertent disclosure in general . . .

- Overview chart of nationwide metadata ethics opinions:
  - <abanet.org/tech/ltrc/fyidocs/metadatachart.html>
II. Ethical Obligations – Inadvertent Disclosure (c’t’d)

- A lawyer’s ethical duty varies whether the lawyer has:
  - sent confidential metadata;
  - received confidential metadata; or
  - disclosed confidential metadata as part of discovery

- N.B. The jurisdiction governing a lawyer’s conduct may provide a different rule re metadata as distinct from other ESI
II. Ethics – A. Sending Lawyer – Basic Rules – Confidentiality

- ABA Model Rules of Professional Conduct [virtually all states have the same or similar rules as the following]
  - 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 [certain specific exceptions, e.g., to prevent death or substantial bodily harm]."
II(A). Sending – Basic Rules – Confidentiality (c‘t’d)

- A lawyer has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

- A lawyer’s duty under Rule 1.6 "includes taking care . . . to employ reasonably available technical means to remove [confidential] metadata before sending the document."
  - D.C. Bar Opinion 341 (Sept. 2007)
II(A). Sending – Basic Rules – Duty of Competence

- "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
  - ABA MRPC Rule 1.1 Competence

- "[A] lawyer . . . [must] avoid improper disclosure of confidential and privileged information in metadata in electronic documents."
  - Minnesota Lawyers Professional Responsibility Board Opinion No. 22 (Mar. 26, 2010) ("Minn. # 22")
II(A). Sending – Basic Rules – Competence (c’t’d)

- Competence requires that lawyers understand that:
  
  - metadata is created in the generation of electronic documents,
  
  - transmission of electronic documents will include transmission of metadata,
  
  - recipients of the documents can access metadata, and
  
  - actions can be taken to prevent or minimize the transmission of metadata."

Minn. # 22
II(A). Sending – Basic Rules – Related Rules

- **ABA Rule 5.1 Responsibilities Of Partners, Managers, And Supervisory Lawyers** requires those with managerial authority to ensure that the firm and its lawyers follow the Rules of Professional Conduct.
  
  - See also Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

- Hence, a lawyer must become knowledgeable about metadata, and a firm must provide for the acquisition of such knowledge.
II(A). Sending – Basic Rules – Related Rules (c’t’d)

- Rule 5.1 may require the implementation of a firm-wide application to scrub certain outgoing e-mail to remove metadata.

- "[L]awyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures." D.C. Bar Opinion 341 (Sept. 2007) (emphasis added)
II(A). Sending – Bottom Line

- Same basic rules generally applicable to ESI . . .
  - "[A] lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when [sending e-mail] . . . ."
  - "Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in ‘metadata’ in documents they transmit electronically . . .."
    - New York State Bar Association Opinion 782 (Dec. 8, 2004)
II. Ethics – B. Receiving Lawyer – Different Standards

- Unlike rules prohibiting the disclosure of confidential metadata, the rules regarding the receipt of ESI containing metadata may differ by jurisdiction.

- The most controversial state ethics opinions prohibit a lawyer who has received ESI to examine that ESI for metadata, often called "data mining."

- Generally, any such prohibition applies in the context of a lawyer’s receipt of materials outside discovery.
II(B). Receiving – Different Standards (c’t’d)

- **Example:**

  - A lawyer who receives an e-mail from another party or another party's lawyer *must refrain from searching for* and using confidential information found in the metadata embedded in the document.”

II(B). Receiving – The General Rule

- For each jurisdiction, the action required of a lawyer who receives confidential metadata through inadvertence is the same as the case in which he/she has received any other type of confidential ESI through inadvertence.
II(B). Receiving – The General Rule (c’t’d)

- For example, if a rule prohibits a lawyer from continuing to read a document once he/she has ascertained it is privileged, a lawyer may not continue to read metadata once he/she has ascertained it is privileged.
II(B). Receiving – The General Rule (c’t’d)

- Similarly, if a rule requires a lawyer who has received a privileged document to notify the sender, the same rule also requires the lawyer to notify the sender if she/he has received privileged metadata.
II(B). Receiving – Specific States’ Rules on Reading Metadata

- **Prohibited**
  - Lawyer examination of received ESI for metadata prohibited by:
    - Alabama
    - Arizona
    - Florida
    - Maine
    - New Hampshire
    - New York
    - North Carolina
II(B). Receiving – Reading
Metadata – Prohibited (c’t’d)

- "A lawyer may not make use of computer software applications to surreptitiously ‘get behind’ visible documents or to trace e-mail."

  - Conclusion, New York State Bar Association Opinion 749 (Dec. 14, 2001)
II(B). Receiving – Reading Metadata – Allowed Absent Actual Knowledge

- Lawyer examination of received ESI for metadata prohibited only if the receiving lawyer has actual knowledge that he/she has received confidential metadata through inadvertence:
  - Colorado
  - D.C.
  - West Virginia
  [should it be with the "prohibited" group?]
II(B). Receiving – Reading Metadata – Allowed Absent Knowledge (c’t’d)

- "[I]f a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences."

- West Virginia State Bar Ethics Opinion L.E.O. 2009-01 (June 10, 2009)
But . . .

"The [W. Va.] Board finds . . . there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata."

Id.
II(B). Receiving – Reading Metadata – Case-by-Case Basis

- A lawyer must determine whether to use metadata on a case-by-case basis
  - Pennsylvania
II(B). Receiving – Reading Metadata – No Prohibition

- Generally no prohibition:
  - Maryland
  - Vermont
  - Minnesota (but a fact specific question)

- This is also the ABA’s position
II(B). Receiving – Reading
Metadata – No Prohibition

- "Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion."
  - Minn. # 22
II(B). Receiving – Reading Metadata – Broad Rule

Consider the breadth of Maryland’s rule:

- "Subject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), . . . there is no ethical violation if the recipient attorney . . . reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata."

- Maryland State Bar Association - Committee on Ethics, Ethics Docket No. 2007-09
II(B). Receiving – Reading Metadata – Other Jurisdictions

- Look for guidance to the jurisdiction’s rules regarding a lawyer’s duty on receipt of any confidential ESI and treat those rules as a minimum duty.

- No jurisdiction has a more lenient rule for confidential metadata than it does for other confidential ESI.
II(B). Receiving – Reading
Metadata – Wrinkles

- One must carefully read any pertinent opinion for the particular application to one’s immediate circumstances.

- As noted above, some opinions presume that searching for metadata is, *per se*, searching for confidential information.
  
  - See, *e.g.*, New York and Alabama.
II(B). Receiving – Reading Metadata – Wrinkles

- Other opinions, however, more precisely prohibit the lawyer from searching for confidential information in the metadata.
  - A “lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.”

- A minimum rule of thumb is that one cannot go looking for metadata with a bad intent, i.e., to discover another’s confidences.
II(B). Receiving – Other Duties Upon Discovering Confidential Info.

- Most jurisdictions require the recipient to notify the sender when the recipient knows or should know he/she has received confidential metadata through inadvertence.

- Some also prohibit use of the received metadata until the matter is resolved between the parties or by a court.

  - ABA MRPC Rule 4.4(b)
  - Minn. # 22
II(B). Receiving (c’t’d) – Professional Judgment

- Even in those jurisdictions allowing free exploration of confidential metadata, the ABA comments:
  - “Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment . . . .”
  - ABA MRPC Rule 4.4 Comment [3].
II(B). Receiving – Professional Judgment (c’t’d)

- Also ask in such circumstances:
  - What is required by the duty of diligent representation?
  - Should one consult with one’s client before returning a document?
II. C. Discovery is Different – Usually

- Quick Intro to Discoverability of Metadata in Client-Created eDocs:
  - Inadvertent Disclosure Law
  - Preservation/Spoliation
  - Scope-of-Production stipulations/agreements

- For an overview of case-law re: metadata discoverability, see Appendix B, eDiscovery Slides
II. C. Discovery is Different – Usually

- A lawyer must ensure he/she does not produce confidential information to another not entitled to see it.

- A receiving lawyer, however, is generally allowed to search for and examine any produced metadata.
II(C). Discovery *(c’t’d)* –

**Basic Rule**

- Same rule re producing metadata as re ESI generally
  - Exercise reasonable care to prevent disclosure of confidential client information hidden in metadata.
II(C). Discovery (c’t’d) – Redact Responsive Confidential Info.

- If a document/ESI contains responsive confidential information, the producing lawyer must redact such information and detail the confidentiality claim on a privilege log.

- If a responsive document is otherwise not privileged while part of the metadata may be, the producing party must redact the privileged metadata and detail the claim on a privilege log.
II(C). Discovery – Redaction *(c’t’d)*

- Instances in which only part of the metadata is privileged.
- If other non-privileged metadata is responsive, such metadata must not be redacted.
- Other metadata, while not privileged, may be either non-responsive or of *de minimis* importance.
II(C). Discovery – Redaction (c’t’d)

- Depending at least in part on content of prior stipulation, if any, as to format(s)-of-production (at CMC or later):
  - Appropriate, and perhaps necessary, to remove all non-responsive metadata.
  - Metadata integral to a document that is responsive, however, should probably be deemed responsive on that basis.
  - Metadata that evidences a document’s integrity generally should not be removed.
II(C). Discovery – Do Not Delete Responsive Metadata

- If one reasonably anticipates litigation, one must be very careful regarding routine deletion of certain metadata.

- For example, one must not delete tracked changes if the changes show contract negotiations between business people if the contract is the subject of likely litigation.

- Such deletion may be spoliation.
II(C). Discovery – Do Not Delete Responsive Metadata (c’t’d)

- “[A] lawyer must be careful in situations where electronic documents constitute tangible evidence. Rule 3.4(a) prohibits altering, destroying or concealing material having potential evidentiary value. . . .”

- “[R]emoval of metadata may be prohibited and must be produced when requested and not objected to. However, any metadata that is privileged can still be protected and exempt from discovery, upon proper assertion of a privilege.”

“Removing metadata from evidentiary documents in the context of litigation or in certain other circumstances may be impermissible or illegal.”

- Minn. # 22
II(C). Discovery – Metadata
Receiving Side – Basic Rule

- Same as the case in which a lawyer has received any other type of ESI in discovery.

- Jurisdictions that prohibit the examination of metadata received outside the discovery context generally allow the examination of metadata embedded in ESI produced in discovery.

- Some opinions use overbroad language, but careful reading suggests broad rule against even searching for metadata inapplicable to ESI and metadata received in discovery.
II(C). Discovery Is Different . . .

- “Absent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party.”

II(C). Discovery Is Different . . . (c’t’d)

- **But . . .**

- “One possible exception to the prohibition against the mining of metadata involves electronic discovery. . . . [P]arties may be sanctioned for failing to provide metadata along with electronic discovery submissions. . . . [T]he mining of an email may be vital . . . In Enron type litigation, the mining of metadata may be a valuable tool in tracking the history of accounting decisions and financial transactions.”

  - *Id.*
II(C). Discovery – Duty of Competence

- As part of a lawyer’s duty of competence (including diligence), a lawyer should examine all produced metadata to the same extent the lawyer would examine similar information in non-metadata ESI.

- A lawyer may also use metadata, for example, in “automatic” computer triaging a set of documents for further consideration, as the lawyer would be entitled to do with similar ESI.
II(C). Discovery – Receiving Side – Additional Action Required

- For each jurisdiction, in discovery, the action required of a lawyer who receives inadvertently produced confidential metadata is the same as the case in which he/she has received any other type of inadvertently produced confidential ESI.
II(C). Discovery – Receiving – Additional Action (c’t’d)

- Hence, if one has a duty to notify the producing lawyer if one has received any type of confidential information through inadvertence, the fact that the confidential information is metadata does not change the duty.
N.B. Typical procedural rules, including the F.R.C.P., only require the receiving lawyer to act after notice from the producing lawyer.

“A lawyer may be subject to a number of obligations other than those provided by the MRPC in connection with the transmission and receipt of metadata, including obligations under the Federal Rules of Civil Procedure and the Minnesota Rules of Civil Procedure.”

Minn. # 22
Conclusion/Questions

- One last scary thought:
  - “alternate data streams (ADS)"

  See, e.g., <informit.com/articles/article.aspx?p=413685>

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  <fenwick.com/attorneys/4.2.1.asp?aid=544>

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  <willhoffman.com/willbio.aspx>
Appendix A – Robert D. Brownstone, Esq. –
Metadata & Electronic Redaction – Supplemental Bibliography (7/27/10)

A. Articles as to Microsoft Office Deficiencies


B. Public Records Decisions (some; there are MANY more on privacy, back-ups, etc.)


- Lake v. City of Phoenix (“Lake II”), 2009 Ariz. LEXIS 257 (Oct. 20, 2009) (“if a public entity maintains a public record in an electronic format, then the electronic version, including any embedded metadata, is subject to disclosure under our public records laws”) <www.supreme.state.az.us/opin/pdf2009/CV090036PR.pdf>

- O’Neill v. City of Shoreline, 145 Wash. App. 913, 187 P.3d 822 (July 21, 2008) (“metadata associated with the e-mail . . . discussed at [the relevant] meeting, or some portion of it, is . . . a public record[; w]e do not rule on the more general question whether e-mail or metadata . . . transmitted to personal e-mail accounts, without more, is” a public record) <mrsc.org/mc/courts/appeellate/145wnapp/145wnapp0913.htm>, review granted, 208 P.3d 554 (Wash. Apr. 28, 2009)


C. Presentations by Brownstone

1. - 9. NCC national broadcasts/webinars – 4/10; 8/09; 3/09; 9/08; 5/08; 2/08; 10/07; 4/07 & 11/06

10. Rossdale Group & Miami Legal Resources national broadcast co-presenter – 3/10

11. - 13. Lorman Education Services nationally broadcast webinars – 2/10; 8/09; and 2/09

14. - 25. Strafford Publications national broadcast co-presenter – 12/09; 5/09; 10/08; 5/08; 12/07; 9/07; 3/07; 11/06; 3/06; 12/05; 9/05 and 7/05

26. - 27. Legal Services Corporation (LSC) conferences – 10/09 (St. Louis); 9/08 (San Antonio)

28. San Diego Cty. Bar Ass’n webinar – 6/09

29. - 30. Blue Cross Blue Shield Ass’n Attys. – webinar (7/08) & conf. (5/08, Glendale, AZ)

31. California State Bar Annual Meeting – 9/07 (Anaheim, CA)

32. Santa Clara County Bar Association (SCCBA) panel – 9/07 (San Jose, CA)

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Appendix A – Robert D. Brownstone, Esq.–
Metadata & Electronic Redaction – Supplemental Bibliography (7/27/10)

D. Publications by Brownstone


2. Robert D. Brownstone, *eFiling: Conversions, Redactions and Uploads, Oh My!*, 30 The Bottom Line No. 5, at 3-8 (Oct. 2009), <www.calbar.org/members_only/lpmt/pdfs/the-bottom-line_2009_vol-30_no-5.pdf?page=3> (Cal. State Bar LPMT Section membership may be required to use URL; or available from author)


Full Brownstone Bio & Bibliography available at <fenwick.com/attorneys/4.2.1.asp?aid=544>
THESE MATERIALS ARE MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT LAW AND PRACTICES. THEY ARE NOT TO BE REGARDED AS LEGAL ADVICE.

THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.
A. Discoverability of Metadata

- The Discovery Context – Overview
  - Preservation/Spoliation
  - Inadvertent disclosure law
  - Scope-of-Production stipulations/agreements
A. Discoverability (c’t’d) – Prior Case Law

- When needed/relevant:
  - *Ex*: definitive eEvidence regarding alleged fabrication or back-dating
      <www.signallake.com/litigation/ma_order_munhshani.pdf>,
    - *See also In re Pemstar, Inc. Secs. Litig.*, Civ. No. 02-1821 (D. Minn. 4/23/04)
A. Discoverability (c’t’d) – Prior Case Law (c’t’d)

- More recent trend, e.g. in patent cases . . . if particularized need shown . . .
A. Discoverability (c’t’d) – FRCP = Vague

- FRCP Committee, in deliberating re: 12/1/06 “not reasonably accessible” change to 26(b)(2)(B) 
  *did not resolve metadata issue*

- As of 12/1/06, new FRCP 34(b) for RFP’s – and new 45(d)(1) re: subpoenas
  - non-conclusive
  - but *do* enable requestor to ID desired format
A. Discoverability (c’td) – FRCP’s impacts

- FRCP 34 & FRCP 45 DO enable requestor to specify desired format
    (.pdf and paper sufficient; no request – or need – for native, let alone with metadata intact)

- IF NOT specified, then what, under FRCP 34 & 45?
  - “... ordinarily maintained . . .” OR
  - “... reasonably useable . . .”

- Same: CCP §§ § 2031.280(d) (parties) and 1985.8(c)(1) (non-parties)
A. Discoverability (c’t’d) – FRCP’s impacts

- Sedona Principles:
  - Pre-12/1/06: absent materiality, presumption against production
  - Post-12/1/06: “taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability . . .”
A. Discoverability \((c't'd)\) – Later Cases

- One Pre-12/1/06 FRCP Decision: "AS MAINTAINED IN ORDINARY COURSE OF BUSINESS" = "METADATA INTACT"
  - absent timely objection or contrary stipulation
  - once parties had agreed to “native” production of Excel files late in case


<http://Williams-9-29-05.notlong.com> (free via PACER)
A. Discoverability (c’t’d) – Williams (c’t’d)

- **Williams FACTS**
  - Age discrimination (R.I.F.) case
  - Day 1 allegation: Δ re-worked pools to improve distribution to pass adverse-impact analysis
  - No prior stip re: scrubbing metadata from, or locking cells/data in, Excel spreadsheets
A. Discoverability (c’t’d) – Williams (c’t’d)

- Williams HELD
  - Spectrum of word-processing files to spreadsheets to databases
  - Presumption that metadata to be produced even if not requested specifically in RFP
    - Contrast post-12/1/06 FRCP 26(b)(2)(B)
    - Up to producing party to object; no unilateral action allowed here
A. Discoverability (c’t’d) – Post-12/1/06 Cases

- Need to Show Need
  - “follow[ing] general presumption against metadata production”
  - “[h]owever, if cause is shown (e.g., metadata associated with a spreadsheet), Plaintiffs may file another motion to compel production, to the extent that the meet and confer process does not yield a resolution to the issue”

A. Discoverability (c’t’d) – Post-12/1/06 Cases

- NO “DO-OVERS”
    - declining to order second/native production of data already produced via scanning-plus-OCR
    - but distinguishing prospective productions
A. Discoverability (c’t’d) – No “Do-overs” (c’t’d)

- **Ky. Speedway v. NASCAR, 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. 12/18/06)**
  - relying on 12/1/06 FRCP amendments as basis for refusing to order Δ to produce metadata for documents already produced
    
    <https://ecf.kyed.uscourts.gov/cgi-bin/show_case_doc?147,46018,,,,,576,1>

- **Williams v. Sprint, 2006 WL 3691604 (D. Kan. 12/12/06)**
  - increased time and effort required for hardcopy review insufficient to justify re-production in native format
    
    <http://Williams-12-12-06.notlong.com>

- **Wyeth v. Impax Labs., 2006 WL 3091331 (D. Del. 10/26/06)**
  - Δ had moved to compel native production with complete metadata
    - under Del.’s Default Standard, upholding prior TIFF production because:
      - no agreement otherwise; and
      - no showing of particularized need for native
    
    <http://Wyeth-Impax-10-26-06.notlong.com>
A. Discoverability (c’t’d) – More Post-12/1/06

Some “Native” Decisions . . .

- **Aguilar v. U.S. ICE Div., 2008**
  WL 5062700 (S.D.N.Y. 11/21/08)

- **White v. Graceland College Center for Prof’l Dev. & Lifelong Learning, Inc., 2008 U.S. Dist. LEXIS 63088 (D. Kan. 8/7/08)**


- **Peacock v. Merrill, 2008 WL 176375 (S.D. Ala. 1/17/08)**

- **Ryan v. Giffor, 2007 Del. Ch. LEXIS 168 (Del. Ch. 11/30/07)**

- **Celerity, Inc. v. Ultra Clean Holding, Inc., 476 F. Supp. 2d 1159 (N.D. Cal. 2/28/07)**
A. Discoverability *(c’t’d) – Some 2009-10 Decisions*

  - See also ARMA, *Court Orders Production of Electronically Stored Photos, Associated Metadata*, Newswire (4/28/10)  

- **Lake v. City of Phoenix (“Lake II”), 2009 Ariz. LEXIS 257**  
  (Ariz. 10/29/09)  <www.supreme.state.az.us/opin/pdf2009/CV090036PR.pdf>

- **FSP Stallion 1 LLC v. Luce, 2009 U.S. Dist. LEXIS 68460**  
  (D. Nev. 7/21/09) (in part, apparently ordering re-production of docs. exchanged via initial disclosure)  
  <https://ecf.nvd.uscourts.gov/doc1/11512112850>

  (D. Mass. 6/22/09) (“[r]ather than a sweeping request for metadata, the [requesting parties” should tailor their requests”)  
  <https://ecf.mad.uscourts.gov/doc1/09503189087>
A. Discoverability \((c't'd)\) – Case Law Developing

**TO LEARN MORE**

- `<applieddiscovery.com/ws_display.asp?filter=Native%20Production%20Required>`
- `<www.krollontrack.com/case-summaries/>`
- `<https://extranet1.klgates.com/ediscovery/>`

**NOTE**

- Each of those sites offers a free e-newsletter
B. Inadvertent Disclosure Clawbacks

1. Claw-Back Procedure in FRCP as of 12/1/06

- ESI-Driven Goals of 12/1/06 FRCP Amendments:
  - 26(b)(5)(B) – “[D]oes not address the substantive questions whether privilege or work product protection . . . waived or forfeited. Instead . . . sets up a procedure to allow the responding party to assert a claim of privilege or of work-product protection after production.”
    
    Rules Report at App. C-54

  - 45(d)(2)(B) – same for non-party subpoenas
    
    Id. at App. C-91

- 26(b)(5)(B) itself
  
  <uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf#page=9>, at 9-10

- STATE ANALOGUES AS WELL
B(1). FRCP Claw-Back Procedure (c’t’d)

- Pre-FRCP-Amendment Grimm Warnings:
  - UNLESS IN SCHEDULING or PROTECTIVE ORDER, non-waiver stipulation (clawback or quick peek) risky & maybe not enforceable
    - states’ laws and circuits’ views differ
    - subject-matter and “selective” waivers


B. 2. F.R.E. 502 – Substantive

- **Goals** = Gap-Filling & Protection
- To address some of those Grimm-type concerns, **F.R.E. 502** became law on September 19, 2008
  - *Cf.* Proposed Wash. R. Evid. 502
    - <www.wsba.org/lawyers/groups/courtrules/october192009courtrulesproceduresmeetingmaterials.pdf>, at 24-28
  - **Comment period expired 4/30/10**

- **Highlights:**
  - “middle ground” approach
  - Rejected strict-liability approach, *i.e.*, inadvertent disclosure CANNOT BE automatic subject-matter waiver
B. 2. FRE 502 *(c’t’d)* – Elements

- FRE 502(b) Waiver Determination Elements
  - Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
    - (1) disclosure is inadvertent
      
      *(begs the question?!)*
    - (2) holder of privilege or protection took reasonable steps to prevent disclosure; and
    - (3) holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B)
(B)(2). FRE 502 \((c\text{'t'd})\) – Estoppel

- No-Waiver Finding Collaterally Estops Future Waiver Contentions
  - Applies to both future state and federal proceedings
  - Applies to non-parties to case
    # 1 IF stip. in a court order
      - Does Congress have authority to bind state court proceedings in this way?
      - Due-process challenge possible . . .

\[<\text{law.wlu.edu/deptimages/Law\%20Review/66-2Noyes.pdf}>\]
(B)(2). FRE 502 (c’t’d) – Practical Tips

Three ways to exert best efforts to try to avoid a waiver finding:

- Stipulated Protective Orders
- QC/QA
- Claw-Backs

For analysis and sample stipps, see:

- Gregory P. Joseph, The Impact of Rule 502(d) on Protective Orders, Nat’l L.J. (11/17/08)
(B)(2). FRE 502 (c’t’d) – “Selective Waiver”

- Rules Committee:
  - Initially added in something on it but then pulled it out
  - Punted but then did send Congress a draft provision

- Congress:
  - Did not address the issue
  - Did not add “selective waiver” provision before adopting 502
  - But [HR 4326](#) now pending
Conclusion/Questions

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- Please visit F&W EIM
  - <www.fenwick.com/services/2.23.0.asp?s=1055>
  - <www.fenwick.com/services/2.23.4.asp?s=1055>