

Metadata in Court: What RIM, IT and Legal Need to Know

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Course Agenda

- Poll audience on Metadata concerns
- Presentation
 - What is Metadata and Spoliation
 - Why is Metadata presenting problems
 - Role of Metadata in authentication of records
 - Court rulings on examples of Metadata
 - Practical Tips for RIM, Legal and IT



Part I



What is Metadata and Spoliation?



Definition of Metadata in General

- Data about data
- Electronically-stored evidence that describes the history, tracking, or management of an electronic document.
- Includes hidden text, formatting codes, formulae, and other information associated with an electronic document.
- Includes contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records.
- Three types: Substantive, System and Embedded

Aguilar v. Immigration & Customs, 255 F.R.D. 350, 354 (S.D.N.Y. 2008)



Three Types of Metadata - Substantive

- Reflects modifications to a document
- Examples: prior edits or editorial comments, plus data that instructs the computer how to display the fonts and spacing in a document.
- A working group in the District of Maryland has concluded that substantive metadata "need not be routinely produced" unless the requesting party shows good cause. Md. Protocol 26.

[Aguilar v. Immigration & Customs, 255 F.R.D. 350, 354 \(S.D.N.Y. 2008\)](#)



Three Types of Metadata - System Metadata

- Data may not be embedded within the file it describes, but usually can be retrieved from whatever operating system is in use.
- Examples: author, date and time of creation, date a document.
- Courts have commented that most system (and substantive) metadata lacks evidentiary value because it is not relevant.
- System metadata is relevant, however, if the authenticity of a document is questioned or if establishing "who received what information and when" is important to the claims or defenses of a party...

[Aguilar v. Immigration & Customs, 255 F.R.D. 350, 354 \(S.D.N.Y. 2008\)](#)



Three Types of Metadata - Embedded Metadata

- Examples: spreadsheet formulas, hidden columns, externally or internally linked files (such as sound files), hyperlinks, references and fields, and database information.
- This type of metadata is often crucial to understanding an electronic document. For instance, a complicated spreadsheet may be difficult to comprehend without the ability to view the formulas underlying the output in each cell.
- District of Maryland working group has concluded that embedded metadata is "generally discoverable" and "should be produced as a matter of course."

Aguilar v. Immigration & Customs, 255 F.R.D. 350, 354 (S.D.N.Y. 2008)



What is “spoliation” and how does it relate to Metadata?

- Where courts have great discretion, at minimum, to impose sanctions for destroying records relevant to pending or potential litigation.
- Some states recognize it as a separate cause of action, while others simply give courts discretion on how to punish the parties involved.

Examples of Spoliation Sanctions

- Evidentiary or legal sanctions
 - Not allowing documents introduced at trial
 - Special jury instructions or assumptions
- Financial sanctions
- Fines per Statute (e.g., \$5 mill per S-Ox)
- Imprisonment per Statute (e.g., 20 yrs per S-Ox)
- New lawsuit in states where available
- Report to State Bar for sanctions



Spoliation of Metadata

- “Removal of metadata from electronic records may constitute spoliation.”

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First Party and Third Party Spoliation

- “Florida courts recognize that the duty to preserve electronic evidence arises in two separate contexts after the onset of litigation: first-party spoliation and third-party spoliation.”
- “First-party spoliation occurs when a named plaintiff or defendant destroys electronic data.”
- “Third-party spoliation occurs when an unnamed party, but related entity, who has a contractual or legal duty to preserve data, fails to retain the information after the litigation commences.”

80 Fla. Bar J. 34

- Government agencies: Heads Up!



Legal Holds Needed Before Litigation Filed

"The duty to preserve material evidence arises not only during the litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."

Toth v. Parish, 2009 U.S. Dist. LEXIS 16116 (W.D. La. Mar. 2, 2009)

- Legal hold should include Metadata.



Part II

Why is Metadata presenting problems?

Real World Concerns

- Clients rolling documents up into PDF or TIFF at the end of the day to capture official records
- Attorney concerns about inadvertent disclosure of privileged or private data
- Fear of unknown if other party is given access to native files
- Control over third parties holding records and ESI



Conflicting Take on Metadata

- “Absent a legal requirement to the contrary, organizations are not required to preserve metadata.”

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BUT...



Onus on Lawyers

- Lawyers are unfamiliar with the very serious professional responsibility considerations involved with e-discovery. Among the topics covered are:
 - Applicable ethics rules and court rules, protecting attorney-client privilege
 - Ethical considerations with preservation and spoliation of ESI
 - Potential minefield of producing metadata that might contain confidential information.

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Tech-savvy lawyers

- “Searching for metadata is currently only the purview of tech-savvy lawyers. However, eventually it will be the norm...[F]inancial factors such as sanctions and liability will compel reluctant lawyers so that searching for metadata becomes commonplace.”

7 Colum. Sci. & Tech. L. Rev. 1



Privileged Information in Metadata

- “Parties may produce information in a different form from the original source if the parties agree.”
- “A native format contains metadata embedded in the electronic file.”
- “Metadata may disclose pertinent information that the responding party did not realize it was disclosing, ie., the history of the document showing who edited the document and when.”
- “Metadata may include privileged information that would not otherwise be discoverable.”

70 Ala. Law. 425



Converted Files and Metadata

- “A converted format such as a .tiff, .bmp, jpeg or .pdf file does not readily contain metadata.”
- “This format is considered a digital image of the information.”
- “The requesting or responding parties must be prepared to provide a technical position for arguing why certain information should be produced in a particular format.”

70 Ala. Law. 425



Reliance on IT

- “Your IT department is likely not aware of the necessary protocols to ensure authenticity of the data and may unwittingly alter document metadata.”

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Scrubbing Metadata

- “You would be prudent to consider the full ramifications before stripping or scrubbing metadata from discovery documents.”
- “It might be viewed as spoliation and could result in an ethics violation.”
- “You may need to get a protective order that permits the scrubbing of metadata from documents that are subject to discovery.”
- “Some discovery requests now include metadata along with requests for the documents, treating it the same as postmarked envelopes and fingerprint dusted documents.”

66 Or. St. B. Bull. 29



Federal Rules of Evidence Revised as of September 19, 2008 – FRE 502

- Under revised Federal Rules there was potential for waiver of privilege re: protected communications
- Extremely high volumes of data exchanged
- So, the judicial review committee recognized that:
 - ✓ There is enormous expense associated with document production (to protect against inadvertent disclosure of privileged information)
 - ✓ Because the producing party risks a ruling that even an inadvertent disclosure can result in a subject matter waiver.





In other words...



If you show it, you blow it!



Why should you care about FRE 502?

- Given sizable productions, the inadvertent disclosure of confidential or privileged information could be deemed a waiver.
- Do you want to be the employee responsible for the disclosure and waiver of privilege that affects the outcome of the case?



Part III

The Role of Metadata in Authentication of Records

Integrity

- “The collection of relevant ESI should be done in such a way that it is comprehensive and maintains the content integrity and preserves the form of the ESI.”
- “Metadata is required to be collected and maintained during this process, and information regarding the chain of custody and authentication is required.”
- *“There is a growing presumption in e-discovery that this ESI be producible in its native file format whenever possible.”*
(Emphasis added.)

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Effect on Authenticity

- “As a result of Krumwiede's spoliation of evidence, even if the thousands of altered and modified documents located on Brighton's laptop are not actually deleted, the changes to the file metadata call the authenticity of the files and their content into question and make it impossible for Brighton to rely on them.”
- “A party suffers prejudice due to spoliation of evidence when the lost evidence prevents the aggrieved party from using evidence essential to its underlying claim.”

Krumwiede v. Brighton Assocs., L.L.C., 2006 U.S. Dist. LEXIS 31669 (N.D. Ill. May 8, 2006)



Alteration of Metadata

- “Once files are converted to TIFF images, they cannot be altered.”
- “Native files, however, can be changed very easily -- either intentionally or unintentionally.”
- “Simply opening a document can change the metadata of a native file.”

81 Fla. Bar J. 33; 20 Utah Bar J. 12



Part IV

Court Rulings on Examples of Metadata:

Public Records

Spreadsheets

Databases

Word Documents

Emails

Screen shots

Electronic Medical Records

Server Logs



Public Records

- Police officer filed suit arising from his job performance.
- Officer submitted public records request to the city, seeking notes kept by his supervisor documenting his performance.
- After reviewing the notes, officer suspected that they had been backdated. Officer requested "metadata" of supervisor's notes file.
- City denied officer's public records request for metadata, claiming metadata is not a public record.
- The supreme court disagreed, holding that if the city maintained a public record in an electronic format, then the electronic version, including any embedded metadata, was subject to disclosure under Arizona's public records laws, pursuant to Ariz. Rev. Stat. § 39-121 (2001).
- The supreme court concluded that when a public officer used a computer to make a public record, the metadata formed part of the document as much as the words on the page.

Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009)



Screen Shots and Song Files

- “The company captured screen shots showing all of the files that Harper was sharing.
- It also captured the metadata associated with each file, which included the name of the artist and song...
- MediaSentry also initiated downloads of the audio files to verify their existence and recovered metadata from which it could identify the artist and song title of each file.”

Maverick Recording Co. v. Harper, 2010 U.S. App. LEXIS 3912 (5th Cir. Tex. Feb. 25, 2010)



Unstructured Files in General

- Class action against Immigration and Customs Enforcement (“ICE”) for unlawful search of homes
- Defendants were directed to produce emails that the ICE Office of the Principle Legal Advisor received with metadata attached in a form that contained that metadata and the metadata for their spreadsheets.
- Defendants were directed to produce the metadata for their word processing and PowerPoint files if plaintiffs agreed to pay production costs.

Aguilar v. Immigration & Customs Enforcement Div., 255 F.R.D. 350 (S.D.N.Y. 2008)



Spreadsheets

- The employee, on behalf of 1,727 other plaintiffs, alleged that age was a determining factor in her employer's decision to terminate her employment during an RIF. The parties were engaged in discovery, and the employer responded to the court's show cause order, stating that it provided the spreadsheets request by plaintiffs in native Excel format, but deleted metadata.
- The court ruled that the employer failed to show cause why it should not produce the electronic spreadsheets in the manner in which they were maintained. The court ordered the employer to produce them as they were maintained and ruled that the employer avoided sanctions by its decision to voluntarily reproduce "unlocked" versions of the spreadsheets.

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



Spreadsheets (cont'd.)

- "As a general rule of thumb, the more interactive the application, the more important the metadata is to understanding the application's output." Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 647 (D. Kan. 2005).
- Thus, while metadata may add little to one's comprehension of a word processing document, it is often critical to understanding a database application. *Id.*
- "A spreadsheet application lies somewhere middle" and the need for its metadata depends upon the complexity and purpose of the spreadsheet. *Id.*

Quasi-Paper

- Even when the numbers are small, printing may not be the best choice. Blind carbon copies aren't always shown on printed e-mails. Hyperlinks are lost on paper. None of the metadata is available when you print to paper. Attachments to e-mails are often overlooked when the e-mail is printed.
- Quasi-paper has been the top choice for the last few years. E-discovery vendors can quickly create TIFFs or PDFs of the documents and produce litigation database load files with this form of production. The opposing party usually demands the production include metadata, which is not available with paper production.

20 Utah Bar J. 12



Word Document and Emails Case

- In particular, plaintiff: (a) asks the court to compel the production of the Business Plan in its original electronic format, with accompanying metadata; (b) asks the court to compel the production of defendants' e-mails in an original format with accompanying metadata

D'Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43 (D.D.C. 2008)



Server Logs

- “In this case, ILS is not sufficiently prejudiced by the loss of some of the metadata in the server logs so as to justify dismissal. ILS argues that it has been prejudiced because it cannot compare the produced server logs to [other images]...
- [The] image of the WebTrends server would therefore not prove or disprove an alteration. In effect, the only possible prejudice that has resulted from the alleged spoliation is that ILS has been denied the opportunity to determine if the server logs produced on the CDs were altered between the dates [in question]...

Inventory Locator Serv., LLC v. PartsBase, Inc., 2005 U.S. Dist. LEXIS 46252 (W.D. Tenn. Oct. 19, 2005)



Electronic Medical Records

- Courts involved in healthcare litigation may order the production of EMR metadata liberally, if not routinely. If a disagreement arises regarding EMR metadata production, the parties likely will contest how much metadata should be produced for litigation.

18 Ann. Health L. 75, 114



Missing Metadata

- Documents apparently modified after the last listed modification date.
- Telxon and plaintiffs contend that missing documents, missing metadata, and the modification of documents long after an audit opinion had been issued, and especially the modification of documents prior to D&T's due diligence and after the production of documents to the SEC, raise issues of spoliation.
- PwC answers that plaintiffs' attorney failed to find supposedly missing metadata because she tried to access them incorrectly and that some documents were routinely modified even after issuance of an audit opinion.

Hayman v. PricewaterhouseCoopers, LLP (In re Telxon Corp. Secs. Litig.), 2004 U.S. Dist. LEXIS 27296 (N.D. Ohio July 16, 2004)



Part V

Practical Tips for RIM, IT and Legal

RIM Tips

- Native is preferred method by courts
- Study case examples discussed today to start paying attention to most sensitive types of record formats
- If store in other formats like PDF, capture enough data to put document in context
 - Make this a policy

Legal Tips

- Meet and Confer as soon as possible to discuss:
 - Current policy on capture of Metadata
 - Exchange of Metadata in discovery
 - Identify and discuss key issues of privacy, confidentiality and privilege contained in Metadata

IT Tips

- Metadata should follow native files of “records”
- See counsel and RIM immediately
- If litigation hold is issued, pay extra careful attention to:
 - All systems are discoverable, if relevant
 - Alteration of Metadata in conversion of files to another format
 - Other Migrations
 - Dynamic systems altering or overwriting of data



Thank You

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