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Mitigating the Dangers of Metadata, Spoliation of Evidence, and Other Issues by Use of Effective Representation Agreements

by Robert B. Fitzpatrick

METADATA

Hypothetical:

Firm works with its C-level client on a term sheet for one-on-one settlement discussions the C-level client will have with the CEO of the company. Your firm and its client have revised the term sheet over and over. Your client transmits the term sheet electronically without first assuring that the metadata (e.g., the tracked changes of the various revisions) is not accessible. Assume that you are in a jurisdiction where the bar's legal ethics committee has opined that it is permissible (or even ethically required) for your opponent to access the metadata. What could your firm have done in its representation agreement to minimize the possibility of this inadvertent disclosure of privileged attorney-client communications?

Suggested Sample Language in the Representation Agreement:

- "Client represents and warrants that he or she fully understands and has received a full explanation not to communicate with the Firm using a company email address or telephone line, and not to use company-issued electronic platforms or other company-issued equipment even if using Client's own personal email address. Client understands and has received a full explanation that such communications may constitute a waiver of attorney-client privilege. Examples of improper communication include sending an email from employee's personal Gmail account to the Firm on a company computer or sending a text message to the Firm using a company-issued Blackberry or other smartphone. Client further represents and warrants that he or she has received an explanation and fully understands that writing documents on company-issued equipment could make those documents accessible to the company and be a waiver of attorney-client privilege. Any questions or requests for summaries of events should be responded to on Client's personal computer and/or personal telephone or smartphone, not a company issued computer, telephone, or smartphone.

  Client represents and warrants that he or she fully understands and has received a full explanation that all discussions and written communications with Firm's attorneys are privileged. Showing these writings to others or discussing Client's conversations with Firm's attorneys to others may constitute a waiver of attorney-client privilege. Client will not discuss documents, attorney conversations, or anything else related to this matter with family members, significant others, friends, boyfriends, girlfriends, coworkers, etc. Client understands that in some jurisdictions, even discussion of otherwise privileged attorney-client matters with a spouse can be disclosed by the Client's spouse, and the so-called marital privilege would not prevent the spouse from revealing such communications.

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Client is advised that, before he / she electronically (e.g., via email) sends any documents directly to his / her employer or any other adverse party in connection with this matter, he / she should first convert said documents into PDF format. Client should not send such documents in any other format (e.g., as a file saved from a word processing program such as Microsoft Word) without first consulting with his / her attorney, as such electronic documents may contain hidden or embedded electronic information which the Client may not intend for the recipient to receive, and which the recipient may be able to retrieve and view.

Educate Your Client – What is Metadata?:

- *Aguilar v. Immigration and Customs Enforcement Division,* 255 F.R.D. 350, 354 (S.D.N.Y. 2008).

> Metadata, frequently referred to as "data about data," is electronically-stored evidence that describes the "history, tracking, or management of an electronic document." It includes the "hidden text, formatting codes, formulae, and other information associated" with an electronic document. *The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production* Cmt. 12a (Sedona Conference Working Group Series 2007), http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed 607.pdf ("*Sedona Principles 2d*"); *see also Autotech Techs. Ltd. P'Ship v. AutomationDirect.com, Inc*., 248 F.R.D. 556, 557 n.1 (N.D. Ill. 2008) (Metadata includes "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records"). Although metadata often is lumped into one generic category, there are at least several distinct types, including substantive (or application) metadata, system metadata, and embedded metadata. *Sedona Principles 2d* Cmt. 12a; *see* United States District Court for the District of Maryland; *Suggested Protocol for Discovery of Electronically Stored Information* 25-28, http://www.mdd.uscourts.govinews/news/ESIProtocol.pdf.

State-by-State Ethics Rules on Viewing or "Mining" Metadata:

For a state-by-state tally of which states allow lawyers to mine for metadata, vs. those which disallow or restrict the practice:

States / opinions which allow lawyers to mine for metadata – sometimes subject to qualifications, include:

- A.B.A. Op. 06-442 (Aug. 5, 2006), *available at* http://www.pdfforlawyers.com/files/06_442.pdf.
- Md. State Bar Ethics Comm., Op. 2007-09 (Oct. 16, 2006) (copy of opinion available online only for MSBA members).

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- Pa. Op. 2009-100 (date unknown) (copy of opinion available online only for PBA members).
- Vt. Op. 2009-1 (undated), *available at* http://69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Electronic%20Documents/09-01.pdf.
- Col. Op 119 (2008), *available at* http://www.cobar.org/index.cfm/ID/386/subID/23789/CETH/.
- Minn. proposed Op. 22 (draft Jan. 26, 2010), *available at* http://www.mncourts.gov/lprb/Opinion22.pdf, says merely that the recipient must notify the sender under Minn. Rule 4.4.

Some opinions have even gone so far as to suggest that an attorney has a *duty* to review metadata sent by an opposing party. For example, in the Vermont opinion cited above, while the panel suggested that the receiving attorney may have a duty to first notify the opposing party where the former knows or reasonably should know that the metadata was inadvertently disclosed, the panel further opined that the receiving lawyer has a thorough duty to review every document received from opposing counsel, in whatever medium it is produced.

On the other hand, states / opinions which disallow / restrict the practice of metadata mining include:

- Ala. State Bar Office of Gen. Csl., Op. 2007-02 (March 14, 2007), *available at* http://www.alabar.org/ogc/fopDisplay.cfm?oneId=412.
- Ariz. Op. 07-03 (November 2007), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=695.
- D.C. Op. 341 (Sept. 2007), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm.
- Fla. Bar Prof'l Ethics Comm., Op. 06-02 (Sept. 15, 2006), *available at* https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument.
- Me. Op. 196 (Oct. 2008), *available at* http://www.mebaroverseers.org/Ethics%20Opinions/Opinion%20196.htm.
- N.H. Op. 2008-2009/4 (April 2009), *available at* http://www.nhbar.org/uploads/pdf/EthicsOpinion2008-9-4.pdf.
- N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 749 (Dec. 14, 2001), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6533, & 782 (2004), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=6871&TEMPLATE=/CM/ContentDisplay.cfm.
- W. Va. Op. 2009-1 (2009), *available at* http://www.wvbar.org/cc/files/metaleo.pdf.

For those interested in the specific holdings of D.C. area opinions on this issue:

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- Maryland State Bar Association's Committee on Ethics, Ethics Docket No. 2007-09, held that "[s]ubject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata." A copy of the full opinion is available online only for MSBA members.
- D.C. Bar's Legal Ethics Committee, D.C. Op. 341, held that "[w]here there is actual prior knowledge by the receiving lawyer as to the inadvertence of the sender [in sending the metadata], then notwithstanding the negligence or even ethical lapse of the sending lawyer, the receiving lawyer's duty of honesty requires that he refrain from reviewing the metadata until he has consulted with the sending lawyer to determine whether the metadata includes privileged or confidential information." If privileged or confidential data is present, "the receiving lawyer should comply with the instructions of the sender." The full opinion can be found at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm.
- As of the date of this publication, the Virginia Bar does not appear to have weighed in yet on this issue.

Another interesting question along this train of thought is whether it would be ethically permissible for an attorney to mine metadata contained in electronic files which were sent to the attorney by an outside non-lawyer party.

Articles and Other Sources on Metadata Mining:

- David Elkanich, *Metadata Update: To Mine or Not to Mine, Is That Really the Only Question?*, The Ethical Quandry, Posted on Feb. 11, 2010, http://blog.hinshawlaw.com/theethicalquandary/?p=954.

- Andrew J. Cavo, *The Ethics of "Mining for Metadata"*, Cornell Law School, August 18, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456995.

- American Bar Association, *Metadata Ethics Opinions Around the U.S.*, last updated Sept. 29, 2009, http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html.

- Andrew M. Perlman, *The Legal Ethics of Metadata Mining*, Akron Law Review, Forthcoming, Suffolk University Law School Research Paper No. 09-40, September 15, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1472712.

- David Hricik and Chase Edward Scott, *Metadata: Ethical Obligations of the Witting and Unwitting Recipient*, Mercer Law School, 2008, http://technology.findlaw.com/articles/01223/011172.html.

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Cases, Rules, Articles, and Other Sources on the Attorney's Duty to Ensure that Clients' Metadata is Protected from Inadvertent Production / Disclosure:

- Even though local rules of professional conduct ordinarily do not cover metadata in particular, such rules can usually be read as imposing a duty upon the attorney to guard against inadvertent disclosure of metadata containing privileged or otherwise confidential information. Similarly, holdings from countless cases arguably impose such a duty as well, even where they do not explicitly reference metadata.

  To take Maryland case law and ethics rules as but one example, s*ee, e.g.*, Md. Lawyer's R. Prof'l Conduct 1.6 (attorney's duty to protect the confidentiality of information relating to representation of a client); *Ehrlich v. Grove*, 914 A.2d 783 (2006) (attorney-client privilege "prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice"); *Harris v. Baltimore Sun Co.*, 625 A.2d 941 (1992) (stating that Rule 1.6 "imposes on lawyers a general and very broad obligation of confidentiality by prohibiting disclosure of information relating to the representation") (internal quotations omitted).

- Jim Calloway, *Metadata – What Is It and What Are My Ethical Duties?*, LLRX.com, January 5, 2009, http://www.llrx.com/features/metadata.htm.

- Sylvia E. Stevens, *Metadata: Guarding Against the Disclosure of Embedded Information*, 67 Or. St. B. Bull. 9 (April 2007).

- John F. Baughman and H. Christopher Boehning, *Defining Metadata Ethics*, EDD Blog Online, January 5, 2007, http://eddblogonline.blogspot.com/2007/01/defining-metadata-ethics.html.

- eMag Solutions, LLC, *A Discussion of Legal Ethics Issues Within Electronic Discovery*, Find Law Blog, 2007, http://technology.findlaw.com/articles/01165/010655.html.

- Brian Beckham, *Production, Preservation, and Disclosure of Metadata*, 7 Colum. Sci. & Tech. L. Rev. 1 (2006).

SPOLIATION / DUTY TO PRESERVE EVIDENCE

Just as an attorney can use his or her representation agreement as a tool to educate the client about inadvertent disclosure of privileged information, the attorney can also do the same with regard to both parties' duty to preserve evidence.

For example, the following language could be inserted into the representation agreement, in an effort to educate the client about his or her duty to preserve evidence:

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"Client understands and agrees not to destroy any documentation which is in any way relevant or related to this matter, and understands and agrees not to delete or 'defragment', modify, corrupt, mislabel, or transfer any information on or related to any computer, email address(es), passwords and access codes, home computer, laptop, hard drives, disks, thumb drives, zip files, software, software to 'wipe' or 'clean-up' data, handheld wireless devices, personal digital assistants, iPod, MP3 player(s), voicemail systems, audio records (tape recorders), servers, mobile telephones, telephone logs, CD-Roms, scanners, and/or fax machines which is in any way relevant or related to this matter.

Client agrees that Firm will generally maintain necessary documents relating to this matter in Firm's client files. If Firm receives no guidance from Client, Client agrees that Firm may employ the following record retention procedure:

(a) Prior to file destruction, Firm will make best efforts to return to Client any original documents Client has provided to Firm.
(b) At any time prior to destruction, upon Client's request, Firm will provide Client copies of any non-original documents, but only if Client requests in writing which, if any, documents Client wants. Client agrees to pay for photocopying and delivery of any documents so requested.
(c) Upon the expiration of five years, Firm may destroy the file."

For articles and other sources on spoliation and the duty to preserve, *see, e.g.*:

- Fernando M. Pinguelo and Frank Gonnello, Jr., *Zublake Revisited: Ineffective Lit Holds and Sloppiness Lead to Wheel of Sanctions*, E-Lessons Learned Blog, March 4, 2010, http://ellblog.com/?p=2009.

- Johnette Hassell, Ph.D., *The Duty to Preserve: Teaching Your Clients,* Computer Forensics & E-Discovery Blog, September 9, 2008, http://www.computerforensicsediscovery.com/2008/09/articles-1/litigation-hold/the-duty-to-preserve-teaching-your-clients/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ComputerForensicsAndE-discoveryBlog+(Computer+Forensics+and+E-Discovery+Blog).

- Scott C. Ford, *Avoiding the Spoliation Trap – Tips for the Litigator*, Virginia Bar Litigation News, Fall 2007, http://www.mccandlishholton.com/publications/pdfs/Avoiding%20the%20Spoliation%20Trap.pdf.

However, it is important to keep in mind that merely warning clients about the duty to preserve evidence may not be enough to ensure against evidential spoliation. The attorney would be wise to – indeed, may have an ethical duty to – follow up to ensure that the client is adequately following the attorney's instructions to preserve evidence. *See, e.g.*:

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- Michael J. Eng, *Counsel Must Not Only Implement Litigation Hold But Must Also Oversee Its Compliance*, Electronic Discovery Navigator, March 7, 2007, http://www.ediscoverynavigator.com/2007/03/schoollink_tech.html.

- Sharon D. Nelson and John W. Simek, *Spoliation of Electronic Evidence: This Way Be Dragons*, American Bar Association Law Practice Management / Law Practice Today, June 2005, http://www.abanet.org/lpm/lpt/articles/tch06052.html.

OTHER ISSUES

Other Preventative Language Which Attorneys Can Place in Representation Agreements:

Just as attorneys can use representation agreements as a tool to educate their clients about the dangers of sending documents with metadata included, or about the duty to preserve evidence, language can be placed in the representation to educate the client about a number of other issues. For example, attorneys might include including language in their representation agreements on the following topics:

- Social Media:

> "Client represents and warrants that he or she has disclosed to the Firm all social media sites that Client uses, as well as those used at any time during the relevant controversy over the past five years, and has provided Firm access to Client's accounts, pages, blogs, and any other materials existing on such sites. Client understands that he or she is not to delete, destroy, take down, or otherwise compromise anything on client's social media sites including wall posts, pictures, videos, messages and tweets. Client further understands that he or she is not to remove anyone from Client's contact or friends lists on such sites."

- Electronic Platforms:

> "Client represents and warrants that he or she has disclosed all electronic platforms Client currently uses, as well as those used at any time during the controversy and over the past five years. This includes platforms personally or company-owned, whether used at home or the office. Electronic platforms include desktop computers, laptops, tablets, smartphones, other cellular phones, PDAs, and other electronic devices capable of storing information, receiving input, and providing feedback to the user."

- Employer's Property:

> "Client represents and warrants that he or she has disclosed all hard copy and electronic information in Client's possession that arguably is the property of the employer. Information arguably the property of the employer includes work emails, work created for the employer, research on company projects, company proposals, marketing plans, notes, memoranda, customer lists, and contact lists,

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including those on company social media and on employee's personal social media obtained as part of employee's job."

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