

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

ARMA Mile High Chapter

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Course Agenda

- Presentation
 - What is Relationship of Metadata to 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



Focus of the Paper in 4 Sections

- Role of metadata in authentication of records
- Analysis of legal think tank opinions & spoliation
- Analysis of court rulings on examples of metadata
- Derive discernible patterns for RIM preservation and e-discovery

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Part I

What is Relationship of Metadata to 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...

Aquilar 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."

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



For RIM Purposes the Paper Concludes:

- Substantive metadata (e.g., tracking substantive changes) is akin to a non-record draft and not needed
- System metadata (e.g., files names, extensions, sizes) is critical to authentication
- Embedded metadata (e.g., formulas in a spreadsheet) is critical to understanding the document fully



For Discovery Purposes the Paper Concludes:

- Substantive metadata (e.g., tracking substantive changes) should be preserved once litigation is pending or threatened
- System metadata (e.g., files names, extensions, sizes) – ditto
- Embedded metadata (e.g., formulas in a spreadsheet) – ditto



Spoliation of Metadata

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

78 PA Bar Assn. Quarterly 1



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!



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.”

Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in the Electronic Age, Guideline 3f

BUT...



Sedona Principle 12

- “...production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, *taking into account the need to produce reasonably accessible metadata...*”

Sedona Principles' Best Practices Recommendations and Principles for Addressing Electronic Document Production



MoReq 2010

- Uses the ISO15489 requirement of using metadata to keep track of the history of a particular record
- Expands on this concept by incorporating a concept from ISO 23081 which involves event history metadata.
- Most entities have three sets of information attached to them which are metadata, event history, and an access control list.
 - Metadata is essentially data about data/ a record that helps in its filing and management.
 - Event history data is a record of events that occur to an entity and its metadata. This allows a user to be able to track a record back to its source of origin; even if the entity has been exported through multiple systems.
 - Access control is a list of users or groups who have access to the entity.



Chapman v. General Bd. of Pension and Health Benefits of United Methodist Church

- “[P]arties who do not specifically request metadata are not typically entitled to it if the responding party has already produced the documents in another reasonably usable form.”

Case No. 1:09-cv-03474, 2010 WL 2679961 (N.D. Ill. July 6, 2010)



Lessons Learned from *Chapman*

- A party is under no obligation to voluntarily provide metadata
- Even if ESI is mentioned and defined in a document request, the definition of ESI must specifically include metadata, otherwise no requirement to produce it



Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Agency

- Metadata is "an integral or intrinsic part of an electronic record"
- Metadata is part of the public record that must be produced by the Government in response to Freedom of Information Act (FOIA) requests.
- Case of first impression in Federal courts

10 Civ. 3488 (S.D.N.Y. Feb. 7, 2011)



Oregon Bar: Formal Opinion No. 2011-187
“Competency: Disclosure of Metadata.”

- Does a Lawyer have a duty to remove or protect metadata when transmitting documents electronically?
- May a Lawyer use the metadata information that is readily accessible with standard word processing software?
- Must a Lawyer who receives a document containing metadata inform the sending attorney?
- Must a lawyer who receives a document containing metadata acquiesce to the sending lawyer’s request to delete the document without reading it?
- May a lawyer use special software to reveal metadata in a document?



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.”

49 Orange County Lawyer 22



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.)

30 Pennsylvania Lawyer 18



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 \(N.D. Ill. May 8, 2006\)](#)



Cogina Investments v. Rothstein and TD Bank

- Plaintiff argued that defendants' expert's opinion was unreliable and should be excluded because the expert reviewed only a sample of plaintiff's data set.
- Court disagreed and allowed expert testimony based on a mere sampling of metadata.

2011 U.S. Dist. LEXIS 120267 (S.D. Fla. Oct. 18, 2011)



Lesson learned in *Cogina*

- Requiring a metadata expert to analyze every document is unnecessary.
- Allowing testimony based on analysis of a sample of documents allows the expert to both assist the court and allow opponent to question the weight to be given to that expert's testimony.



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)



Re: Public Records, see also

- *O'Neill v. City of Shoreline*, 187 P. 3d 822 (Wash App. 2008)
- Washington Court of Appeals held that metadata contained in emails received by the Mayor in her personal account and referenced at a city council meeting were part of the public record



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](#)



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

- Courts showing preference for native format
- 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

- Mind recommendations for both Legal and RIM
- Follow their lead
- Read recommended fields to preserve for “records” (presented in the paper)



E-mail Fields to Preserve

E-mails - Metadata fields that tend to show who knows what and when, such as:

- Custodian
- Dates created and modified
- Subject
- Size of file and attachment
- Modified by
- Senders and receivers
- Attachments
- Author



WORD, WordPerfect & Spreadsheets

- Fields to consider might include:
 - Dates created and modified
 - Authors and modifiers (the latter not necessary to declare records)
 - Custodian
 - Size of file
 - Beginning document page number
 - End document page number
 - Key formulas embedded in any of the documents
 - Hyperlinks
- Per *Aguilar* “depends upon the complexity and purpose of the spreadsheet.”



Music file shares, photos, animations, videos, graphics and images

- These should include:
 - Folders
 - File Names
 - Author (if known)
 - Dates created or downloaded
 - Date modified (not needed to declare records)
 - Modified by (if known, and not needed to declare records)
 - Custodian
 - Formulas embedded in any of the documents, if any
 - Size of file
 - Hyperlinks, if any



Paper's Key Conclusions

- Distinguish "records" from data preserved and produced in discovery
- Need guidelines or procedures to preserve metadata for declared and classified records
 - First line of defense
- In discovery, preserve ALL metadata that is reasonably accessible and thus render document usable





Thank You

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