

**Metadata: Basic Guidance for New York Attorneys**  
**New York State Bar Association**  
**Commercial and Federal Litigation Section**  
**Electronic Discovery Committee<sup>1</sup>**

- **What is metadata?**

Metadata is “information describing the history, tracking or management of an electronic document.”<sup>2</sup> It contains information about a document that is not visible on the printed page or, in most instances, on the computer screen, but which may nevertheless be relevant or useful. Depending upon the particular type of electronic document, metadata can contain information about who created the document, when it was last saved, changes between versions, user comments, and more. Certain metadata can be created actively by a user, but often metadata is generated automatically by the computer program or system involved in creating the electronic document.

Analogies from the paper world may be useful in understanding metadata. Metadata may be compared to the information contained on an old-fashioned library index card, which shows information about cataloguing, copyright, publisher, and edition. A library’s stamps inside the book might also be compared to metadata, as well as notes scribbled in the margins and information about who borrowed the book and when. In the electronic world, metadata is linked electronically with the original file.

Files created by different programs have different associated metadata. For example, documents created in Microsoft Office include without limitation the following metadata: the name of the author; the name of the author’s company or organization; the name of the author’s computer; the name of the network server or hard disk where the document is saved; non-visible portions of objects embedded within the document; the names of people who edited the document; document revisions and versions (such as used by the Track Changes feature); hidden text, comments, and the last time the document was printed and saved.

Some metadata can be inaccurate and based solely on the original configuration of the software and not on current information. One example of inaccurate or out-of-date metadata is a document author’s “manager” as indicated in Microsoft Word metadata. This field is typically populated at the time the software is configured and is not kept up to date regularly.

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<sup>1</sup> This document was authored by Adam Cohen and Daniel Tepper, with research assistance from Kirstin McPolin.

<sup>2</sup> THE SEDONA PRINCIPLES (SECOND EDITION) ADDRESSING ELECTRONIC DOCUMENT PRODUCTION § 12 cmt. 12.a. (June 2007).

E-mail typically contains metadata indicating whether there were any attachments to a message as well as information about the addressee(s) and when the message was sent, including “bcc” recipients. Any documents attached to an e-mail will have their own associated metadata.

- **What are the legal and ethical issues for lawyers?**

Metadata raises many legal and ethical issues for lawyers. While there are no clear answers as to how these issues should be resolved in individual cases, lawyers should be aware of the issues that may arise. Some of the primary issues include:

- What are your obligations, if any, to preserve metadata?
- How is metadata preserved?
- What are your obligations to produce metadata?
- What obligation does a recipient of inadvertently produced metadata have regarding its review?
- What are your obligations to prevent the disclosure of metadata containing confidential or privileged information?

- **What are your obligations to preserve Metadata?**

The obligations to preserve metadata are not well defined under current statutory and case law. Lawyers must exercise their judgment in evaluating the extent of their obligation to preserve metadata under different circumstances. Is the metadata relevant to the claims or defenses in the action? If there is a reasonable anticipation of litigation, can the lawyer reasonably foresee that the metadata in question is likely to be relevant to the anticipated action? If the answer to these questions is yes, then the lawyer needs to consider what steps should be taken to preserve metadata and whether the burden of doing so is warranted under the circumstances.

- **How is metadata preserved?**

The mechanics of preserving metadata vary depending on the types of files involved and the media on which the files are stored. What lawyers need to know is that often even opening, moving or copying electronic documents can alter or destroy metadata and therefore potentially constitute spoliation. Sophisticated techniques and tools have been developed to preserve metadata safely and reliably, but these processes generally require the use of experts and the expense of retaining experts may not be warranted in all cases. When lawyers have questions about how to preserve metadata, they should seek out resources that can provide the necessary expertise. In this area of the law, courts are increasingly unlikely to accept ignorance as an excuse.

- **What are your obligations to produce metadata?**

In many jurisdictions and venues, there is no rule requiring the production of metadata in all circumstances. Where metadata is relevant and not unduly burdensome to produce, some courts are likely to order its production. The new Uniform Rules of the Commercial Division of the Supreme Court of New York, amended in 2006, require, *inter alia*, production of metadata.<sup>3</sup> Attorneys should be mindful of other local rules that may address metadata production.

- **What are your ethical obligations as a New York lawyer with respect to metadata?**

The New York State Bar Association has taken the position that it is unethical to use metadata to gain an advantage in legal proceedings where the production of metadata is inadvertent. In Ethics Opinion #749 (Dec. 14, 2001), the NYSBA Committee on Professional Ethics concluded that “a lawyer may not make use of computer software applications to surreptitiously ‘get behind’ visible documents or to trace e-mail.” The Committee reasoned that producing counsel generally intends receiving counsel to receive the visible document only, and that “absent explicit direction to the contrary”, producing counsel does not intend for receiving counsel to receive the “‘hidden’ material or information about the authors of revisions to the document.”<sup>4</sup>

The Committee revisited the issue in Ethics Opinion #782 (Dec. 8, 2004), concluding that attorneys must use reasonable care to avoid the disclosure of metadata containing client confidences or secrets and stating that surreptitious exploitation of metadata is an “impermissible intrusion on the attorney-client relationship,” which is dishonest, fraudulent and deceitful.<sup>5</sup>

Other bar associations have issued opinions on the review and disclosure of metadata. These opinions are not consistent.<sup>6</sup> Accordingly, it is important for lawyers handling metadata to understand the ethical rules in their particular applicable jurisdiction.

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<sup>3</sup> Unif. R. N.Y. State Trial Cts. § 202.70, R. 8(b).

<sup>4</sup> New York State Bar Op. 749 (2001).

<sup>5</sup> New York State Bar Op. 782 (2004).

<sup>6</sup> Contrary to the NYSBA, the American Bar Association and the Maryland State Bar Association, for example, take the position that lawyers who receive electronic information can search for and make use of metadata. ABA Formal Op. 06-442 (Aug. 5, 2006); Md. Ethics Docket No. 2007-09.