

# PRACTICE TIP SHEET

## All About Metadata

### What is metadata?

Personally, I don't find the standard "data about data" definition that helpful, do you? But try this on for size: "[M]etadata is information associated with—and made part of—an electronic document that is not visible in the normal viewing or printing of that document." (Patrick Zeller, [Technology: Recent cases help evolve guidelines for producing metadata](#), Inside Counsel Blog, posted July 29, 2011.)

Word or WordPerfect, Excel, and PowerPoint files all generate and store a lot of information about a document's author, revisions, templates, deleted text, and more. Even PDF documents contain some metadata, although much less.

### Is metadata good or bad?

Well, the answer is a favorite in the legal profession: It depends!

That's right, it largely depends on whose metadata it is, and in what context the metadata is likely to be discovered or reviewed.

### Confidentiality, Privilege, and Work Product

If the document is internal to the law office, that means attorneys and staff have likely generated it, reviewed it, revised it, and possibly commented on it. The document will contain embedded metadata that records all those events. Perhaps a document has even been reviewed, revised and commented on by a client.

In this case, the metadata contained in the document may well fall under any of – or all three of – the above-listed categories. In that case, an attorney and her staff have an ethical obligation to protect that metadata from being seen by anyone not directly involved in the client's representation.

### Discovery of Electronically Stored Information (ESI)

On the other hand, if the metadata is contained in discoverable documents that are relevant to the claims or defenses at issue in the case, then the metadata is probably discoverable too.

In fact, increasingly parties are including metadata in their discovery requests, requiring that ESI be produced with its associated metadata intact. Sometimes this is accomplished by producing ESI in its native format, together with all original metadata. Other times this is accomplished by processing ESI into TIFFs, and producing them with load files that contain the documents' original metadata.

### Ethical Obligations

Attorneys and their staffs have ethical obligations in either case with respect to handling the metadata associated with electronic documents.

### ***Client Confidences***

In the case of metadata potentially containing confidential, privileged or attorney work product information, the lawyer has an ethical duty to take steps to prevent its disclosure.

An increasing number of ethics opinions have been issued by state bar associations relating to a sending attorney's obligations to prevent disclosure of confidential metadata, as well as a receiving attorney's ethical obligations in the event of receiving metadata that was inadvertently shared.

On the latter issue, there is some disagreement among the states. However on the issue of the sending lawyer's obligations, there is broad agreement that [Model Rule 1.6](#) requires an attorney to assure that in the process of transmitting electronic documents, he does not inadvertently disclose his client's confidential information.

### ***Discoverable Evidence***

On the other hand, when metadata is embedded in documents relevant to the issues in the litigation, the lawyer has an ethical duty to take steps, and to urge her client to take steps, to see the metadata is not altered, destroyed or withheld from production, if requested.

In fact in federal court, stipulated orders are becoming commonplace concerning protocols for producing ESI which require production of specified metadata. In addition, the issue of whether metadata should be included in productions of ESI is the subject of motions to compel, and while the rulings are often very fact specific, courts are increasingly requiring that metadata be produced. (See, e.g., *Younes v. 7-Eleven*, Nos. 13-3500, 13-3715, 13-4578 (D.N.J. Mar. 18, 2015); *Nat'l Day Laborer Or. Network v. United States Immigration & Customs Enforcement Agency*, No. 10-civ-3488 (S.D. NY Feb. 7, 2011).)