speaking of ethics

By Saul Jay Singer

Metadata as Metaphor: A Major or Miner Matter?

One fine morning in the District of Columbia, at a litigation department meeting

PETER PARTNER Good morning, folks The good news today is that, under threat of our motion to compel, Defendant Jones finally produced documents in response to our Request for Production in the *Stephens* case Our preliminary review shows we have received some very helpful docs, including several produced to us in electronic form Alice, I want you to contact Doc Digit, our IT guru, and determine if Jones also produced any helpful metadata

ALICE ASSOCIATE Metadata? What's that?

PAM PARTNER Metadata—information not visible from the face of the document, but which is imbedded in the software and retrievable by various means—is ubiquitous in electronic documents It includes information such as how, when, and by whom the document was collected, accessed, or modified, and it can include comments about the creation and modification of a document Peter is correct that metadata comments by Jones on his earlier drafts of the *Stephens* contract could prove our case However, I believe "mining for metadata," as Peter proposes to do, is unethical, it is dishonest to look for metadata absent some affirmative representation by the sender that it was intentionally transmitted Officers of the court and representatives of the legal profession do not read other people's mail Had opposing counsel unintentionally left his briefcase in the deposition room, would you open it and read it, even if to secure an advantage for our client? Besides, under the D C Rules of Professional Conduct, Rule 4 4 forbids a receiving lawyer from reading an inadvertently sent document, and D C Bar Legal Ethics Committee Opinion 256 held that

PETER Sorry, Pam, but Rule 4 4(b) says no such thing, nor does Opinion 256 In fact, the rule unambiguously provides that a lawyer shall not examine a writing if he or she "knows, *before* examining the writing, that it has been inadvertently sent " Not only do we lack any such knowledge in this case, we don't even have a basis to suspect that any metadata production was inadvertent Had Jones called to inform us that metadata had been unintentionally sent, or had he notified us that we were not to review the metadata, or had he told us that he was unable to remove the metadata, but provided the documents to us only to facilitate timely production and to avoid our nasty motion to compel, that might be different But absent such *knowledge*, we have the affirmative *duty* to go on a mining expedition on behalf of our client and who knows what buried treasure we might find?

ALICE But would our blanket search for metadata constitute the requisite "good faith" review? And what about Rule 8 4(c)'s proscription against dishonesty? I feel very uncomfortable about this

PAM I agree with Alice and I think that, as usual, her instincts are right on looking for something that your adversary did not mean to disclose is a form of dishonesty And Opinion 256, our seminal opinion on this issue, was premised on the very notion that such conduct is dishonest Remember the discussion about a lawyer who comes upon a wallet in the street?

PETER But "dishonest" under Rule 8 4 has been interpreted by the Legal Ethics Committee as constituting conduct that everyone would *recognize* as dishonest, and I dare say that mining for metadata does not fall within that category In fact many, if not most, people would say that the lawyer sending the documents has every reason to know that the docs will be carefully scrutinized by his or her opponent and, as such, the sending lawyer has the duty to ensure that there are no unintended disclosures made Counsel could have—indeed, *should* have—"scrubbed" the metadata, as we routinely do with our electronic productions Do I really have to remind you all that our duty is to our client and not to opposing counsel?

ARTHUR ASSOCIATE I think that there is a significant difference between a hard physical document and metadata With a paper document, unless the paper is clearly labeled, the recipient cannot realize that it was sent inadvertently until at least a portion of it is actually read With metadata, you are actively seeking confidences that you hope your less-sophisticated opponent has overlooked I think Pam's "forgotten briefcase" analogy is very much the point I would certainly expect opposing counsel to refrain from rifling through my briefcase I am a firm believer in both the adversary system and in doing everything we can to advance our clients' interests, but there *are* ethical limitations Mining for metadata is no different than looking at your neighbor's examination paper when he or she gets up to go to the restroom I think it is unethical to look for metadata absent some knowledge that it was intentionally sent

PETER Okay, we apparently cannot agree Alice, call the D C Bar legal ethics helpline and report back to me on how those guys see this issue

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The D C Bar Legal Ethics Committee, in addressing the very controversial metadata issue, held in Opinion 341 that "a receiving lawyer is prohibited from reviewing metadata sent by an adversary *only* where he has *actual knowledge* that the metadata was inadvertently sent." (Emphasis added) Moreover, "mere uncertainty by the receiving lawyer as to the inadvertence of the sender does not trigger an obligation by the receiving lawyer to refrain from reviewing the metadata "

Thus, the committee essentially agreed with Peter Partner's position that absent specific knowledge of inadvertent production, the firm may examine metadata encoded in electronic documents produced pursuant to subpoena or in discovery Noting that Rule 3 4 proscribes the obstruction of another party's access to data, and that metadata can constitute probative evidence,[1] the committee reasoned that the producing party is *obligated* to produce electronic documents[2] and, as such, the receiving lawyer may reasonably assume that the sender intended to produce metadata—unless he or she actually "knows" of any evidence to the contrary[3]

In fact, though the receiving lawyer does not have the ethical *obligation* to mine metadata and to attempt discovery of tangible evidence to advance the client's interests,[4] the committee, in Opinion 341, suggests it might be advisable to have a Doc Digit or other IT professional on board "the lawyer in such instances may consult with a computer expert to determine the means by which the metadata can be most fully revealed and reviewed "

However, the committee also clarifies in Opinion 341 that

> By stating that the standard for a violation is "actual knowledge," we do not condone a situation in which a lawyer employs a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender The Rules of Professional Conduct are "rules of reason," Scope [1], and a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks "actual knowledge" in an individual case

Id, n 3 Therefore, a firm cannot automatically assign a Doc Digit to mine every document coming in *before* the receiving attorney undertakes a good faith assessment of the production to determine if, given the particular facts and circumstances underlying the production, there are any indications the metadata was produced inadvertently This requirement is entirely consistent with Rule 4 4, comment 3. "where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, *and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent,* the receiving lawyer commits no ethical violation by retaining and using those materials " (Emphasis added)

A comparison with the American Bar Association's (ABA) position on the metadata question is particularly instructive While the ABA declined to specifically apply Rule 4 4 to metadata, it nonetheless noted that, pursuant to this rule, a lawyer "may"—but is not required to—return without reading inadvertently produced documents, and that his sole duty is to provide notice to the sender that inadvertently sent information has been received Formal Opinion 06-442 (Aug 5, 2006) [5] However, because D C Rule 4 4(b) is far more restrictive of a lawyer's right to review inadvertently sent documents than its ABA Model Rule 4 4 analogue, Opinion 341 prohibits the review of a document which the lawyer knows to be inadvertently sent

Conclusion

1 *Generally*

The newly revised Federal Rules of Civil Procedure provide for the handling of electronic discovery, and it is not unreasonable to expect that at some point, most, if not all, state and federal courts will jump into the e-discovery and metadata fray It is essential that members of the Bar familiarize themselves with all applicable new procedures

2 *Lawyer Producing Documents*

a A lawyer sending electronic documents may have an affirmative duty under D C Rules 1 1 and 1 6 to ensure that privileged or other nondiscoverable information in the form of metadata is not inadvertently produced This responsibility may include the duty to understand how metadata is created and maintained and, if necessary, to retain a professional or employ adequate software to protect client confidences

b Blindly "scrubbing" all metadata from litigation documents may not only be unethical, but criminal To the extent that privileged or nonresponsive information is redacted or removed before production, the lawyer should ensure the original is maintained in its original form

c There is, however, an important difference between scrubbing metadata and preventing its creation, and setting up a computer system in such a way that metadata is not created in the first instance is neither unethical nor improper

3 *Lawyer Receiving Documents*

a If a lawyer knows that metadata has been produced inadvertently, the lawyer may not retrieve it or review it

b If the lawyer lacks specific knowledge that the metadata was inadvertently produced, he or she must first review the production for any evidence of inadvertence and may not simply refer every electronic document for mining without first undertaking this review in good faith If knowledge is obtained that the producer did not intend to provide metadata, the lawyer may not extract or mine it

c Absent evidence the metadata was produced inadvertently, the lawyer may—but is not ethically required to—attempt discovery of tangible evidence in produced metadata and, if necessary, consult with a computer expert to determine how to reveal and exploit the metadata

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Legal Ethics counselors Hope C Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext 231 and 232, respectively, or by e-mail at ethics@dcbar org

Notes

1 *Williams v Sprint/United Management Co*, 230 F R D 640 (Kansas 2005), which discusses the propriety of scrubbing metadata, notes that "metadata is an inherent part of an electronic document and its removal ordinarily requires an affirmative act by the producing party that alters the electronic document " As such, "when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata " *Id* at 652

Thus, Peter Partner's acknowledgement that his firm routinely scrubs metadata from litigation documents or from documents produced in anticipation of litigation is, at the very least, problematic What the producing firm should do is treat metadata as it would any other document it proposes to produce pursuant to a request or subpoena carefully review it, assert privilege or other grounds for nonproduction as appropriate, and retain the original in its original form

2 The producing party has an unambiguous Rule 1 6 duty to take steps to assure the confidentiality of metadata and, in that regard, "must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures " D C Bar Legal Ethics Comm Opinion 341 (2007)

3 "Knows" means "actual knowledge," which "may be inferred from circumstances " Rule 1 0(f)

4 A lawyer might reasonably conclude that, absent knowledge that the metadata was inadvertently produced, he or she would be *required* to mine the metadata in all electronically produced documents (and thereby attempt electronic discovery of tangible evidence to advance the client's interests) pursuant to Rule 1 3 (diligence and zeal) However, the committee explicitly ruled that "we do not intend to suggest that a lawyer *must* undertake such a review" in all instances (emphasis in original), and that the lawyer could decline such a review "whether as a matter of courtesy, reciprocity, or efficiency " *See* Op 341, n 9

5 In Maryland, the receiving attorney's right to review and use metadata is even broader—the receiver need not even provide notice to the sender Maryland State Bar Ass'n Comm on Ethics Op 2007–09