

LEGALTECH

ESLP3: Global Electronic Discovery, or Did You Mean Disclosure?

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Presented By:
Donna Payne, CEO, Payne Consulting Group
Ross L. Kodner, Esq., Senior Legal Technologist/CEO, MICROLAW
Eugene P. Stein, Esq., Formerly Chief Knowledge & Technology Officer, White & Case LLP

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Presenter Introductions

- **Ross L. Kodner, Esq.**
 - Marquette Univ. Law School, 1986 (Law Review)
 - Founded MicroLaw, Inc. in 1985
 - Legal Technologist, Educator, Author
 - Over 1200 law practices assisted across North America•Technolawyer Legal Technology Consultant of the Year 1999, Contributor of the Year 2001, 2002, 2005, 2006
 - Founder/National Coordinator, HelpKatrinaLawyers.org
 - Chair, Wisconsin Law & Technology Conference 2002-2007
 - Founder / Chair, Wisconsin Solo & Small Firm Conference 2006
 - Chair and Founder, National Solo & Small Firm Conference 2006-2007
 - Chair, Milwaukee Bar Association Technology Committee, 2002-2007
 - Chair, ABA LPM Section Computer & Technology Division and Member, TECHSHOW 1997- 2001 Board, Co-Chair, LegalTech CLE Planning Board 1999-2005
 - Founder, Annual Legal Consultants & Technologists Dinner (www.thedinner.net)
 - Named to the UK's Global 100 List of Top Legal Technology Leaders, 2006
- CEO/Senior Legal Technologist
- **MicroLaw, Inc.**
- Milwaukee, Wisconsin
- E-Mail: rkodner@microlaw.com
- Web: www.microlaw.com




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Presenter Introductions

- **Eugene Stein, Esq.**

Mr. Stein has been the senior executive responsible for creating and sustaining full business value propositions for a law firm's attorneys, legal professionals and clients. This responsibility included establishing and maintaining the strategic direction for Information Technology, Knowledge Management, Litigation Support Technology, e-Discovery, Library and Information Resources and Records Management. Through the organization of efficient and capable teams of professionals from all disciplines, Mr. Stein was able to align the various and diverse functions with the Firm's business drivers and ensure that the resources, tools and tactics are available to satisfy the business and information technology needs of over 6,000 users in 45 offices and 24 countries.

During his career, Mr. Stein has accumulated over twenty-five years of experience in professional service firms and government agencies. He has a proven track record of providing competitive advantage and increases in service delivery through innovative solutions and visionary leadership. Mr. Stein is repeatedly recognized in and out of the industry as a pioneer and thought leader.
- Former CIO of White & Case and Shearman & Sterling



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Presenter Introductions

- Donna Payne
- CEO of Payne Consulting Group
- Winner IT Consultant of the Year
- Author of 12 Books
- DonnaPayne@payneconsulting.com



Donna Payne is CEO and founder of Payne Consulting Group. She is the recent recipient of the first-ever IT Consultant of the Year award given by Law Technology News, and the recipient of Lex Profecto award for lifetime service advancement of legal software and publishing.

Payne is an original member of Microsoft Legal Advisory Council, and is a member of the American Bar Association, the American Society of Journalists and Authors, and the Project Management Institute. She is a frequent speaker at legal and technical conferences worldwide and has spoken to Congressional committees, the Senate and at international judicial conferences on the subject of metadata and preventing accidental disclosure.

Payne is a columnist for several legal and technical publications; she has been featured in syndicated articles on women in technology.

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Agenda

- The impact of Metadata – Recent Exposures
- Metadata and privacy issues, in the U.S. and beyond
- International data privacy issues
- Thoughts on how you can avoid accidental disclosures

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Let's Back Up and Talk About Metadata

- *Metadata is basically Data about Data*
- *Metadata is embedded in a document*
 - *Some metadata is necessary in order for the document to function properly*
 - *Some metadata is potentially harmful if shared outside the firm*
 - *Some metadata is added by the software or operating system, other data is added by the user*



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Quick Overview of the Risks of Metadata Disclosure

- **ETHICAL VIOLATIONS:** Confidential information can be exposed.
- **SECRETS REVEALED:** Tipping your hand in by disclosing information that should not be revealed.
- **EMBARRASSMENT:** Disclosing embarrassing personal information or client relationship - damaging info.



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The Trouble With Accidental Disclosure...

1000 Internal DRAFT do not circulate
File Format: Microsoft Word - View as HTML
Draft 2008 Water Use Efficiency Proposal Solicitation Package Exhibits I-VII Draft 2008
WUE PSP - Exhibits - I - VII - 6/7/2008
www.water.ca.gov/docs/2008wuePSPExhibits4-rev.doc - Similar pages

meeting
meeting
Guyla L. McCarty
Guyla L. McCarty
State Of California
Microsoft Office Word Picture
MS Word Doc
Word Picture
Internal DRAFT do not circulate
Baryshay
Word Document
Summer 1st 2008

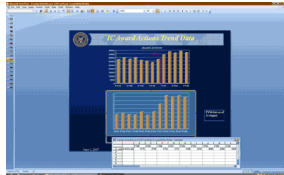
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Recent Exposures: Embedded Objects

- Classified US Intel Budget Revealed Via PowerPoint .

The Office of the Director of National Intelligence - budget of the 16 US intelligence agencies in fiscal year 2005 was \$60 billion, almost 25% higher than previously believed (Slashdot, Monday, June 11, 2007 7:05 AM)

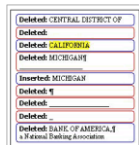


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Track Changes

- SCO Group's lawsuit against DaimlerChrysler
 - A Microsoft Word document of SCO's suit against DaimlerChrysler, originally identified Bank of America as the defendant instead of the automaker.
- United Nations Report
 - Track changes were discovered that support the published conclusion that Syria was behind Mr. Hariri's assassination in a bomb blast on Valentine's Day in Beirut. The names of the brother of Bashar al-Assad, President of Syria, and other members of his inner circle, were dropped from the report that was sent to the Security Council.



Bone and Blanford, "UN office doctored report on murder of Hariri," *The Times Online* (Oct. 22, 2005), available <http://www.timesonline.co.uk/article/0,251-1837848,00.html>

Track Changes

- Former White House Edit
 - A Microsoft Word document of SCO's suit against DaimlerChrysler, originally identified Bank of America as the defendant instead of the automaker.



"The real scandal here is that after 15 years of using Microsoft Word, I don't know how to turn off track changes." Max said

Failed Redaction

GE Suffers a Redaction Disaster

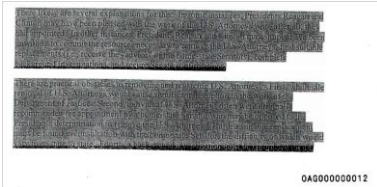
- Information about the inner-workings of GE's white, male-dominated management and their alleged discriminatory practices against women, which is supposed to be sealed by court order, appears with little technical savvy required.
- All parties agreed that the documents would be filed under seal," Sheffer said. "We acted under belief that they were filed under seal, and we're concerned."

Douglas S. Malan, "GE Suffers a Redaction Disaster," *The Connecticut Law Tribune* (May 28, 2008), available <http://www.timesonline.co.uk/article/0,,251-1837848,00.html>

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Can a Scanner Read Through Your Redacted Document?



Yes It Can

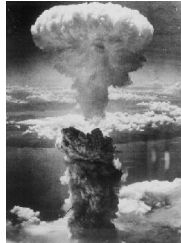
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THE "METADATA" BOMBSHELL

In 2004 a New York Legal Ethics Opinion Opened the Legal Floodgates re: Metadata Issues

- **New York Ethics Opinion 782: The Metadata Bombshell**
- This 12/2004 ethics opinion states: "Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."
- Expect this approach in other states over the next couple of years
- Ignorance is no longer an option!
- Read: www.hricik.com/eethics/3.2.html



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Florida Ethics Opinion – Unrealistic and Impractical?

- Florida issues Ethics Opinion 06-2 took an idealistically impractical position:
- (2) It is the recipient lawyer’s concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender’s client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. See, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.

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Florida Ethics Opinion – Unrealistic and Impractical?

- Florida issued Ethics Opinion 06-2 which took an idealistically impractical position:
- (3) If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must “promptly notify the sender.” Id.
- The foregoing obligations may necessitate a lawyer’s continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a). As set forth in the Comment to Rule 4-1.1, regarding competency:
- To maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education.

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The DC Bar Chimed in – Summer 2007 – A New Direction?

The DC Bar issued opinion no. 341 – we can look at metadata where there is no knowledge the metadata was inadvertently sent. If there is actual knowledge, the receiving lawyer must consult the sending lawyer to see if there is client work product contained . . . Hmm . . . Another jurisdiction struggles with the issue.



Home > For Lawyers > Ethics > Legal Ethics > Opinions
Opinion 341
 Review and Use of Metadata in Electronic Documents
 A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer’s client.

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Alabama Struggled – Have Your Metadata Cake and Eat it Too?

Alabama in August 2007 follows NY and said lawyers have a duty to remove metadata. But then they say it is ethically impermissible to “mine” metadata that they inadvertently or improperly receive from another party. The question – how would you know it was inadvertently or improperly received? Yet more confusion.

Opinion Number: 2007-02

Search for:

Ethical Propriety of Mining Metadata

DISCLOSURE AND MINING OF METADATA

QUESTION #1:

Does an attorney have an affirmative duty to take reasonable precautions to ensure that confidential metadata is properly protected from inadvertent or inappropriate production via an electronic document before it is transmitted?

ANSWER:

Lawyers have a duty under Rule 1.6 to use reasonable care when transmitting electronic documents to prevent the disclosure of metadata containing client confidences or secrets.

QUESTION #2: Is it unethical for an attorney to mine metadata from an electronic document he or she receives from another party?

ANSWER:

Absent express authorization from a court, it is ethically impermissible for an attorney to mine metadata from an electronic document he or she inadvertently or improperly receives from another party.

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Arizona, Pennsylvania and Colorado chime in as well

Colorado stated it best when their May 2008 Ethics Opinion No. 119 indicated (note the part about “competence”: . . . *The duty to provide competent representation requires a Sending Lawyer to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary.*

Within a law firm, a supervising lawyer has a duty to ensure that appropriate systems are in place so that the supervising lawyer, any subordinate lawyers, and any nonlawyer assistants are able to control the transmission of metadata. . . .

SEE: www.cobar.org/index.cfm/ID/386/subID/23789/CETH/

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Pennsylvania Acknowledges, Realistically, This is a Gray Area

Pennsylvania’s Metadata Opinion 2007-500: The ethics commission in Pennsylvania made the following very vague (but realistic) statement in its commentary:

“After reviewing the existing opinions, the committee concluded that “it would be difficult to establish a rule applicable in all circumstances and that consequently the final determination of how to address the inadvertent disclosure of metadata should be left to the individual attorney and his or her analysis of the applicable facts.”

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Arizona Follows the Crowd in November 2007:

Arizona jumped on the bandwagon of "impractical approaches" to the metadata threat when put forth the idea that, while it was the responsibility of the transmitting lawyer not to send out some types of metadata, it was also the responsibility of the lawyer who receives it not to look at it. The opinion states:

"Under Arizona's version of ER 4.4(b), a "lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures."

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Amendments to the Federal Rules of Civil Procedure

- Rule 26(a)(1)(B) – requires initial disclosure of sources of discoverable information.
- Rule 26(b)(2)(B) – parties are to identify sources that are "not reasonably accessible because of undue burden or cost."
- Rule 26(b)(5)(B) – sequester privileged/non-discoverable information; inadvertent production is not a waiver of privilege.
- Rule 26(f) – parties meet early to discuss "any issues relating to preserving discoverable information."
- Rule 34(a) – scope of production information; e-mail is discoverable.
- Rule 34(b) – the procedure in which to request information; the "request may specify the form or forms in which electronically stored information is to be produced."

For the text of the Federal Rules of Civil Procedure Amendments, see http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

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"METADATA": THE RISKS

Special Legal Requirements Make This Urgent

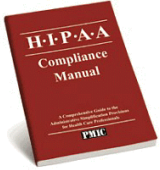
- Disclosure of confidential information today could cause your clients tremendous legal difficulties -examples include:
 - **Electronic Discovery** - information is unknowingly produced as hidden Metadata
 - **HIPAA** -confidential healthcare information disclosure is a per se violation



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The Metadata Issue Proves this Point: The Intersection of Technology and Substantive Law is Blurred Beyond Recognition



Lawyers everywhere need to understand that new laws and new techniques mean new knowledge is mandatory – and clients need to be advised accordingly. This means understanding metadata ramifications, e-Discovery issues and the broad, sweeping (and chilling) impact and reach of HIPAA

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YOUR LAWYERS AND THEIR COMPETENCY: DOES IT INCLUDE KNOWLEDGE OF TECHNOLOGY IN PRACTICE?



EXAMPLE: MINNESOTA PROFESSIONAL RESPONSIBILITY RULE 1.1: COMPETENCE states, under the heading:

“Thoroughness and Preparation” that “Competent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners.”

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TREND: “METADATA” AND MINNESOTA’S LEGAL ETHICS OPINION NO. 19

- MINNESOTA LEGAL ETHICS OPINION NO. 19 USING TECHNOLOGY TO COMMUNICATE CONFIDENTIAL INFORMATION TO CLIENTS
- A lawyer may use technological means such as electronic mail (e-mail) and cordless and cellular telephones to communicate confidential client information without violating Rule 1.6, Minnesota Rules of Professional Conduct (MRPC). Such use is subject to the following conditions:
 - E-mail without encryption may be used to transmit and receive confidential client information;
 -
 - Analog cordless and cellular telephones may be used by a lawyer to transmit and receive confidential client information only if the lawyer obtains client consent after consultation with the client about the confidentiality risks associated with inadvertent interception;
 - When the lawyer knows, or reasonably should know, that a client or other person is using an insecure means, such as an analog cordless or cellular telephone, to communicate with the lawyer about confidential client information, the lawyer shall consult with the client about the confidentiality risks associated with inadvertent interception and obtain the client’s consent.

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TREND: "METADATA" AND MINNESOTA'S ETHICS OPINIONS

- **Comment**
- **A lawyer may not knowingly reveal a confidence or secret of a client.** Rule 1.6(a)(1). **A lawyer should exercise care to prevent unintended disclosure.** See Comment to Rule 1.6. ... *Id.* Similarly, a lawyer should take reasonable steps to prevent interception or unintended disclosure of confidential communications. All communication carries with it some such risk, for example by eavesdropping, wiretapping, or theft of mail. The precautions to be taken by a lawyer depend on the circumstances, including the sensitivity of the information, the manner of communication, the apparent risks of interception or unintended disclosure, and the client's wishes.
- The purpose of this opinion is to address concerns that certain devices or methods may not be used by lawyers to communicate client confidences or secrets because they do not guarantee security. The committee believes absolute security is not required, and that the use of new technology is subject to the same analysis as the use of more traditional methods of communication.

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ALERT: METADATA AND LITIGATION: HEAD-ON TRAIN WRECK FOR YOUR FIRM?

- **Metadata contained in electronic documents is subject to discovery in litigation**
- *It is well-established that if metadata passes the usual tests for admissibility, it is discoverable in litigation*
- This presents significant challenges for client and their legal, IT and records management teams
- *In-House counsel needs to provide clear guidance in policy formulation related to removal of metadata in the ordinary course of doing business*
- In-House counsel also needs to communicate intelligently to records management professionals related to the inclusion of metadata procedure in document retention/destruction policy



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ALERT: METADATA AND LITIGATION: HEAD-ON TRAIN WRECK FOR YOUR FIRM/CLIENTS?

- Formulating sound procedure in response to a discovery request (which can occur either in "reasonable anticipation of litigation" or in the event of a formal document production request in a matter in suit) is imperative
- *Consequences for causing legal "spoliation" of documents subject to discovery can be draconian, including significant financial sanctions*



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ALERT: METADATA AND LITIGATION: HEAD-ON TRAIN WRECK FOR YOUR FIRM/CLIENTS?

- Even inadvertent spoliation of documents – e.g. via the failure to suspend the use of automated metadata removal software – can lead to sanctions in a legal action
- *Do you have any idea what might be lurking beneath the "hood" of your clients' documents?*
- Does metadata removal software protect in-place documents or only those sent as email attachments?



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Global Ramifications of Metadata, Electronic Discovery and Regulation



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Globalization Affects Discovery Requests

- Think About How Many U.S. Companies Outsource Processes to Foreign Countries?
 - According to Gartner Group, outsourced business processes in 2007 was \$173 billion with \$24 billion of that outsourced to offshore contractors.
- John Bugh, Outsourcing Risks and Rewards, Customer Interaction Solutions, July 1 2006, at 40(3), <http://www.tmcnet.com/call-center/0706/outsourcing-risks-and-rewards.htm>

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Opposing Laws

- Some countries have added legislation to protect from disclosure of certain types of information.
 - Privacy Laws – Many countries have stricter privacy laws than the U.S. In example, the European Union Data Protection Directive concerns the treatment of personal data (including e-mail) in the European Union. The European Court of Human Rights (ECHR) has found that there is a right to private communications in the workplace which becomes an obstacle for US litigation.
 - Council Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995, O.J. (L281)

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Opposing Laws

- French Court of Cassation found that protection information for Data Protection Directive included discovery of foreign e-mail, files, or computer, even when there is suspicion of wrongdoing.
 - Philippe K. v. Cathnet-Science, Cour de Cassation, Chambre Sociale, Arret No. 1089 FS-P+B+R+1, Pourvoi No. J-03-40.017, 5/17/05.
- Ontario Canada's Business Records Protection Act (1947 Ont.Rev.Stat. c 54)

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So It's Even More Important to Know What's In Your Files and To Protect Yourself

How to Mitigate Your Risk

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“METADATA”: BOTTOM-LINE

Doing “Nothing” is Not an Option

ARGUMENT: *Failing to develop metadata policy could put your firm and clients at significant professional and financial risk with substantial exposure to legal liability*

ADVICE: *Educate your people NOW about Metadata issues and take proactive measures to stop disclosure IMMEDIATELY – it’s not just a matter of buying software, it’s a comprehensive protective policy endeavor*

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Other Tips from the Panel

1. Installation – Choose Wisely
2. Stay Current on Software
3. Buy a Metadata Removal Tool and Use It!
4. Stay Current on Case Law, Opinions and Sedona Guidelines
5. Educate
6. Check Public Domain

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Thank You!

Visit Booth 2006 to talk with Payne Consulting Group or check out the new video interview on Metadata at www.payneconsulting.com

Go to www.microlaw.com and check out the articles and great information available from Ross Kodner or e-mail him at kodner@microlaw.com.

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