

What's a Little Metadata Mining Between Colleagues?

By Jessica M. Walker
Daily Business Review
April 21, 2006

When Florida Bar president-elect Henry Coxe III brought up metadata mining to the Bar's board of governors, some board members conceded they had never heard of the practice.

Coxe himself had only recently become aware that electronic documents could be mined for information about their history when it happened to a partner at this firm. At the board of governors meeting in December, he recounted the first time he became aware of metadata mining and its consequences.

The partner at Coxe's firm had sent a brief to a lawyer at another firm who was working on a similar case. Based on the brief, which was sent electronically, the other firm was able to reconstruct every change that had been made to the document, including e-mails between Coxe's partner and his client -- a potential violation of attorney client privilege.

Alarmed by the experience, Coxe urged the board to declare unethical the practice of culling through electronic documents to find hidden data about the history of the document.

But the Bar's initial stance of banning the practice has met with strong opposition from some Florida lawyers, who say mining metadata is a regular part of their practice.

Metadata -- the so-called "DNA of documents" -- is typically hidden from view. But procedures ranging from simple mouse clicks to more invasive tactics involving special software can reveal almost everything about a document and its creation, including the authors, their comments and all changes made to the document.

Some attorneys revere mining metadata as a way to root out wrongdoing with electronic sleuthing and as a valuable tool in e-discovery. Others consider it sneaky and slimy, akin to picking through rubbish bins or rifling through another attorney's desk.

Metadata contained in documents can often make a difference in high-stakes cases. Spreadsheets in a pricing or wage case can be mined to find out the formulas behind the calculations. Mining electronic documents can show a history of exchanges that may reveal duplicity by a document's author or bring other potential defendants in a case to light.

While many attorneys use these tactics, others are in the dark about how to mine metadata. Also of concern is the fact that some attorneys may be unwittingly signing the death warrants for their own cases by sending documents containing privileged or damning information.

Given the high stakes in litigation, it's not surprising that firms are willing to invest substantial money into e-discovery as well as to protect their metadata from prying eyes. Most major firms have computer programs that scrub their documents clean of metadata before sending them out. Others, like Hunton & Williams, have entire divisions devoted to the issues posed by e-discovery.

And the surge of electronic issues has led to a cottage industry of technology experts who aid the legal field. The aid is far from cheap.

Karen Unger of American Document Management of Fort Lauderdale, Fla., says rates for electronic recovery can run as high as \$500 per hour in a complex case. On the lower end, for a simple procedure, an expert still costs as much as \$125 per hour.

But some metadata mining is simple, involving basic maneuvers any user can conduct on office software.

ETHICS OF MINING

When Coxe brought the issue to the attention of the Florida Bar's board of governors late last year, the members unanimously agreed that the practice should be stopped, voting for a motion to proclaim metadata mining unethical. The issue was forwarded to the Ethics Committee for further review, and a final opinion is pending.

When the board's move to ban metadata mining became public, it sparked concern from the more technologically adept members, who urge caution in banning the practice.

"That's a little overly broad, saying that everybody that looks for metadata is evil," said Doug Cherry, a member of the Bar's Computer Law Committee. "We offered our help to make sure everybody on the committee has an idea of what metadata is. Most people I talk to, once I've explained the advantages of it, they think that not all of it is unethical."

Metadata mining can be used to extract information from correspondence between attorneys, as well as for examining electronic documents produced in discovery. The issue has brought a number of ethical issues to the forefront that have just begun to be explored by attorneys and the Bar.

As the details of metadata mining ethics are hammered out, many attorneys face a learning curve. They'll discover electronic data can be used for or against them.

Raymond V. Miller, a partner at Gunster Yoakley & Stewart in Miami, is from the older school of litigators. He was not aware that his documents and e-mails could be mined for hidden data until informed by other lawyers.

"I suspect there may have been times when inadvertent disclosures have been made and I wasn't aware of it," Miller said. "I'm certain [metadata mining] is going on. Information is just too valuable."

Douglas Balog, counsel for Intersil Corp. in Melbourne, Fla., bristled at the suggestion that mining metadata is unethical and wrote a letter to the Bar expressing his views on the practice.

"Some of the members had never even heard of metadata before the meeting, and they rushed to vote to condemn it," Balog said in an interview. "I look at the properties of documents every, single day to see what law firm drafted it and who worked on it. And I don't think it's unethical."

In his letter to the Bar, Balog wrote that mining metadata was "an invaluable tool for ferreting out fraud and unethical individuals." He pointed out that he had recently busted an individual that had a false certificate claiming that a part he had was manufactured by Balog's company. The smoking gun, in this case, was metadata contained in the certificate.

As the discussion of metadata continues, some believe defining metadata mining is crucial to any ethics opinion on the matter. For example, there's a large difference between delving into electronic files looking for attorney-client privileged information and conducting forensic e-discovery.

"If you get a letter from another attorney and you mine it for metadata, that may be unethical," Cherry said. "If you're talking about mining metadata in a lawsuit, you might have a duty to do it."

The issue of metadata is just raising its head in the legal world. In 2004, the New York State Bar Association issued opinions forbidding attorneys receiving electronic documents from using special tools to recover metadata, while also requiring the sending attorneys to remove metadata from its sent documents.

The New York opinion encapsulates the ongoing debate over where the ethical responsibility lies with metadata mining.

ISSUE OF PRIVILEGE

While the Florida Bar's initial position indicates that the receiving attorney should not snoop around in electronic files looking for hidden clues, there are also issues of attorney-client privilege that seem to put the onus on the sending attorney to erase data that could reveal strategy or other privileged information.

"If I e-mail something, and they go in and read the metadata they could find changes or the client saying something snotty," said Tom Sadaka, partner at Berger Singerman in Fort Lauderdale and member of the Bar's Computer Law Committee. "They also might find something that's privileged information between the attorney and the client. If that happens, it's bad. The sending attorney has a duty not to violate attorney-client privilege. So I should be scrubbing data."

Data scrubbing, or erasing metadata from documents, is becoming more common, especially among larger firms. Sending in PDF format is a popular way of sending a document without much of the metadata found in word processing documents.

However, PDF files are images that cannot be changed, which is a problem for attorneys going back and forth, redlining changes to settlement agreements to come to a consensus on the terms.

"If you are handling litigation, you have to trade redlined versions for a mutual meeting of the minds," Balog said. "You're supposed to mark [the document] up."

An attorney sending an image, rather than a document that can be worked on, puts the receiving attorney in the position of having to compare by hand the drafts to find the changes.

While in some cases scrubbing files for metadata might be necessary to preserve attorney-client privilege, scrubbing data before turning over documents in discovery could actually be unethical, since it destroys evidence contained in the page.

The issue has come up in at least one federal employment case -- *Williams v. Sprint*, a 2005 opinion out of Kansas.

The plaintiffs in the case claimed that metadata had been scrubbed from the spreadsheets provided during discovery. The court found that while the emerging standards governing electronic discovery appeared to have a general presumption against producing metadata in discovery, the employer in the case had to turn over the metadata, since it had not claimed the electronic data as privileged information earlier in the case.

Although the case law is murky on the issue, some attorneys say sanctions for spoliation of evidence could be possible if documents were scrubbed in production.

"I would probably file a motion to make them produce it, and if for some reason they couldn't, I'd have a couple of options," said Timothy J. Conner, partner at Holland & Knight in Jacksonville, Fla. "One would be a motion for sanctions. Another would be asking the court for a presumption that the metadata would have been favorable to you."

Mining for metadata has become an important part of discovery in some cases, and the attorneys that use it are likely to fight to make sure the bar doesn't deem it unethical.

'RIDICULOUS' POLICY

Berger Singerman's Sadaka said that in some circles, a policy of banning metadata mining is thought of as "ridiculous."

Some lawyers feel that if you get a document in discovery, you should be able to do whatever you want with it," Sadaka said. "It's like if you sent me a contract, I can have it fingerprinted to see who's handled it. I can't do the same thing with metadata, but it's the same thing."

For example, in a case dealing with wage and hour laws, the employer might turn over a spreadsheet that calculated paychecks. The face of the spreadsheet might only show the end amount, but an attorney could mine the document's metadata to find out exactly what formula was used to calculate the paychecks.

Another example, cited by Cherry, is a letter blaming a party in a civil suit. Cherry said that commonly, there are earlier drafts of a letter that may have distributed blame more widely.

"I've had a couple of examples where I've seen prior revisions where the corporate spin doctors came in and changed a letter," Cherry said. "There might have been a prior version before the spin doctors got to it, saying we messed this up. Then they redrafted it to sweeten it up. It's always interesting to see those prior versions."

In these cases, lawyers say they could be giving their client the short shrift by not looking at the metadata.

Metadata and the law has also been cropping up in the news in recent years, as more lawyers and journalists become aware of metadata's existence. In 2004, SCO Group, based in Santa Cruz, Calif., filed lawsuits against DaimlerChrysler and AutoZone. However, metadata remained in the lawsuit revealing that it had initially intended to sue Bank of America, but switched defendants. The revelation, which was made by the media, not opposing counsel, amounted to a gift-wrapped argument for the defense.

In the course of depositions in litigation against Vioxx manufacturer Merck, the drug company was discovered to have altered data submitted to the *New England Journal of Medicine*. The excised data was recovered through metadata mining and helped bolster the plaintiffs' arguments that Merck had been deceptive about the safety of the drug.

Closer to home, and on a much smaller scale of importance, hiring attorneys at Hogan & Hartson in Miami got a resume from a potential hire in the form of an electronic document. Metadata revealed that a professor had written extensively in it.

"It didn't help his case," Hogan & Hartson partner Al Lindsay said of the job candidate.

As the Bar continues to look into the ethics of metadata mining, it is continuing to educate attorneys on the topic. A continuing legal education class being planned for June will deal specifically with it.

"I think we're all feeling our way out along these new electronic discovery and communications issues, involving email and confidentiality and privileges," said R. Edson Briggs, senior counsel at the Ferrell Law Firm in Miami.

And many expect the new technologies and new rules to bring about more ethical questions to grapple with.

"If you survey the land on legal ethics, just about every new issue relates to technology," Lindsay said. "It's landmines for the unwary. It's a hot topic. Law firms like mine are learning what to do and how to do it properly in house."

<http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1145538533635>