

Quick Reference Card

What is metadata?

Information you don't normally see when opening a document but can be disclosed. Reveals information about electronic documents beyond the printable text. Of Most documents in circulation, 90% began as something else. (Vanson Bourne study, "Cost of Sharing").

• 3 common types in files (DOC/PDF)

- Properties – visible (example of subjective metadata: Authors, storage path, computer used, software used, date printed, number of works in a document, firm or organization name, name of hard drive or network server, name and type of printer, names of previous document, document versions, information about the template used to create file and comments)
 - Track Changes - visible
 - Embedded electronic data created
 - Invisible until exposed manually
- Useful for finding documents, reviewing, and sharing, especially for profiling and searching as part of discovery or litigation
 - Can provide extensive information for building an electronic paper trail as to who created, read, or even deleted text from a particular document, whose computer it was stored on

Metadata – Friend or Foe?

We're all aware that internal Metadata from markups on documents should always be scrubbed (removed) from the documents prior to hitting send, but did you know how helpful metadata can be in a lawsuit? Often the biggest question is:

How Will I know If I Need To Collect Metadata From My Client?

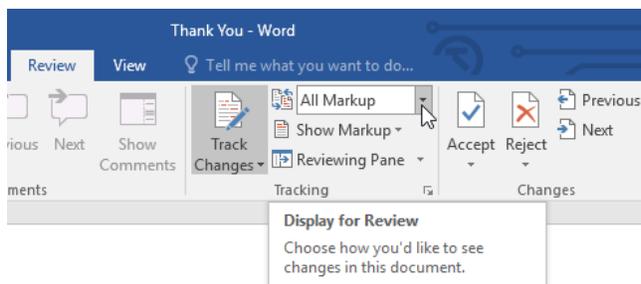
- Do you need to sort through your documents by date or subject?
- Do you need similar searches as you do in Westlaw and Lexis (search connectors)?
- Do you need to filter documents based on a specific person, date or subject/topic?
- Do you need a binder of your client documents?

If you answered yes to any of these questions, you SHOULD collect metadata.

Please refer to the Discovery Reference Guide for details, and Bill or Kahea for questions.

How to Remove Metadata

- Make sure **Track Changes** is turned off and "All Markup" is selected
- Properly **accept/reject tracked changes** one by one or all at once
- Use **metadata scrubbing software**
- **Scrub** before or during conversion to portal document format (PDF)



Potential Pitfalls

You could voluntarily, but unknowingly, send confidential client communication to the opposing side

- Unwanted information that is included and delivered within files could be detrimental to court cases or contract negotiations
- Sharing documents containing metadata can lead to the disclosure of confidential client information and the breach of client/attorney confidentiality
- Potential for malpractice claims increases
- Can be a source of evidence

Metadata Ethics Opinions

What is the Sender's Duty When Transmitting Metadata?

No explicit duty regarding metadata is imposed, but a number of methods for eliminating metadata (including "scrubbing," negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are "concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata." [06-442] Presumably, a lawyer's general duties with regard to the confidentiality of client information under Rule 1.6 apply to metadata.

May the Recipient Review or "Mine" Metadata?

YES. After noting that some authorities have found metadata mining "ethically impermissible," the Committee states that it "does not share such a view, but instead reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on receiving lawyer's conduct found in other Rules." [06-442]

Must the Recipient Notify Sender if Metadata is Found?

YES, if lawyer knows or reasonably should know that transmission was inadvertent. ABA Formal Opinion 05-437 cites the Rule 4.4(b) provision that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." [05-437] The Opinion goes on to state that Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly" but "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." [05-437]