

Metadata as blessing and burden

The document speaks for itself (but does it say too much?)


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By Miles B. Cooper

The settlement agreement I drafted took a lengthy path before it came back to me. My opposing counsel's assistant opened it first. Then it was forwarded to an associate. The associate opened it, modified it, closed it and e-mailed it to someone at the insurance company. Another modification there. Back to the associate, who opened it again. Then to my opposing counsel. Then back to me.

How do I know? Because the document has the words you see when you open Microsoft Word – the terms of the settlement agreement – and the data you don't. The invisible information is called metadata.

What is metadata?

Metadata is simply data about data. An example: the old library card catalog. The card for a book had the author, year published, number of pages, and Dewey decimal location. The information about the book on the card was metadata.

Metadata has tremendous digital impact. Electronic files – be they digital images, video, Word documents, pdfs, you name it – contain underlying data. The reason is not nefarious. In many documents, drafting and modifying a settlement agreement for example, it can be useful to know who changed what. With digital images, you can tell when (and sometimes where) the image was shot, the camera settings and the actual camera used. When I say actual camera, I mean just that. Photographers whose cameras have been stolen have searched image warehousing sites like Flickr for their camera's serial number in the underlying image metadata to locate other images shot by the camera (and thus the thief.)

But is the data reliable?

Some metadata can't be altered. The attached metadata is applied by the computer or software and cannot be altered by the operator. Other metadata is subject to human manipulation. Let's continue with the digital image example. There are image editors that allow a photographer to change information about the image – the location for example. Knowing what is and is not reliable is probably beyond your interest level – you've got lawyering to do. In order to determine reliability and lay a proper foundation before judges who may not have encountered this issue, you'll probably need an expert.

Getting metadata admitted based on Imwinkelried factors

The standards for admitting metadata have yet to be codified. If you are trying to get metadata admitted, you should develop the following factors articulated by Edward J. Imwinkelried, a UC Davis law professor and noted evidence expert. *In re Vee Vinhnee* (B.A.P. 9th Cir. 2005) 336 B.R. 437 held that these factors (with some clarification of the fourth factor) are the grounds for metadata admissibility. Since this may be a new issue for some courts, a motion in limine raising the issue for early discussion is also wise.

The Imwinkelreid factors

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Tuck this away for PMK and IT depositions as well as for requests for admissions.

— Miles Cooper

Seek and ye shall find

Before you get to admissibility, you need to find the data in the first place. The very first step is data preservation. If you believe electronic data will be at issue, send a data preservation letter detailing what you want preserved. The failure to comply can result in issue sanctions. The usual suspects: RPDs, custodian of records and persons most knowledgeable depositions are useful. But so is the IT person's deposition. Pick your battles though. You may not need this in a garden-variety, car-collision case (although the cell phone, text, Twitter, and Facebook posts surrounding the time of impact may be of interest.) You may, however, want it in a product case where changes to the user

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manual's warning language are at issue.

Electronic discovery gets expensive quickly. Mirroring hard drives and having experts sift through the resulting information can turn up great information in the right case. But make sure it is the right case. You don't want to end up fighting the discovery equivalent of a land war in Asia (one of the classic blunders[1]).

Get that metadata into evidence

You need to demonstrate that the information is relevant and reliable to get your metadata before the jury. You can't cross-examine the computer to find out how it processed the information to meet this threshold. Like patent law, the pace of codification has had a hard time keeping up with advances in technology. The Business Record Exception[2] is not enough.

In these situations, case law typically develops faster than statute. A Ninth Circuit bankruptcy appellate case provided case law for metadata admissibility. *In re Vee Vinhee* (B.A.P. 9th Cir. 2005) 336 B.R. 437 lists 11 factors articulated by Edward J. Imwinkelried, a U.C. Davis law professor. The quick version: the material must come from a computer that has systems to ensure the information produced is reliable and explainable. While the Imwinkelried factors are not binding, they are the best persuasive targets currently available for your discovery and admissibility efforts.

Settled

Back to the beginning and our settlement agreement. *Who* did *what* to the document didn't matter. But at some point, you'll have a case where it will. And your knowledge of metadata will help you prevail.

Constrained by space limitations, we've listed the factors in a checklist in our online December issue (**www.plaintiffmagazine.com**)

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Endnotes

[1] Shawn, W. (1987) "The Princess Bride," Metro-Goldwin-Meyer Studios Inc., Santa Monica, CA

[2] More on the Business Record Exception can be found in Plaintiff: The price of admission: the business record exception, March 2012, available online at http://bit.ly/TpJPH6

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