

# Metadata: What You Can't See CAN Hurt You

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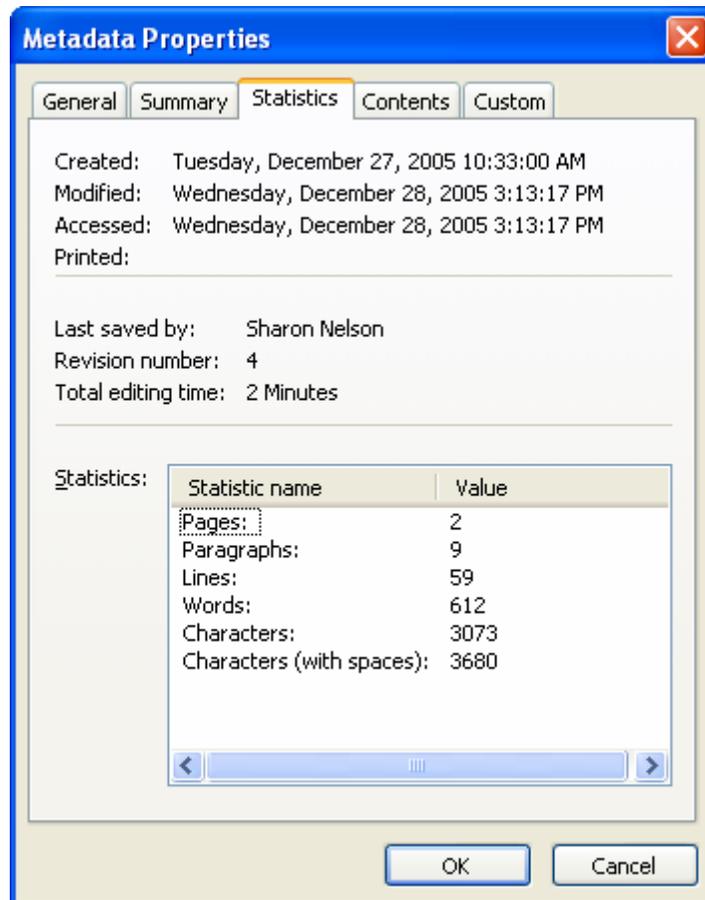
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*I think that I am familiar with the fact that you are going to ignore this particular problem until it swims up and bites you on the ass.*

Richard Dreyfuss as Hooper in the movie "Jaws"

Why do lawyers continue to ignore metadata when it is potentially so perilous? Routinely, as we lecture, we find that about half of an average audience has no idea what metadata is. Most of the remainder have an "it's no big deal" stance. Only 10% or less seem to absorb just how dangerous metadata can be.

Let's start at the beginning for those who do not know what metadata is. The classic definition is that metadata is "data about data." A most unhelpful definition if you cannot visualize metadata, so let us make it something you can see: (insert box)



This is just one tiny example of metadata. As you can see from the above image, there are other tabs containing other information. But here you can see that Sharon Nelson last saved this article on December 27<sup>th</sup>. From this screen we really don't know who the originator was, although we can find that out if needed. Overall, this document was worked on four times, and has a total of two minutes editing time. The document was last accessed on December 28<sup>th</sup>, presumably by Sharon as she is the last one to save it. As someone continues to work on the document, close it, and then work on it again, Word will continue to collect information about their work.

So . . . while you are typing away at your Word document, the program is gathering data about what you are doing. Just because you can't see it doesn't mean it isn't there. If you want to see what metadata is embedded in one of your documents, go to "File" then "Properties" and you can see at least part of it for yourself. Word is collecting data about the document's creator (at least the person that "registered" Word on the computer used to originate the document), the date of creation, the date of last access, the date of last modification, the file location and size, etc. If you are working collectively with colleagues, embedded data will include every editor, every change and the order in which the changes were made. Not something you probably want to advertise to your opponent, for example. If they know how to turn on the "Track Changes" feature of Word, that is what you have just done. Every time you attach a Word document to an e-mail, you are sending all that invisible data with the document. Gulp!

And it's not just Word. Many programs carry metadata, including Excel, PowerPoint, WordPerfect and PDF (though to a far lesser extent). E-mail, that smoking gun of so many electronic evidence cases, carries metadata identifying the path it took from origin to destination along with times, IP (Internet Protocol) addresses, etc. That metadata you cannot expunge, though pieces of it can be fabricated – but that's the subject of another article entirely.

So you belong to the "it's no big deal camp?" Time to read *Williams v. Sprint!* In this recent case (*Williams v. Sprint/United Management Co.*, 2005 WL 2401626 (D.Kan. Sept. 29, 2005)), Shirley Williams sued Sprint/United Management Company in a collective action asserting that age was a determining factor in Defendant's decision to terminate employment in connection with a reduction-in-force ("RIF"). After much hoo-ha (this is a technical term with which all litigators are familiar) about producing Excel spreadsheets, the spreadsheets were produced. However, the files had been scrubbed of metadata and some of the cells were locked, preventing access to the underlying formulas or reference. The defendant responded that the metadata was irrelevant, contained privileged information, and was never requested or discussed at any discovery conference. The Court ordered Defendant to show cause why it had not produced the spreadsheets as maintained and why it should not suffer sanctions for this failure. Because current primary law and the federal rules were not clear, the court turned to the Sedona Principles for Electronic Document Production and associated Comments. Based on the emerging standards of the Sedona Conference and the proposed amendment to Rule 34 of the Federal Rules of Civil Procedure, the Court held that 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, the parties agree that the metadata should not be produced, or the producing party requests a protective order.

One sigh of relief was in order for the defendant. Based on the ambiguity of the then current law, the judge declined to impose sanctions on the defendant.

If you are sitting rigid with fear yet, perhaps another harpoon to the gray matter will hit its mark. A partner in a large New York City firm was approached by the CEO of a major client and asked to draft an important document personally. He was specifically asked NOT to use an associate because the matter was so critical and confidential. As soon as the client was out the door, the partner turned the project over to an associate. The associate completed the document, which was stored on the server. The partner sent the document out as an attachment via e-mail, with the representation that he had completed the document personally as requested. The recipient CEO knew how to look at the metadata – as you might imagine, he went ballistic when it showed that the author was an associate and showed no work whatever by the partner. To add salt to the wound, the law firm’s invoice appeared the next day – and the CEO’s firm had been billed completely at the partner’s rate. A disciplinary complaint was promptly filed and the law firm lost the client. Metadata can be a very powerful weapon.

People seem to think that metadata might come into play “once in a while.” Nonsense. As ED experts, we deal with metadata virtually every day. Not every case hinges on it, of course, but many cases require that metadata be examined, if only to verify the truth of what is being asserted.

In our office, we would never dream of sending out an attachment that hadn’t been “scrubbed” clean of metadata – and neither should you. So how do you purge a document or file of metadata? One simple method is to convert a document to PDF, which will strip out **almost** all of the metadata. However, this is frequently not what an attorney wants to do, for any number of valid reasons. We prefer to use software, our favorite being Metadata Assistant (about \$80/seat) which is available from [www.payneconsulting.com](http://www.payneconsulting.com). This marvelous program helps by idiot-proofing (well, to a degree) attorney e-mail. If an attorney is moving too fast (as is common) and hits “Send” on an e-mail with a Word, Excel or PowerPoint attachment, Metadata Assistant pops up a dialog box to say, “Whoa there, do you really want to send an uncleaned document or would you like me to clean this for you?” It would be impossible to enumerate the number of times this attorney/co-author has said “Bless you Metadata Assistant” in the absolute knowledge that she would have hit that “Send” button without thinking but for that marvelous dialog box.

There are stories by the legions of tech-savvy judges who have looked at metadata only to find reviewer comments such as “How are we going to get this by the judge – she’s not THAT dumb” and “Boy, we’d better paper over this weak sister argument.” Just what you want a judge to read. NOT. The negative consequences of metadata run the gamut from embarrassment to possible malpractice. Again, metadata is like milk-based invisible

ink. Apply a little heat and presto, there is the information for all to see. When we send a document, we want the recipient to receive the information we intend them to receive and nothing more. In the words of the old children's ditty: "We wash our hands with a rub rub rub, we take a bath with a scrub scrub scrub, we take a swim with a glub glub glub. Rub rub rub scrub scrub scrub glub glub glub cleano cleano. Rub scrub glub."

When you think metadata, "scrub, scrub scrub" is the soundest advice you will ever receive and "cleano cleano" is the desired result!

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