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LEGAL TECH

The Art of Redacting Privileged Data

In today's age of e-discovery, keeping privileged information concealed is more difficult

By Kenton Hutcherson

In the old days, redacting privileged data from a document was simple. I would pull out my black Sharpie, cross out privileged words, and record the redaction on a privilege log. Attorneys produced redacted documents with full confidence that their client's privileged information would remain concealed. In today's age of electronic data discovery, attorneys can no longer retain the same confidence.

In 2005, I first witnessed the severe consequences of failing to understand the mechanics of the EDD production process. Opposing counsel produced hundreds of thousands of e-documents. I loaded these documents into a computer program from Ipro Tech Inc. that helps users view the produced documents as images, and then perform keyword searches.

These keyword searches yielded a surprising phenomenon: They would identify documents where the searched-for keyword was noticeably absent. Upon consulting our computer guru, I learned that the keyword search was performed not on the document image, but rather on the document image's corresponding text file that is not readily accessible within the computer program.

Once I located this corresponding text file, I found my missing keyword in the space where a redaction box appeared on the document's image. Indeed, this phenomenon was consistent throughout the production — every piece of text redacted from the document's image appeared unredacted in the corresponding text file. We ceased examining the files and informed opposing counsel that it appeared they produced their client's privileged information.

In the two years since this incident, I would have expected those in the EDD industry to correct this glaring mistake — after all, it is not good litigation strategy to produce your client's privileged information. But law firms and EDD vendors frequently continue to make this mistake. One vendor acknowledged the issue, but required an extra hourly fee to take the appropriate step of deleting redacted text from the accompanying text files, saying that was not part of their standard practice.

To avoid this mistake, here is what you need to know. Under the Federal Rules of Civil Procedure, parties must produce e-documents in a format that preserves the same functionality as the original, native e-document. Although parties can choose to produce their documents in native format, few parties actually do because native e-documents:

- Can be easily altered.
- Cannot be easily stamped with a Bates number.
- Cannot be redacted to withhold privileged information without purposefully changing the document.

Instead, many parties convert native e-documents into three producible parts. First, a static TIFF (tagged image file format) or PDF (portable document format) image is taken of the native e-document. This process is akin to scanning a copy of the document. Once an image is made of the document, an electronic Bates number is burned onto the image for proper tracking.

Second, a text file is created by extracting all of the text directly from the native e-document. This process removes all of the native document's complex formatting. As the discovery rules require the preservation of the original e-document's functionality, producing a text file for the document lets the requesting party conduct keyword searches throughout a large e-document production — easily accomplished with the original e-document. For most e-documents, a text file can be easily created by extracting the digital text directly from the original document.

For other e-documents in which text does not exist digitally, such as PDF files, a text file can be created indirectly using OCR (optical character recognition) programs that create a computer's interpretation of the text in the document. Within a completed e-document production, text files and corresponding images are cross-referenced by assigned Bates numbers.

Third, the metadata of the e-document is extracted and produced within a "load file." Metadata is the underlying information that accompanies e-documents and comes in two general forms — system metadata and embedded data. Computers create system metadata to help them organize large amounts of

Hutcherson is the principal of The Hutcherson Law Firm, based in Dallas.

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electronic information to allow for quick and easy access. Thus, metadata such as the file name, file source path, date of creation, date of modification and name of custodian all must be produced because they are part of the original document's functionality. Embedded data include electronic comments, edits, tracked changes and formulas that are created directly by the author of the document but may not be visible when the document is printed. As you would expect, some of the most valuable evidence is found in a document's metadata.

Attorneys often accidentally produce privileged client information because they typically only redact for privilege on a computer by placing white or black boxes over the privileged portion of an e-document's TIFF or PDF image. The redaction box is burned into the image electronically, thereby concealing the privileged content. The problem is that it neglects the privileged information contained in the corresponding text file. To make a complete redaction, you must make sure to delete the privileged text from the corresponding text file as well.

If you do make the mistake of accidentally producing redacted text unredacted in the underlying text files, do not expect to have this privileged information immediately returned to you.

Under the amended Federal Rules of Civil Procedure, a party who receives inadvertently produced information that is later claimed as privileged "may promptly present the information to the court under seal for a determination of the claim [of privilege]." FRCP 26(b)(5)(B). Thus, as opposed to immediately returning the inadvertently produced information unexamined, under the new rules, a receiving party can submit the subject information to the court and immediately challenge the producing party's claim of privilege.

State courts are similarly unsympathetic where privileged information is obtained in the normal course of discovery. The Texas Supreme Court, for example, held in *In re Meador*, "If a lawyer receives privileged materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials.

"Rather, the producing party bears the burden of recovering the documents by establishing that the production was involuntary." 968 S.W.2d 346, 352 (Tex. 1998).

Thus, do not expect your opposing counsel to voluntarily inform you of your mistake. ■