

Redaction in eDiscovery:

*Reducing the Risk of
Inadvertent Information
Disclosure with Electronic
Redaction*

Executive Summary

The process of redaction evokes images of legal teams gathered along large conference tables surrounded by boxes stroking black permanent markers across brittle documents, while assistants shuttle between photocopiers and bates stamping machines to prevent an adversary from spotting a privileged smoking gun. In fact, a recent survey of law firms across the United States revealed that 74 percent of those law firms taking the survey still perform redaction manually while only 44 percent now employ technology to protect privileged information. With the transformation of modern litigation from print to digital, those who incorporate and master the use of electronic tools have a distinct advantage.

The management of an exponentially increasing universe of electronically stored information (ESI) is challenging the legal community to more efficiently control discovery. "The question comes down to how to do it effectively," says Eric J. Sinrod, a partner with Duane Morris LLP in San Francisco.

The answer is complicated by the 2006 amendments to the Federal Rules of Civil Procedure (FRCP), which expanded the types of sensitive and proprietary content that are discoverable, as well as how legal teams must handle them. A recent example of incorrectly redacting documents filed in the PACER federal court filing system highlighted the danger of publicly revealing information sealed by court order. Failure to comply with redaction rules can be costly both to a firm and its client.

This white paper will outline the impact of electronic redaction on the protection of private, proprietary or other sensitive information during the review of e-discovery, as well as the increased complexity caused by the amendments to the FRCP.

Cost Containment and the Dynamics of Review

In a January 2007 speech, Cisco Systems Inc. General Counsel, Mark Chandler, famously declared, "the most fundamental misalignment of interests is between clients who are driven to manage expenses, and law firms which are compensated by the hour."¹ Those hourly fees are often the largest part of the bill for discovery services and the more labor intensive the project, the greater its expense. One attorney with a global law firm alarmingly highlighted that the costs associated with redaction, in particular, in a large-scale proceeding could be staggering.

This is consistent with a Forrester Research report, which concluded that spending on e-discovery technology is expected to reach at least \$4.8 billion by 2011, largely driven by an estimated 40% annual increase in gigabytes to be processed.² This will have a

¹ The Platform: Opinions and Insights from Cisco, *Cisco General Counsel on State of Technology in the Law* (January 25, 2007). http://blogs.cisco.com/news/comments/cisco_general_counsel_on_state_of_technology_in_the_law/; See also, The Wall Street Journal Law Blog, *Law Firms: The Last Vestige of the Medieval Guild System* (January 29, 2007). <http://blogs.wsj.com/law/2007/01/29/ciscos-gc-on-law-firms-the-last-vestige-of-the-medieval-guild-system/>.

² Barry Murphy, *Believe It — eDiscovery Technology Spending To Top \$4.8 Billion By 2011*, Forrester Research (December 11, 2006).

critical impact given that some estimates place the cost of reviewing a single document at between four and ten dollars.³

Although the industry's Electronic Discovery Reference Model (EDRM) identifies various phases of discovery for which there may be an expense,⁴ review is the single largest cost center in the continuum. In fact, as part of that review, it is the responsibility of legal counsel to properly redact all documents prior to production. As the recent survey reveals, most lawyers are manually searching through thousands of printed documents, wasting time and exposing their review to the likelihood of human error. The combination of impracticality and risk endanger a case before an adversary receives a sheet of paper.

And there is lots of it, given that almost 800 megabytes of recorded information is produced per person each year, 92% of which is in on a computer, backup tape or other storage media.⁵ When legacy data and duplicates are factored into this amount, the total is staggering.

The Essence and Importance of Electronic Redaction

The widespread impact of the amendments to the FRCP has heightened awareness of document review and production in ways that have transformed the process. Judges are more attentive and adversaries are far more sophisticated. "The importance of redaction cannot be overstressed," says Dan Sedor, a partner and co-chair of the Discovery Technology Group with Jeffer Mangels Butler & Marmaro LLP.

Sedor notes that a single electronic file may contain privileged information, as well as relevant, non-privileged and discoverable details. He highlights that a producing party and its lawyers are obliged to produce the latter but must protect the privilege as to the former. "Platforms that permit redaction facilitate production of responsive information while protecting the privilege," he adds.

Sedor's point is echoed throughout the legal community. Electronic redaction is different from standard redaction requiring the use of a Sharpie® marker or redaction tape and a lot of hope. It is the complete removal of content from an electronic document, making it irretrievable and unavailable for view, print, search or copy. It can be manual (with the user drawing a box over the area), automatic (allowing searches for a text string) or intelligent (by matching patterns -- finding all social security numbers).

Electronic redaction solutions can be server-based systems (organization-wide redaction that integrates with content management systems) that can batch process documents or relatively inexpensive desktop applications that redact one document at a time. Ultimately, "it is a lot cleaner to do it electronically," says the manager of practice technology at a large national law firm.

That said, it is still not possible to completely eliminate human oversight. Automated redaction may not block a search term contained in a scanned image since the text in an

³ Steven Harber, *Fixed Per Unit Pricing Revolutionizes E-Discovery Review*, Executive Counsel (November 2007).

⁴ The Electronic Discovery Reference Model, EDRM.net.

⁵ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 Nw. J. of Tech. & Intell. Prop. 171 at <http://www.law.northwestern.edu/journals/njtip/v4/n2/3> (Spring 2006).

embedded image is not searchable. Embedded tables or graphs, and handwriting on scanned documents should be manually redacted (despite claims to the contrary by some applications). Finally, when legal teams use optical character recognition (OCR), redaction tools are as good as the OCR results. For instance, if the OCR software incorrectly identified “there” as “where,” the redaction search will not find it. For those reasons, there should be manual oversight. After all, “whenever you are producing documents, you always want to ensure that confidential and privileged information is properly redacted,” remarks Angelo Stio, a partner with Pepper Hamilton LLP.

Redaction Techniques Send Signals About eDiscovery Review

The vast array of electronic media and explosion of potentially responsive data has presented creative counsel with a unique opportunity for evaluating a document production. “When we have not received any redacted documents, I am highly suspect of how they did their privilege review,” notes Helen Bergman Moure, a partner with K&L Gates LLP and a member of its e-Discovery Analysis and Technology Group. Moure remarks that redacted documents indicate a thorough review for privilege and a thoughtful release of material that is not privileged. Few or no such items often indicate that a party completely withheld any document that had any protected content at all. “That is not usually a defensible position to take,” she adds.

In fact, it is not even realistic. If most communication is completed through e-mail, including messages to and from legal counsel, there is unlikely to be a set of documents of any size that does not include some partially privileged documents. If, in fact, there are no redacted items, counsel has probably been over broad in what he or she claims to be privileged. Challenging an adversary’s privilege calls based on the lack of redaction is a persuasive argument to a special master or a judge, who tend to be much savvier than even just a few years ago. You can scrutinize their logs and call the integrity of their entire review into question because lower threads of e-mail correspondence that did not include comments from lawyers or did not relate to legal advice may be relevant.

“You have to be very careful when redacting documents,” says Fernando M. Pinguelo, a partner with Norris, McLaughlin & Marcus, P.A. and Co-chair of its Response to Electronic Discovery & Information Law Group. “If you are overly zealous in that regard and the other side challenges your claims of privilege, a court may second guess you for the entire case,” he adds.

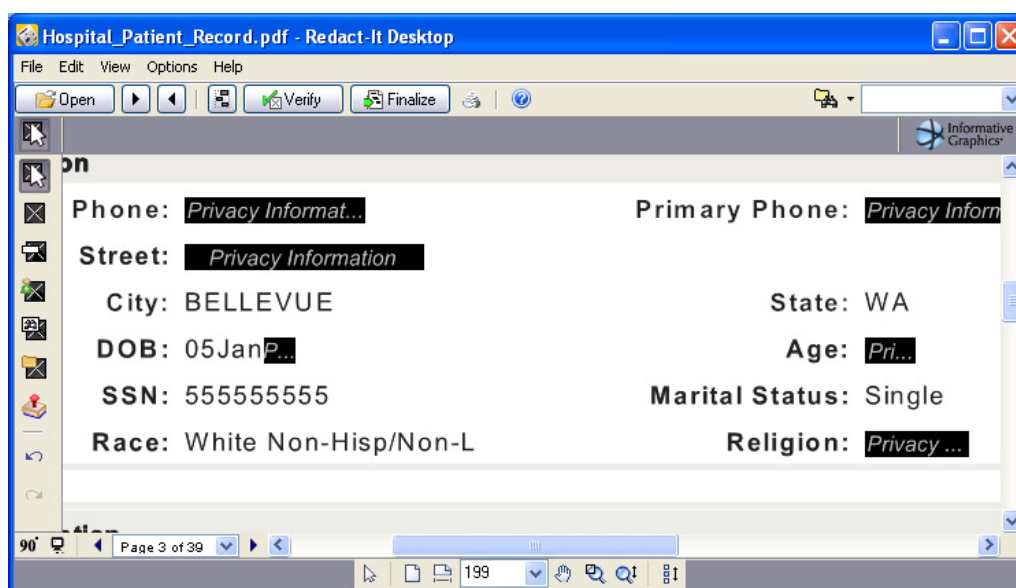
According to FRCP Rule 5.2, the following types of data must be redacted before filing documents:

- all but the last four digits of a social security number and taxpayer identification number;
- the month and day of an individual’s birth;
- a minor’s name (only their initials may be used); and,
- all but the last four digits of financial account numbers.

These points are meant to be merely guidelines. If the last four digits of an individual's social security number are irrelevant to a particular matter, the entire number can be redacted.

Full redaction, however, is not always appropriate. In a class action against a pharmaceutical company, for example, a discovery request may require production of thousands of patient records from clinical trials. While personally identifiable information may not be necessary, maintaining a record of the patient ID corresponding to a tissue or other sample could be important. Counsel may need to produce a record of that patient's actual identity or original unredacted documents containing that his or her specific information.

Most redaction software offers the ability to add a reason for redactions, such as "Privacy Information" or "Privileged." Sometimes the reason is actually printed on the redaction entity.



Example of Redaction Reasons Displayed on Redaction Entities

Insufficient Redaction Could Cause Irreparable Harm

The reason that most of the lawyers surveyed still prefer manual redaction over electronic removal is because improper redaction can have dire consequences. "You can't help but wonder if that black line across the text is going to remain once you print the document," notes Pinguelo. That crisis of confidence is only exacerbated by examples like the one cited recently in *Schaefer v. GE*. In May of 2008, legal counsel for the plaintiff improperly redacted documents by simply placing black bars over the text set for deletion. Although a court order mandated that the revealed information be sealed, the flawed documents were e-filed and available for download from PACER.

When GE realized that readers of the material covered by the black lines could copy and paste the content into Microsoft Word, GE's attorneys filed an unsuccessful motion to dismiss.

While a lawyer who has produced insufficiently redacted information could be in violation of various ethical rules and subject to malpractice,⁶ FRCP Rule 26(b)(5)(B) provides a “claw back” provision where both parties can enter an agreement to return unwittingly produced protected materials without claiming waiver. In the absence of such an agreement, the court can decide if the documents must be returned or not. Regardless of the outcome, the damage is often irreparable.⁷

In *Schaefer v. GE*, plaintiff’s counsel was able to withdraw the documents at issue and re-file properly redacted copies. While the error will not materially affect the outcome of the case, the negative press may undermine its potential and existing client confidence.

Native Format and Defensible Redaction

One dramatic change prompted by the amendments to the FRCP is the increased demand for litigants to produce ESI in “native format” (e.g., Microsoft Word’s .doc format), or in a “neutral format” such as TIFF or PDF. Although FRCP Rule 34 indicates that the requesting party can specify the format in which the document must be produced and the responding party can object, native format is generally considered to be the default.

A prominent lawyer and expert in e-discovery noted, “in the fullness of time, native productions will be less expensive.” Despite that bold prediction, there is a complication: Redacting native files changes their character, which is akin to spoliation.

Spoliation is the “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”⁸ Sanctions for spoliation almost exclusively involve ESI⁹ and are often due to failure to properly stop document destruction policies when becoming aware of pending litigation.

If counsel provides the requested data, courts will generally not impose penalties; however, if redactions are willfully and knowingly used to conceal relevant and possibly incriminating content, fines could include an adverse jury instruction, monetary payment or a default judgment in favor of the prejudiced party.¹⁰ Consequences for improper

⁶ Douglas S. Malan, *GE Suffers a Redaction Disaster*, The Connecticut Law Tribune (May 28, 2008). <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202421717785>.

⁷ On September 11, 2008, Congress presented to President Bush S.2450, a bill to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine. If signed into law, S.2450 would amend Federal Rule of Evidence 502 to limit the potential consequences of inadvertent disclosure of privileged material.

⁸ *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001).

⁹ Steven A. Weiss, *Do Not Delete: Sanctions for Spoliation of Electronic Evidence*, ABA The Committee on Pretrial Practice and Discovery Newsletter, Volume 13, Number 2 (Spring 2005). http://www.abanet.org/litigation/committees/newsletter_gratis/ppandd_pretrial.pdf.

¹⁰ Matthew P. McGuire, *Document Management and E-Discovery in Class Actions – Avoiding The Spoliation Trap*, http://www.nelsonmullins.com/DocumentDepot/MPM%20ACI%20Paper%20--%20Anti-Predatory%20Lending%20Conference_v2.pdf.

redaction trigger provisions of both the FRCP and various rules of professional conduct.¹¹

The key to avoiding complications is to employ electronic redaction software that creates a copy of the document scheduled for redaction. Some redaction applications will save changes to the source file, irretrievably overwriting the original contents. Using an application that automatically creates a new output file allows the original document to be produced if there is any question of spoliation or if particular information that was initially redacted is deemed discoverable later. Maintaining privileged, proprietary or private information separately will help ensure that is not unintentionally disclosed through a transfer of metadata.¹²

Under new FRCP 16, metadata (the unseen information about a document, including document creator, text revisions, notes and comments, bookmarks and access date and time stamps) is discoverable and counsel must determine its relevance at the “meet and confer” conferences prior to trial.

Automation and the Impact of Effective Redaction

Effectively redacted information (including metadata) is completely protected from disclosure. The integrity of the source file is, however, maintained with metadata intact should it need to be produced later. As files remain in electronic format, the management of these documents is more efficient and sophisticated software handles the bulk of the redaction automatically, so only visual verification is required.

“The flexibility and functionality of such products allow the reviewer to quickly block out and redact text as a document review is done on-screen, saving hours of time and wasted effort that would be required for traditional physical redaction,” says An Nguyen, an associate with Jeffer Mangels Butler & Marmaro LLP.

In fact, certain tools can review an entire directory tree for a list of search terms or even text patterns (e.g., XXX-XX-XXXX for social security numbers) and create a redacted rendition of the file in a neutral format (e.g., TIFF or PDF) while preserving the source file. Neutral formats are ideal for archiving due to their longevity and compression.

Conclusion

In an era where the volume of information is growing exponentially, but the pressure to cut costs and process documents more quickly increases, electronic redaction can help legal teams shorten the most expensive and time-intensive element in e-discovery. It will also reduce the risk of inadvertent disclosure and preserve the integrity of the process.

¹¹ *Zubulake v. UBS Warburg LLC*, 2004 U.S. Dist. LEXIS 13574, at *61-*62 (S.D.N.Y. July 20, 2004)

¹² Richard A. Schneider, Matthew S. Harman and Robert B. Friedman, *The New Federal E-Discovery Rules: An Expository Narrative*, The Metropolitan Corporate Counsel (March 2007).
<http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=March&artYear=2007&EntryNo=6329>

From a practical perspective, redaction tools help legal teams prepare more effectively. “Redactions can be quickly flagged and electronically isolated for review, which provides the review team with the quick ability to double check work,” says Nguyen.

As both a defensive and an offensive tool, redaction has become an essential weapon in the e-discovery arsenal. With the proliferation of digital information, use of electronic redaction is the only way to ensure the protection and preservation of key data.

Modern redaction techniques maintain the source file of relevant documents and ensure that they are not altered and retain all metadata. They also produce redacted files in easily accessible neutral formats (PDF or TIFF) without metadata that indicate reasons for redaction (e.g., “Privacy Information”).

Historical redaction was complex and less than user-friendly. One lawyer commented that those who have experience with unsound manual redaction “probably have scar tissue around it.” Modern discovery guided by updated rules of professional practice require advanced technology to safeguard the most important data in litigation – private, proprietary and protected material. Using anything less than the latest technology is unnecessarily costly, but more importantly, potentially reckless.

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