

NEWSLETTERS

The Perils Of Redaction: Simple Steps To Protect Confidential Information

May 19, 2015

Note: This article appears in the May 2015 edition of Barnes & Thornburg LLP's *Commercial Litigation Update* e-newsletter.

The exchange of confidential information is an inevitable feature of modern litigation. The volume of confidential information has blossomed to the point where the federal courts (and many state courts) have mandated redactions of information that is customarily confidential in court filings. Attorneys now have an obligation to redact many sorts of confidential information before submitting documents to courts, including social security numbers, financial account numbers and other sensitive information. Penalties for failing to comply with these requirements can include monetary damages, awards of attorney's fees, public admonishments and other sanctions. *Reed v. AMCO Ins. Co.*, 2012 WL 846475 (D. Nev. 2012) (allowing attorney's fees as a sanction); *Weakley v. Redline Recovery Services, LLC*, 2011 WL 1522413 (S.D. Cal. 2011) (court imposed sanction of \$900 to pay for five years of credit monitoring, for defendant's counsel's violation of Rule 5.2); *Ulin v. Lovell's Antique Gallery*, 2010 WL 3768012 (N.D. Cal. 2010) (defendant "admonished" for including plaintiff's unredacted Social Security Number on brief, but brief not stricken because plaintiff demonstrated no prejudice resulting from violation).

Despite this requirement to redact documents, inadvertent disclosures continue to occur in courts throughout the country. High-profile errors in redaction have included disclosure of a confidential subpoena in the prosecution of former Illinois Governor Rob Blagojevich, the disclosure of the name of an NSA agent and confidential business records of several top companies.

These errors occur because not all methods of redaction provide the same level of protection. While no system is perfect, a few basic redaction practices may help minimize the inadvertent disclosure of confidential information.

First, a common error some litigants have made is to use their word processing or file management program to simply change the color of confidential text from black to white. While this tactic makes the text *appear* invisible on the screen, the text can easily be revealed even after the document is converted to PDF. Whether by selecting the text within a PDF or by exporting it to a text file, the opposing party or the public can easily identify words "redacted" by this method.

Second, proper redaction through electronic means requires knowing the limits of the program used to redact. For instance, inadvertent disclosure of confidential information can occur through overreliance on tools embedded in Adobe Acrobat and similar programs. This software

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may allow the user to create comments and other boxes that will appear opaque on the screen. These “boxes” often may be easily removed or manipulated later by a sophisticated user. Reliance on this type of redaction recently resulted in public disclosure of a score of documents that detailed the inner workings of a Fortune 100 company. This problem arises most frequently when counsel relies on older versions of document management software. To truly redact materials electronically, the software must be explicitly designed for the purpose of redaction. Simply hiding the text through program tools that create artificial black boxes is insufficient. Counsel regularly redacting documents should look to obtain the most current version of Adobe Acrobat Professional or obtain plug-ins for their document review software that are designed to redact material for all purposes.

Third, proper redaction requires consideration of the “metadata” embedded in documents. All word-processing programs contain hidden code that provides a trove of information whose disclosure could harm a client. Metadata reveals who reviewed a document, when it was reviewed, text that was deleted or added, and whether other versions of the document exist. This type of metadata can persist even after a document is converted to a PDF. It may also reveal confidential information that an attorney considered “redacted” because it was deleted from the original document. While a full analysis of all the means of redacting meta-data is beyond the scope of this article, documents that contain sensitive or confidential information must be scrubbed of metadata before being publicly produced.

Finally, a party needing to ensure that confidential information is redacted may still rely on traditional methods of manual redaction. In fact, a recent survey found that 74 percent of law firms still regularly redact documents through manual means. The surest means to redact hard copy documents is to physically cut the confidential language from the document. Given the time-consuming nature of that task, the most frequent means of manual redaction remains the use of dark tape or opaque marker. Parties using this means must use caution because electronically filed documents must still be scanned back into PDF format. Many scanners are sensitive enough to perceive covered words even when the naked eye cannot. A cautious approach requires holding the redacted document up to the light before scanning and carefully reviewing the PDF document after it has been scanned.

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