

## **Redaction of Filings Containing Confidential or Sealed Information and Removing Metadata**

By

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California Rules of Court, rules<sup>1</sup> 8.45 to 8.47, establish the requirements governing sealed and confidential records in appeals and original proceedings in the Court of Appeal and the Supreme Court. (Rule 8.45(a).) If a document, such as a brief or application, must include confidential or sealed information, two versions must be filed in the reviewing court — a public redacted version and an unredacted version. (Rules 8.46(d)(1) [sealed records - motion or application to file under seal], 8.46(f)(2) [sealed records - application, briefs, petitions, or other memorandum ], 8.47(b)(3)(C)(i) & (ii) [confidential records - *Marsden* or other in camera proceeding], & 8.47(c)(2)(i) & (ii) [confidential records - other confidential records].)<sup>2</sup> The rules also require that the filing be transmitted to the court in a “secure manner that preserves the confidentiality of the record to be lodged.” (Rules 8.45(c), 8.46(d)(3), & 8.47(b)(3)(C)(ii) & (c)(2)(ii).)

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<sup>1</sup> Referred to as Rule or Rules.

<sup>2</sup> For an overview of the law and policies dealing with confidential and sealed records, see [http://www.adi-sandiego.com/practice/conf\\_records.asp](http://www.adi-sandiego.com/practice/conf_records.asp). Other resources include the ADI Practice Manual, Chapter 3, §3.7, et. seq., and Chapter 5, §5.45A at <http://www.adi-sandiego.com/panel/manual.asp>, as well as [http://www.adi-sandiego.com/news\\_alerts/pdfs/2012/Motion\\_Practice\\_2.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2012/Motion_Practice_2.pdf), [http://www.adi-sandiego.com/research/ethics\\_topics.asp](http://www.adi-sandiego.com/research/ethics_topics.asp), [http://www.adi-sandiego.com/practice/forms\\_samples.asp](http://www.adi-sandiego.com/practice/forms_samples.asp), and [http://www.adi-sandiego.com/practice/filing\\_service\\_chart.asp](http://www.adi-sandiego.com/practice/filing_service_chart.asp).

E-filing and service of documents are governed by rules 8.70 to 8.79. Rule 8.74(a)(1) imposes a duty on the electronic filer (appointed appellate counsel)<sup>3</sup> to “[c]omply with any court requirements designed to ensure the integrity of electronic filing and to protect sensitive personal information.” Although this duty is not expressly included in rule 8.78, which governs electronic service, the same policy would apply not only to personal information but all matters that would be protected under the law as provided for in the rules of court pertaining to confidential and sealed records.

***What comprises redaction?***

Rule 8.45(b)(6) defines “redacted version” as “a version of a filing from which all portions that disclose material contained in a sealed, conditionally sealed, or confidential record have been *removed*.” (Emphasis added.)

The rules do not provide any further guidance. As long as the text is *removed*, that would comply with the rules. But simply removing the text would cause the redacted and unredacted briefs to be paginated differently, and a reviewing court may find that as not acceptable. In fact, a reviewing court in this district has issued an order in one case stating that the “brief must be redacted by *retaining* but blacking out the text to be redacted.” (Emphasis added.) Redacting by retaining appears to conflict with the plain language of the rule which requires *removal* of confidential information. Removal is defined, in relevant part, as to “Take (something) away or off from the position occupied” and to “Abolish or get rid of.”

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<sup>3</sup> Rule 8.70(c)(7) defines an “electronic filer” as “a party filing a document in electronic form directly with the court, by an agent, or through an electronic filing service provider.” Rule 8.10 defines a “party” as including “any attorney of record for that party.”

<https://en.oxforddictionaries.com/definition/remove> [as of March 29, 2017].) The problem with concealing by blacking out but retaining the text within that electronically filed, served, and stored document is the ability of the receiver or anyone having electronic access to the public version of the document to view the confidential information.

***Redaction tools that black out and remove.***

There is a plethora of information on the internet regarding redaction.<sup>4</sup> Word processing programs, typically, have a feature for redacting documents. In WordPerfect X7, for example, there is a redaction link under the Tools dropdown. Done correctly, the blacked-out text is removed, not disguised, from the document. ([GPSOLO 2009 - Product Review](#)<sup>5</sup>.) However, redaction does not eliminate metadata.

***What is metadata?***

“Metadata refers to information about an electronic document that is not visible when normally displayed or printed.” (*Crews v. Willow Unified School District* (2013) 217 Cal.App.4th 1368, 1372, fn. 2.) ““Many types of programs, including most wordprocessors and spreadsheets, automatically track information relating to the editing history of the files they create.”” (*Ibid.*, quoting *Overly on Electronic Evidence in Cal.* (2012-2013 ed.) § 2:9, pp. 46-47.)

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<sup>4</sup> See, e.g., <http://www.caed.uscourts.gov/caednew/index.cfm/cmecf-e-filing/> [on left column, click on “Redaction Requirements,” then click on “How to Redact”]; [http://www.americanbar.org/publications/law\\_practice\\_magazine/2012/march\\_april/get-the-most-out-of-microsoft-word.html](http://www.americanbar.org/publications/law_practice_magazine/2012/march_april/get-the-most-out-of-microsoft-word.html); <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html>; [http://www.corel.com/static/product\\_content/wordperfect/x6/WPOX6\\_Reviewers\\_Guide.pdf](http://www.corel.com/static/product_content/wordperfect/x6/WPOX6_Reviewers_Guide.pdf); <http://www.nrc.gov/docs/ML0607/ML060760605.pdf>

<sup>5</sup>[http://www.americanbar.org/content/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/productreview\\_wordperfect.html](http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/productreview_wordperfect.html)

“There are three principal metadata categories: file system; e-mail; and document (a/k/a embedded data).” (Stone, [Metadata: To Scrub Or](#) (Feb. 2008).)<sup>6</sup> The document category “consists of prior content of an electronic file.” (*Ibid.*)

The attorney, therefore, must take reasonable steps to strip metadata reflecting confidential information about the client from the public redacted version of the document. Not only is this necessary to comply with the aforementioned governing rules but also Business and Professions Code section 6068, subdivision (e)(1), which requires the attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or client” and Rules of Professional Conduct, rule 3-100(A) which provides that “[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) . . . .” (See also [California State Bar Formal Opinion 2010-179](#):<sup>7</sup> Confidentiality and Technology [discusses the ethical confidentiality concerns in using technology and what an attorney should consider when deciding what reasonable steps would be necessary to comply with those obligations].)

### ***Saving Without Metadata and Removing Hidden Data***

Check your word processing program for useful tools for saving without metadata and for removing hidden data. In WordPerfect X7, for example, there is an option at the “File” dropdown

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<sup>6</sup> [http://apps.calbar.ca.gov/mcleselfstudy/mcle\\_home.aspx?testID=27](http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=27)

<sup>7</sup> <http://ethics.calbar.ca.gov/Ethics/Opinions.aspx>

bar for saving without metadata. (See also [\*Saving documents without metadata\*](#)<sup>8</sup> [includes a chart of types of metadata and what it can reveal, [\*Saving WordPerfect Files Without Metadata\*](#)<sup>9</sup>, and [\*Minimizing Metadata In WordPerfect12\*](#)<sup>10</sup> [includes tips on removing hidden text].)

Microsoft support has resources which can be accessed by searching key terms, such as, remove hidden data, on its support website at <https://support.office.com/>. Resources are also available for Adobe documents at [https://helpx.adobe.com/support.html#/top\\_products](https://helpx.adobe.com/support.html#/top_products).

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<sup>8</sup> <http://www.wordperfect.com/en/pages/items/1600090.html>

<sup>9</sup> <http://www.wordperfect.com/en/pages/items/1500674.html>

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[http://www.corel.com/content/pdf/wpo12/Minimizing\\_Metadata\\_In\\_WordPerfect12.pdf](http://www.corel.com/content/pdf/wpo12/Minimizing_Metadata_In_WordPerfect12.pdf)