

Metadata: Reflection on an Attorney's Professional Responsibility

Electronic Discovery

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Introduction

The electronic tools that are available for attorneys are not different than those used within other professions. Nearly every document or work product that an attorney creates is in an electronic document, and many documents are created solely for electronic communications. Like other businesses, most legal documents are created, revised, and critically reviewed by electronic means within a workgroup or work team prior to the work product being considered "final." In addition, the growth of email has outpaced letters as the preferred method for communication for most business and client communications. Nearly all commercial software that facilitates the ability of tracking revisions or peer collaboration retains the revision history within the file as metadata, which is not readily apparent when viewed on the screen, but may create an embarrassing situation if these comments are viewed by an unintended observer.

In the legal field, metadata can create more than merely embarrassing situations for both the attorney and client; inadvertent disclosure of privilege information via metadata may create a claim for civil damages or legal malpractice should the information be used in a damaging way against the client. Unlike other professions where electronic communications with clients are unfettered and common place, an attorney has a professional obligation to always ensure that privilege is preserved for his client, regardless of the means of communication. In addition, some observer's within the legal profession have expressed concerns that when an attorney chooses to review opposing counsel's metadata it is an ethical lapse of an attorney's duty to refrain of behaviors that are "dishonest." The evolving nature of technology implies that method used to secure information must also adjust; and that the attorney's conduct must adapt to

comply with the ethical obligations of the profession. While the American Bar Association's 2005 model rules of professional conduct do not directly mention metadata concerns, the model rules and respective comments, provides guidance as to what the ethical norms are for the profession and a framework to consider metadata concerns for the legal profession.

Additionally, the New York State Bar association has issued two 2004 professional responsibility opinions that are persuasive for the profession on the topic of metadata and the appropriate conduct of an attorney within the framework of the state's disciplinary rules for attorneys. While other state bar associations have issued opinions dealing with different technology issues, these opinions are also persuasive as to how their respective bar might interpret the metadata challenges and an attorney's duty to protect and maintain attorney-client privilege.

Metadata: What is it?

Metadata is a term which literally means "data about data." Meta data is stored within an electronic file but is not visible in when the document is viewed either on the screen or when the document is printed (Mark R Arkfeld , *Electronic Discovery and Evidence*, 2004 Student Edition, Law Partner Publishing, Phoenix, AZ, Glossary page 9). Metadata most often includes the author's name, reviewer's names, comments, revisions or other descriptors of the file (Lawrence M. Friedman, *Riding the Circuits: What, Me Worry about Metadata?*, 18 CBA Record 43, October 2004, p. 43). Nearly every modern, commercially available software program records some type of metadata. Metadata, as designed, is generally considered to be a useful feature to improve the efficiency of review or cataloguing the file within the structure of a document management scheme. Metadata allows the program to track changes to a document as

it progress through the various revisions, as well as allows its users to collaborate within a file. Software programs that are the most concern to the legal profession for risky metadata security concerns would include both the Microsoft office suite (Word, Excel, PowerPoint, Outlook) and Corel's office suite (WordPerfect) (David Hricik and Robert R. Jueneman, *The Transmission and Receipt of Invisible Confidential Information*, Juneman Consulting, LLC (www.Hrick.com and www.Jueneman.com), "Metadata: Hidden Information in Microsoft Word Documents and Its Ethical Implications", 33 *The Colorado Lawyer* 53 (October 2004), Volume 33, No. 10, page 53).

Metadata is relatively easy to retrieve from any software document file, depending upon the program. For instance, in Microsoft Word or Excel, within the "open" dialogue, once the file has been selected, but before actually opening, if the user selects "Recover Text from any file: from the files dropdown, some of the metadata will appear at the bottom of the file on screen. In addition, Microsoft word allows a reviewer to click anywhere in a document and add comments. Even though these comments may later be deleted, the name of the author and the comment is saved within the file as metadata. Metadata in web pages is even easier to retrieve as the user can select "view source" from anywhere within the document and the metadata will appear in a separate window (Chuck Linebaugh, "Metadata, Spyware and Back-up CSs," *Findlaw's Solo Practice*, August 2002, www.practice.findlaw.com/askitguy_0802.html)).

There are also a multitude of freeware metadata viewers available with only a few mouse clicks on the internet that will give access to hidden metadata. The important point to remember is that although the average user does not see a document's metadata, it is always present and easily accessible. The attorney must be cognizant that the electronic document's entire revision history

may be discovered from its metadata and this is a potential risk of breaching client privilege, particularly if documents are exchanged in native formats.

Why is this important?

Most lawyers, like other professionals, have migrated towards sharing electronic documents with third persons. In the practice of lawyering, electronic documents may be filed with the court, which could lead to potential discovery of revisions or internal critiques of the arguments if they are reviewed by the other side. Other potential issue may be contract litigation where an ambiguous clause could be clarified by examining the revision history of the document or where vague discovery responses are shown to have been edited from more unguarded answers (Friedman, p, 44).

As technology has helped the lawyer to be more efficient with electronic document creation and more proficient overall, it has almost virtually eliminated the “historical practice” of deliberate writing process (writing on paper, typing or printing, proofing, review for content, and final delivery). In most law offices, the process has been replaced by a rushed electronic writing process (Bob Blacksberg and Kelly Cunningham, *Unintentional Disclosure in Electronic Documents*, Texas Association of Legal Professionals, (www.texasalp.org/disclosure.html)). Documents may be electronically circulated for review and formatted, but more than likely the major writing and revision work rests solely within the attorney’s computer prior to the document being sent electronically to the courts, client or opposing counsel. A paralegal may do some formatting of the document or instead may write the entire document. This could also lead to an embarrassing billing dispute when the document’s metadata shows that the billing attorney spent only minimal time on drafting the document.

Attorney Hypothetical Involving Metadata Inadvertent Disclosure

Attorneys rely on electronic media to produce documents and to communicate; this increases the risk of inadvertent disclosure of sensitive information. Attorneys frequently prepare new documents and pleadings based on a template or earlier documents. These templates may retain all previous client information in metadata. For example, the previous client's name and facts may be in the original document. If such a document were sent to a new client it might not only be embarrassing, it would likely be a breach of the attorney's duty of confidentiality.

In complex contract negotiations, a number of attorneys will review one electronic contract. This contract may undergo numerous revisions from both sides of the negotiating table. Common revision tools generate long-lasting metadata. The "insert comment" function of Microsoft Word allows a reader to insert comments directly into a document. Even if the comment is later deleted; it remains part of the document as unseen metadata. This information will be available to a third party who receives the document. Further, the "track changes" function will memorialize changes made to a document (Robert E. Bershad and Laura Bandrowsky, *Avoiding Microsoft Word Document Land Mines*, 20 No. 2 LJM's Legal Tech. News, May 2002, p 24). These changes may reveal a party's negotiation strategy and ultimately weaken the client's bargaining position or claim for damages (when there are conflicting values recorded within the metadata).

In litigation, parties increasingly file, serve, or produce electronic copies of documents and pleadings. Electronic discovery is less expensive and faster; however, there is a greater risk that a party will inadvertently provide sensitive or damaging information if there are not additional steps to remove metadata from native files or submitted as PDF or Tiff files.. Transmitting an electronic document to opposing counsel may compromise a case if the native

format of the electronic document's metadata contains sensitive information. Metadata may also impact the issue of notice. For example, it would be embarrassing for a party to allege that they did not have notice of a particular fact when a document's history shows that they accessed a document containing that very information (Ibid, 26). The party's date and time of access will remain part of the document's history unless other means are used to remove the metadata.

American Bar Association Model Rules of Professional Conduct

All attorney's are bound to follow the ethical rules of professional conduct promulgated by the respective state bar associations of the state where they are licensed. Each state's ethical rules maybe different, but in general the American Bar Association's model rules serve as a good guide for the general norms of the attorney conduct. The following discussion outlines the two principal model rules and respective comments with discussion of the rules application and an attorney's duty of care around metadata in document creation and implication of reading other's metadata in the scope of his representation of his client.

Model Rule 1.6

The model rule 1.6 is the major platform tenet regarding attorney-client privilege and the attorney's duty to preserve the client's confidential information. Model rule 1.6 section (a) opines that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." (American Bar Association, Model Rules of Professional Conduct, Rule 1.6 Confidentiality of Information, http://www.abanet.org/cpr/mrpc/rule_1_6.html). By its very hidden nature of metadata, the inadvertent disclosure of a client's secret adverse to his interest would go to the heart of this rule.

It would be likely that the client may seek damages against the attorney for such carelessness, depending on upon the degree of damage to his interests.

The essence of this model rule is developed more fully through the comment section associated with the principle. The following comments are most germane to the subject of creation of metadata and protection of the client information.

Model Rule 1.6 Comments

Comment (2) highlights the trust afforded by the attorney–client relationship by encouraging the client to “communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter” (http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html). Since many on-going client relationships may consist of email exchanges or collaboration on electronic documents, the issue of metadata disclosure should be reasonably foreseen by the attorney. As the attorney and client amend an electronic document to best position the client’s interest it can be expected that any comments or clarifications may be recorded that the attorney may not wish opposing counsel to also be privy to such a discussion.

Comment (4) parlays the metadata concern as it explains that the rule 1.6(a) “also applies to disclosures by a lawyer that not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person” (Ibid, 1). As the vulnerability of metadata disclosure in electronic documents becomes more common in both the awareness of the public and attorney, it is hard to imagine that the attorney’s inadvertent disclosure of the client’s information through metadata could be excluded from the possibly sanctions. This comment suggests that the attorney should be careful to take measures to

exclude sensitive metadata from any documents or work products that subject the attorney to sanction issue would not be covered under this comment of the rule.

Comment (16) emphasizes the attorney and his staff must act competently in representing the client in safeguarding the client's information (Ibid, 1). This comment is must usually interpreted that the attorney is responsible for the actions of those who are within his employment to ensure that they diligent preserve and protect the client's information. One application of this comment within the metadata context is that the attorney is responsible ultimately for the documents that are sent out at his direction, even though he may not be the person actually doing the electronic filing or electronic exchange. The attorney is responsible for the work of the office professionals and should ensure that they also understand the risk of metadata in the documents that they prepare (either through revision of templates, or previous work products, or cleaning up editorial comments for the attorney). Since all metadata is normally hidden from view on the screen or printed page, it is most likely that the office professional will be the one person that is most likely to take the extra steps required to prevent metadata from being included in the documents leaving the attorney's office.

The above rules and comments are most applicable to a lawyer's duty in document creation in preserving attorney-client privilege in preventing inadvertent disclosure of the client's secrets through inadvertent access of the electronic document's metadata. This is prospective of the document creation process and the potential security risk. The attorney, however, is potentially at risk in violating his state's ethical code of conduct if he reads (or directs others on his behalf) to read the metadata. The following model rule 8.4 and its respective comment most clearly speak to the acceptability of reading others' metadata and potential client secrets. It is a valid case of professional misconduct for an attorney to use to his client's advantage any

information that might be gained through mining the metadata of electronic documents. It is because this conduct is considered to be dishonest and not within the norms of the vocation.

Model Rule 8.4

The model rule 8.4 section (c) states that “it is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit, or misrepresentation” (http://www.abanet.org/cpr/mrpc/rule_8_4.html). The contention is that if an attorney reviews such information gained by reading the opposing counsel’s metadata. For an attorney to be sanctioned, the conduct may not necessarily be criminal, but reflects poorly upon the trustworthiness of the profession.

Model Rule 8.4 Comment

Comment (2) states that “offenses involving..., dishonesty, breach of trust, or serious inference with the administration of justice” may cause the lawyer to be sanctioned (http://www.abanet.org/cpr/mrpc/rule_8_4_comm.html). It continues that “a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” This is probably the most troubling for an attorney to understand as the documents that he obtained were provided to him legally. An attorney’s desire (and requirement) to zealously represent the client’s interest would naturally lead him to study the documents for whatever advantage he may find. However, the review of the metadata would violate the opposing counsel’s privilege on work products for the attorneys’ client unfair advantage and would be considered deceitful by a third party observer.

New York State Bar Ethic Opinions

In 2004, the New York Bar association considered both aspects of an attorney's duty in safe guarding a client's secrets from inadvertent disclosure of metadata and addressed the propriety of an attorney reading other metadata. These two state bar opinions are the only state ethic opinions that have directly addressed the topic of metadata. However, numerous other states have indirectly addressed both similar issues relating to previous technology issues and could be similar analogized to a similar outcome (Delaware Bar Association Opinion 2001-2 - *Ethical Propriety of an Attorney Transmitting Confidential Client Information via E-mail and Mobile (or Cell) Phone* (<http://www.dsba.org/AssocPubs/PDFs/2001-2.pdf>), Colorado Bar Association Opinion 108 - *Inadvertent Disclosure of Privileged or Confidential Documents* (<http://www.cobar.org/group/display.cfm?genid=1830&printerversion=y>), Alaska Ethics Opinion 98-2- *Communication by Electronic Mail* (<http://www.alaskabar.org/index.cfm?ID=4871>), Vermont Ethics Opinion 97-5 - *Communicating with a Client by E-mail, including the Internet, without Encryption.* (http://www.vtbar.org/ezstatic/data/vtbar/attorney_judicial_resources/advisory_ethics_opinions/1997/97-05.pdf), Illinois Ethics Opinion 96-10 - *Electronic Communications; Confidentiality of Client Information; Advertising and Solicitation*, (<http://www.isba.org/EthicsOpinions/96-10.asp>), South Carolina Ethics Opinion 97-08 - *Confidential Client Communications be Transmitted via Electronic Mail* (<http://www.scbar.org/member/opinion.asp?opinionID=469>), Florida Bar Association Opinion 93-3 - *Inadvertent Disclosure of Privileged or Confidential Documents* (<http://www.cobar.org/group/display.cfm?genid=1830&printerversion=y>), Ohio Ethics Opinion 99-2 – *Communicating with Clients through Electronic Mail without Encryption* (http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1999/Op_99-002.doc),

In December of 2004, the New York State Bar Association Committee on Professional Ethics issued Opinion 782, *Emailing documents that may contain hidden data reflecting client confidences and secrets*. In this opinion, the committee outlined many of the issues already discussed under the American Bar Association Model 1.6 discussion, but stresses a few additional duties of a licensed New York attorney. The opinion stresses that the attorney must evaluate the risks with the use of the technology and determines if the manner of communication is appropriate for the situation. Once the risks are understood, the attorney must use “reasonable care” to prevent the disclosure of the client’s confidences. In addition, the attorney must “stay abreast of the technological advances” in accessing the risks associated with the technology. The opinion concludes that the lawyers do have a duty to use “reasonable care” when transmitting documents by email to prevent disclosure of metadata containing client confidences.

In the same month, the same committee also issued Opinion 749, *Use of computer software to surreptitiously examine and trace e-mail and other electronic documents*. In this opinion, the committee based its opinion on its interpretation of its state’s disciplinary 8.4 (DR 1-102 [sect. 1200.3] Misconduct). The committee concludes that it is impermissible conduct to use technology to review metadata as an infringement into the attorney-client privilege. The disclosing lawyer “intends” for only the “visible document” and not any hidden information contained in the metadata. The public policy interest in preserving privilege outweighs any counter argument of zealous client representation. Earlier opinions are analogized to the circumstances where the lawyer receives confidential information accidentally. The lawyer’s duty is to not examine the information, notify of the sender of receipt, and follow the sender’s instructions as to how the material should be handled.

With the publishing of these two ethical opinions, the New York bar has placed its attorneys on notice regarding conduct associated with metadata. The attorney has a duty of reasonable care not to inadvertently disclose client confidences via metadata as well as it is impermissible to read the contents of other's metadata.

Summary

Reasonable care by the attorney in creating documents would be to make sure that the documents are “scrubbed” to remove potentially damaging metadata based upon the importance and sensitivity of the contents of the documents. Utilizing Microsoft's own tools, third party metadata scrubber applications, or conversion to TIFF or PDF files, which are static electronic versions of paper documents, would minimize the risk of transmission of metadata within the attorney's work products. If there is no need for collaboration, then the attorney has no need to transmit documents in a native format, even for routine communications.

In addition, a general sense of decency would suggest that it is inappropriate for an attorney to read opposing client's metadata, where there may be privileged information. This is an “affirmative” action that is not consistent within the ethical standards of the profession. While it would be difficult to prove that any advantage was achieved from reading opposing counsel's metadata, the legal profession is self-policing and each attorney is called to maintain the standards of the profession. Once the attorney is aware of the potential risk of disclosure from metadata, there is more incentive to take simple steps to remove the metadata and avoid the problem.