

L.E.O. 2009-01
WHAT IS METADATA AND
WHY SHOULD LAWYERS BE CAUTIOUS?

Introduction

The Lawyer Disciplinary Board sees the need to raise awareness of metadata in electronic documents and emphasizes the need for attorneys to protect this kind of information.

All computer files have metadata (literally, the “data behind the data”) associated or within them that provide information about the files. Whenever a document is created, opened, or saved in a program on a computer, the document stores information, such as the author’s identity, the number of revisions made and comments and redlining. This metadata adds functionality to the editing, viewing, filing and retrieving capabilities of computer programs. In essence, metadata reveals information about electronic documents beyond the printable text and is used for a variety of legitimate purposes.

If legal professionals provide electronic versions of documents to other parties, metadata that is embedded in the document may be provided inadvertently. The information that is embedded is often of little or no interest, but in some instances it may reveal significant information. When this information is passed on to inappropriate parties, it can create adverse consequences for a legal professional or a client. In order to avoid these consequences, it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so

could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be viewed as a violation of the Rules of Professional Conduct.

Discussion

The ABA has noted that the Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. See ABA Formal Op. 06-442. However, metadata use may implicate other Rules of Professional Conduct.

Lawyers sending electronic documents have an obligation under Rule 1.1, which provides that a lawyer shall provide competent representation to a client, together with Rule 1.6, which obligates a lawyer not to reveal confidential information relating to the representation of a client, to take reasonable steps to maintain the confidentiality of documents in their possession. This includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either confidential or privileged, and to employ reasonable means to remove such metadata before sending the document. Accordingly, lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures. See N.Y. State Bar Ass'n Committee Op. 782; D.C. Bar Op. 341.

It is the duty of the lawyer sending electronic documents to protect sensitive metadata, and protecting metadata is not difficult. Sending documents in hard copy, creating an image of the document and sending only the image (scanning and creating a .pdf file, for example), or printing and faxing a document will prevent the transmission of embedded information. Software programs that remove metadata are also available. Lawyers must always exercise reasonable care not to disclose confidential information and ensure that the lawyer's firm and staff have the appropriate technology and systems in place to control the transmission of metadata.

Where a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences. See N.Y. State Bar Ass'n Committee OP. 749 (concluding that lawyers have an obligation under Rule 8.4(c) not to exploit an inadvertent or unauthorized transmission of client confidences).

In a discovery or subpoena context, however, a lawyer must be careful in situations where electronic documents constitute tangible evidence. Rule 3.4(a) prohibits altering, destroying or concealing material having potential evidentiary value. Therefore, in certain instances involving discovery responses or subpoena compliance, removal of metadata may

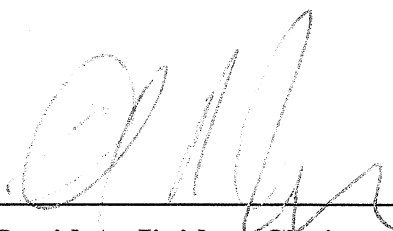
be prohibited and must be produced when requested and not objected to. However, any metadata that is privileged can still be protected and exempt from discovery, upon proper assertion of a privilege.

In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

Conclusion

The Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata.

APPROVED by the Lawyer Disciplinary Board on the 5th day of June, 2009, and
ENTERED this 10th day of June, 2009.



David A. Jividen, Chairperson
Lawyer Disciplinary Board