

# **Lawyers Professional Responsibility Board**

## **Proposed Opinion No. 22**

### **A Lawyer's Ethical Obligations Regarding Metadata Draft 1/26/10**

A lawyer has a duty under Rule 1.6, Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules. The lawyer's duty not to knowingly reveal such information extends to and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to take reasonable care to avoid improper disclosure of confidential information in metadata in electronic documents. If a lawyer receives a document which the lawyer knows or reasonably should know contains inadvertently sent metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4, MRPC.

#### **Comment**

##### **Metadata Generally**

Metadata, sometimes defined as data within data, is used in this Opinion to refer to information generated and embedded in electronically created documents. Metadata is generated automatically by software when an electronic document is created, accessed and modified and typically may include such information as the date the document was created, the author, and the date changes were made to the document. Other times metadata may be purposely created, such as when the author adds comments or other information visible in the document's electronic format but which may not be visible in its printed version. When electronic documents are transmitted electronically—for example, as a Word document attached to an e-mail—the metadata is transmitted with the document.

Metadata can be “scrubbed” or removed from an electronic document by various means, including the use of special software programs or by scanning a printed copy of the document and sending it in a PDF format. Transmission of metadata can also be avoided by transmitting hard copies of the document rather than electronic copies or by faxing the document.

Metadata embedded in an electronic document can be “mined” or viewed by a recipient of the document. Some metadata can be accessed simply by right-clicking a mouse or selecting “properties” or “show markup” on a Word document. Other metadata can be accessed by the use of special software programs.

There are many types of metadata, many ways of creating metadata, and many means for removing and accessing metadata, all of which will undoubtedly continue to expand and evolve with technological innovation.

Most metadata is not confidential, and the disclosure of metadata may often be intentional and for the mutual benefit of clients with adverse interests. Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits

which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Due to the hidden, or not readily visible, nature of metadata and the ease with which electronic documents can be transmitted, a potential exists for the inadvertent disclosure of confidential or privileged information in the form of metadata in both a litigation and non-litigation setting, which in turn could give rise to violations of a lawyer's ethical duties.

### **Applicable Rules**

Rule 1.1, Minnesota Rules of Professional Conduct (MRPC), states that "[a] lawyer shall provide competent representation to a client." Comment 5 to Rule 1.1 provides that "[c]ompetent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners."

As noted in American Bar Association Formal Opinion 06-442 (2006) at 1:

In modern legal practice, lawyers regularly receive email, sometimes with attachments such as proposed contracts, from opposing counsel and other parties. Lawyers also routinely receive electronic documents that have been made available by opponents, such as archived e-mail and other documents relevant to potential transactions or to past events. Receipt may occur in the course of negotiations, due diligence review, litigation, investigation, and other circumstances.

Competency requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, and that actions can be taken to prevent or minimize the transmission of metadata.

Rule 1.6(a), MRPC, states that, "[e]xcept when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client." Comment 2 to the rule explains that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." Comment 15 provides that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision"; and Comment 16 further provides that "when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Opinion No. 22 makes clear that the duty imposed by Rule 1.6(a), MRPC, regarding client information extends to and includes metadata in electronic documents. Thus, a lawyer must take reasonable steps to prevent the disclosure of confidential metadata. *See* ABA/BNA Lawyers' Manual on Professional Conduct 55:401 (2008) ("When a lawyer sends, receives, or stores client information in electronic form, the lawyer's duty to protect that information from disclosure to unauthorized individuals is the same as it is for information communicated or kept in any other form.").

Rule 4.4(b), MRPC, states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 to the Rule explains that lawyers sometimes receive documents that were mistakenly sent and that "[i]f a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." Comment 2 states that "[f]or purposes of this rule, 'document' includes email or other electronic modes of transmission subject to being read or put into readable form. Opinion No. 22 makes clear that the duty imposed by Rule 4.4(b) regarding documents extends to metadata in electronic documents.

"Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." Comment 2 to Rule 4.4.

A lawyer who receives inadvertently sent metadata may be subject to a number of other obligations in addition to those provided by the Minnesota Rules of Professional Conduct. For example, Rule 26(b)(5)(B), Fed. R. Civ. P., and Rule 26.02(f)(2), Minn. R. Civ. P., require a lawyer who is notified that the lawyer has received information protected by the attorney-client privilege, which may include metadata, must promptly return, sequester or destroy the information, must not use or disclose the information until the claim of privilege is resolved, and must take reasonable steps to retrieve the information if the party disclosed it before being notified of the privilege claim. Furthermore, removing metadata from evidentiary documents in the context of litigation or in certain other circumstances may be impermissible or illegal. Opinion No. 22 addresses only a lawyer's ethical obligations under the Minnesota Rules of Professional Conduct.

### **Other Ethics Opinions on Metadata**

A lawyer's duties regarding metadata have been the subject of ethics opinions from other states and the American Bar Association. *See, e.g.*, Ala. St. B. Office of Gen. Counsel, Formal Op. 2007-02 (2007); Ariz. St. B. Comm. on Prof'l Conduct, Formal Op. 07-03 (2007); Cal. St. B. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2007-174 (undated); Colo. B. Ass'n Ethics Comm., Formal Op. 119 (2008); D.C. B. Legal Ethics Comm., Formal Op. 341 (2007); Prof'l Ethics Comm. of the Fla. B., Formal Op. 06-2 (2006); Prof'l Ethics Comm'n of the Bd. of Overseers of the Me. St. B., Formal Op. 196 (2008); Comm. on Ethics of the Md. St. B. Ass'n, Formal Op. 2007-09 (2006); N.H. Bar Ass'n Ethics Comm., Op. 2008-2009/4 (4/16/09); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Formal Op. 749 (2001); Comm. on Legal Ethics & Prof'l Responsibility of the Pa. B. Ass'n, Formal Op. 2009-100 (2009); W. Va. St. B.

L. Disc. Bd., Op. 2009-1; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006). Ethics opinions generally agree that a lawyer has a duty to use reasonable care to prevent the disclosure of confidential metadata in electronic documents, but the opinions differ on the duty of an adverse lawyer who receives metadata.

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