

Why you should care about metadata

by

**Megan Engelhardt, Assistant Director
Minnesota Office of Lawyers professional Responsibility**

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E-mail correspondence and the use of electronic documents have become common and important tools for the quick exchange of information between lawyers. But they have also created a situation where a computer-savvy lawyer may discover potentially confidential information from an electronic document by looking for metadata.

Issues surrounding metadata have spawned ethical questions nationwide.ⁱ In fact, the Lawyers Professional Responsibility Board determined it was important enough to the general bar that guidance in this area would be helpful. Enter Opinion No. 22 — entitled “A Lawyer’s Ethical Obligations Regarding Metadata” — issued earlier this year by the LPRB.

Metadata is the term used to refer to information created and embedded in electronic documents. It can include the date and time the document was created, who created, accessed and modified the document, and comments added to the document, among other information. Probably the most common example of metadata transmission is attaching a Word document to an e-mail.

Opinion No. 22 provides that a lawyer’s duties under Minnesota Rules of Professional Conduct Rules 1.1 and 1.6 — to not knowingly reveal information related to the representation of a client and to act competently to safeguard information related to the representation of a client against inadvertent or unauthorized disclosure — should extend to protecting confidential information transmitted in the metadata of electronic documents. Specifically, Opinion No. 22 states that “a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents.”

There are ways to prevent metadata from being transmitted in electronic documents. Metadata can be “scrubbed” from the document being transmitted by using special software programs. In the alternative, transmitting metadata can be avoided by scanning a copy of the printed document and sending it in a PDF format. Of course, metadata is only transmitted in electronic documents, so metadata would not be transmitted if a document is sent by mailing hard copies or by faxing the document.

Opinion No. 22 only addresses the duty of the sender to protect disclosure of confidential and privileged client information. It does not address whether the recipient of an electronic document has any ethical obligation to look or not look for metadata in the document. Looking for metadata (often referred to as “mining”) can be as easy as right-clicking with the mouse or selecting “show markup” on a Word document, or as difficult as employing the use of special software to mine for metadata.

Lastly, Opinion No. 22 states that the duties imposed under MRPC Rule 4.4(b) extend to metadata. Thus, an attorney who receives an electronic document that he or she knows or reasonably should know inadvertently contains confidential or privileged information in the metadata shall promptly notify the sender.

The issue of metadata in electronic documents has not yet been a large area of attorney discipline for this office, but the ramifications for attorneys are real. No attorney wants to reveal a client’s bargaining position or bottom line by merely sending an electronic document to opposing counsel. Lawyers should take a few minutes to completely review Opinion No. 22 and take steps to evaluate their office procedures, including speaking with staff to ensure they are acting competently to protect the disclosure of confidential and privileged information in metadata in electronic documents.

ⁱ The American Bar Association has addressed the issue of metadata in Formal Opinion 06-442 and Formal Opinion 05-437. Moreover, 12 U.S. jurisdictions have issued opinions on the issue of metadata as well. A chart illustrating ethics opinions from around the United States can be found at: <http://www.abanet.org/tech/ltrc/fyidocs/metadachart.html>