PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

FORMAL OPINION
2007 – 500
MINING METADATA

I. Introduction

This Formal Opinion provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials, including documents, spreadsheets and PowerPoint presentations under circumstances in which it is clear that the materials were not intended for the receiving lawyer. As more fully set forth below, it is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.

In reaching this conclusion, the Committee notes that there is no specific Pennsylvania Rule of Professional Conduct determining the ethical obligations of a lawyer receiving inadvertently transmitted metadata from another lawyer, his client or other third person; and, there is no specific Pennsylvania Rule of Professional Conduct requiring the receiving lawyer to assess whether the opposing lawyer has violated any ethical obligation to the lawyer's client. Thus, the decision of how or whether a lawyer may use the information contained in the metadata will depend upon many factors, including:

- The judgment of the lawyer;
- The particular facts applicable to the situation;
- The lawyer's view of his or her obligations to the client under Rule of Professional Conduct 1.3, and the relevant Comments to this Rule[1];

[1] Comment 1 to R.P.C. 1.3 states:

> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication

- The nature of the information received;
- How and from whom the information was received;
- Attorney-client privilege and work product rules; and,
- Common sense, reciprocity and professional courtesy.

Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee believes that the inadvertent transmissions of such materials should not constitute a waiver of the privilege, except in the case of extreme carelessness or indifference.

II. Background

Metadata, which means "information about data," is data contained within electronic materials that is not ordinarily visible to those viewing the information. [2] Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations and Corel WordPerfect documents.[3] Metadata generally contains seemingly harmless information. However, metadata may also contain privileged and/or confidential information, such as previously deleted text, notes and tracked changes, which may provide information about, *e.g.*, legal issues, legal theories and other information that was not intended to be disclosed to opposing counsel. *See, e.g.,* Daniel J. Siegel, "Scrub Your Documents," *The Philadelphia Lawyer*, Fall 2005.[4]

> to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] Although metadata appears in various types of materials such as documents, spreadsheets and presentations created by computer programs such as Microsoft Word, Microsoft Excel, Microsoft PowerPoint and Corel WordPerfect, this Opinion refers to these materials collectively as "documents."

[3] Corel WordPerfect Version X3 permits a user to easily remove all or specific metadata. Microsoft Office products do not permit the easy removal of this information. Additional information about metadata and removing it from Microsoft documents may be found on Microsoft's website at http://support.microsoft.com/kb/290945 and http://support.microsoft.com/kb/q223790/

[4] The Microsoft Office website contains detailed information about metadata, provides examples of metadata that may be stored in materials created by Microsoft applications, and explains how to remove this data from a document. Examples of metadata that may

Attorneys who receive electronic documents from other attorneys can easily use a variety of software to discover and utilize this metadata, with potentially disastrous consequences to the other side. *See,* David Hricik and Robert B. Jueneman, "The Transmission and Receipt of Invisible Confidential Information," 15 *The Professional Lawyer* No. 1, p. 18 (Spring 2004). For example, in a products liability lawsuit involving the prescription drug Vioxx, the metadata contained within documents produced by Merck, the manufacturer of the drug, revealed that Merck had edited out negative information from a drug study. *See* Eileen B. Libby, "What Lurks Within: Hidden Metadata in Electronic Documents Can Win or Lose Your Case," http://www.abanet.org/cpr/about/Hidden_Metadata.html. Because the problems with metadata have become increasingly common, and because the software that permits review of the data is inexpensive and easy to use, the ability to discover and utilize metadata presents serious challenges to the protection of the confidentiality of information provided by counsel.

III. Discussion

Pa.R.P.C. 1.6 ("Confidentiality of Information") governs an attorney's disclosure of information relating to the representation of a client. The Rule states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The Comment to Rule 1.6 states in relevant part:

> [2] 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. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

---

be hidden in documents include the name of the author, information about the computer on which the document was typed, the names of previous authors of the document, as well as the number of revisions to the document and the contents of those revisions.

In addition, Rule 4.4(b) ("Respect for Rights of Third Persons") states:

> (b) 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.

The Comment to Rule 4.4 states:

> [2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that 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. 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. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.
>
> [3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

When Rule 4.4(b) and the Comments to the Rule are read in conjunction with Rule 1.6, it is possible to conclude that the Pennsylvania Supreme Court has determined that attorneys in Pennsylvania who receive inadvertently disclosed documents have an ethical obligation to promptly notify the sender in order to permit that person to take protective measures. The absence of a specific Rule addressing the inadvertent disclosure of metadata may also be viewed as analogous to the inadvertent disclosure of a document and not an act consciously undertaken by counsel.

Various Ethics Committees have considered whether it is ethically permissible to review the metadata contained within documents produced by opposing counsel.

The American Bar Association Standing Committee on Ethics and Professional Responsibility considered the review and use of metadata in *Formal Opinion 06-442* (August 5, 2006), concluding that the ABA Model Rules of Professional Conduct "generally permit" a lawyer to review and use metadata contained in e-mail and other electronic documents, "whether [they are] received from opposing counsel, an adverse

party or an agent of an adverse party." *Id.* Finding Model Rule 4.4(b) most closely applicable, the Committee stated that, although Rule 4.4(b) provides 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," the rule is silent on the issue of whether or not an attorney can review or use such information. *Id.* The Committee therefore concluded that the Rule's sole requirement of promptly notifying the sender of inadvertently sent documents was "evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct..." *Id.* The Committee suggested several methods by which counsel could protect himself or herself from inadvertently disclosing metadata, including negotiation of a confidentiality agreement or protective order that allows the transmitting attorney to "pull back" transmitted documents. *Id.* These methods of protection, however, will not always adequately protect an attorney, such as when the transferred metadata contains information about a client's willingness to settle and/or the terms by which the client may be willing to do so.

Consistent with the ABA Opinion, the District of Columbia Bar Association issued *Ethics Opinion 341* in September 2007, in which it concluded:

> A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

The D.C. Bar further opined that, "In all other circumstances, a receiving lawyer is free to review the metadata contained within the electronic files provided by an adversary."

Several Ethics Opinions issued by various states have concluded, contrary to the ABA and D.C. Committees, that a party may not use inadvertently disclosed metadata. *See, e.g.,*. New York Committee on Professional Ethics, *Opinion 749* (December 14, 2001) and *Opinion 782* (December 8, 2004). In *Opinion 749*, the Committee addressed the use of computer software to surreptitiously examine metadata contained in emails and other electronic documents. The New York Committee concluded that such a use of metadata "constitutes an impermissible intrusion on the attorney-client relationship in violation of the [Code of Professional Responsibility]." *Id.* Noting that the Code "prohibits a lawyer from engaging in conduct 'involving dishonesty, fraud, deceit or misrepresentation...' and 'conduct that is prejudicial to the administration of justice...'" the Committee opined that "in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship," such a use of metadata would go against the spirit of the Code. *Id.* The Committee paralleled the use of inadvertently transmitted metadata to the use of inadvertently transmitted communications in general, which the Committee had previously found impermissible under the Code because the conduct involved "dishonesty, fraud, deceit or misrepresentation, [was] prejudicial to the administration of justice'" and would "undermine confidentiality and the attorney-client

relationship." *Id.* The Committee concluded that the use of software to examine metadata was more impermissible than the use of inadvertently transmitted communication in general noting that, whereas in the latter scenario the transmitting attorney's carelessness caused the inadvertent transmission, in the former scenario, the transmitting attorney unwillingly and unknowingly transmitted the metadata, which the receiving attorney then secretly and deceitfully accessed. *Id.*

In *Opinion 782*, the New York Committee addressed the emailing of documents that may contain metadata "reflecting client confidences and secrets." The Committee concluded that "Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in 'metadata' in documents they transmit electronically to opposing counsel or other third parties." *Id.* Identifying the various rules under the Lawyer's Code of Professional Responsibility that provide guidance in these situations, the Committee stated:

> The Lawyer's Code of Professional Responsibility (the "Code") prohibits lawyers from "knowingly" revealing a client confidence or secret, DR 4-101(B)(1), except when permitted under one of five exceptions enumerated in DR 4-101(C). DR 4-101(D) states that a lawyer "shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." See also EC 4-5 ("Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another"). Similarly, a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances. See N.Y. State 709 (1998) ("an attorney must use reasonable care to protect confidences and secrets"); N.Y. City 94-11 (lawyer must take reasonable steps to secure client confidences or secrets).

Id. The Committee opined that "Reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with respect to the mode of transmission," implying that attorneys have the responsibility to take steps to prevent the transmission of metadata when emailing documents. *Id.* The Committee noted, however, that "Lawyer-recipients also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets." *Id.* Therefore, while finding that attorneys may have to take steps to prevent the transmission of metadata, the Committee continued to hold that it is unethical for receiving attorneys to use technology to secretly view and use metadata.

The Professional Ethics Committee of The Florida Bar and Alabama State Bar Office of General Counsel have reached similar conclusions. In *Professional Ethics of the Florida Bar Opinion 06-2* (September 15, 2006), the Florida Committee addressed the duties of both transmitting and receiving attorneys with respect to metadata contained in electronic

documents. With respect to transmitting attorneys, the Committee examined Fl.R.P.C. 4-1.6(a), which is virtually identical to Pa.R.P.C. 1.6, for guidance. The Committee concluded that "Florida lawyers must take reasonable steps to protect confidential information in all types of documents and information ... including electronic documents and electronic communications with other lawyers and third parties" in order to maintain confidentiality as required by Rule 4-1.6(a). *Id.* With respect to receiving attorneys, the Committee relied on Fl.R.P.C. 4-4.4(b), which is substantially similar to Pa.R.P.C. 4.4(b), for guidance, concluding:

> It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit. *See*, Ethics Opinion 93-3 and Rule 4-4.4(b), Florida Rules of Professional Conduct, effective May 22, 2006.
>
> ...If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must "promptly notify the sender." *Id.*

Id. (footnote omitted) The Committee concluded that the duties of transmitting and receiving attorneys mentioned above "may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information under Rule 4-1.6(a)," noting that Rule 4-1.6's Comment addressing competency states that a lawyer "should engage in continuing study and education" to maintain the skills and knowledge necessary for competent representation. *Id.*

In *Alabama Bar Formal Ethics Opinion 2007-02* (March 14, 2007), the Alabama State Bar Office of General Counsel, concluded that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences," noting that what constitutes reasonable care will vary based on the circumstances of each case. *Id.* Relying upon Ala. R. Prof. C. 1.6 and 8.4, which are substantially similar to Pa.R.P.C. 1.6 and 4.4, the Opinion also concluded that "Just as a sending lawyer has an ethical obligation to reasonably protect the confidences of a client, the receiving lawyer also has an ethical obligation to refrain from mining an electronic document." *Id.* The Alabama Bar specifically agreed with New York *Opinion 749* that the use of computer technology to view and utilize metadata "constitutes an impermissible intrusion on the attorney-client relationship in violation of the Alabama Rules of Professional Conduct," noting that the protection of the confidence of the client is "a fundamental tenet of the legal profession." *Id.*

In a similar vein, the Maryland State Bar Association Committee on Ethics issues Opinion 2007-09, in which it concluded that lawyers who produce electronic materials in discovery have a duty to take reasonable measures to avoid the disclosure of confidential information embedded in the metadata within the documents. Citing the recent amendments to the Federal Rules of Civil Procedure, the Committee further concluded that lawyers who receive electronic discovery materials have no ethical duty to refrain from viewing or using metadata.

These various opinions reach different conclusions, although each offers a persuasive rationale. This Committee believes, however, that it would be difficult to establish a rule applicable in all circumstances and that, consequently, the final determination of how to address the inadvertent disclosure of metadata should be left to the individual attorney and his or her analysis of the applicable facts.

IV. Conclusion

The utilization of metadata by attorneys receiving electronic documents from an adverse party is an emerging problem. Although a transmitting attorney has tools at his disposal that can minimize the amount of metadata contained in a document he or she is transmitting, those tools still may not remove all metadata.

Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy. Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee believes that the inadvertent transmissions of such materials should not constitute a waiver of the privilege, except in the case of extreme carelessness or indifference.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.