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Protecting Proprietary Information
This Month: Metadata

With the advent of e-mail and other forms of electronic communications, attorneys are increasingly sharing electronic documents with opposing counsel. All electronic documents, however, have information embedded within them that may not be readily visible to the average user. This information is called metadata.

Metadata can be useful. For example, metadata can record who created a document, and at what time, which can aid in tracking the latest version when a document is being edited by more than one person. Metadata also helps users correct mistakes. A common example is the “undo” function in word processors. In order for the “undo” function to work, the program stores prior versions of the document. When the user makes a mistake, hitting “undo” restores the version of the document before the last change.

Metadata is also useful when multiple people are reviewing a document. Many word processing programs have a “review” or “comment” function. This allows a reviewer to place comments and suggestions in a document without actually changing the text.

While useful, metadata can pose a risk. If an attorney does not clear out the metadata it could remain embedded in the document. If the attorney sends that electronic document to an opponent, the metadata could lay waiting for a more tech-savvy person to discover it.

Pursuant to the rules of ethics, an attorney is charged with protecting his or her client’s confidences. Moreover, an attorney must take reasonable steps to prevent employees, associates and others from revealing client confidences. To satisfy these requirements, many jurisdictions have found that an attorney must stay abreast of evolving technology, and understand the capabilities of the software that the attorney uses (DC Ethics Opinion 341, NY Ethics Opinions 709 & 782). Nonetheless, New York recognizes that even the most tech savvy user may have difficulty erasing all of the metadata from prior versions of the electronic document (NY Ethics Opinion 749).

Ethics law may provide some protection against the inadvertent disclosure of a client’s confidences through the use of metadata. New York, for example, has examined the issue and clearly stated that an attorney may not surreptitiously examine electronic communications in order to discover confidential information (NY Ethics Opinion 749). New York’s analysis is guided by the rules governing attorney misconduct as well as the public policy to preserve client confidences. Thus, New York provides that absent explicit communication to the contrary, an attorney who receives an electronic communication should presume that opposing counsel did not intend for the attorney to see the information hidden in metadata. If an attorney finds such hidden information, New York provides that the attorney must not review it, must notify opposing counsel, and must abide by opposing counsel’s instructions.

The District of Columbia takes a slightly different approach. The District of Columbia provides that an attorney may not use metadata hidden in a document, but only if the attorney **knows** that the data was sent inadvertently (DC Ethics Opinions 256, 318 & 341). If the private nature of the information is not apparent on the face of the document, the attorney may be permitted to review the information. For the District, its ethics opinion is guided by the duty to provide diligent representation to the client. Thus, while the District agrees that an attorney may not “mine” a document for hidden information, whether the transmission of metadata was inadvertent can only be determined on a case-by-case basis. Indeed, the District notes that the withholding of metadata can be unlawful in some circumstances, such as during discovery.

Other jurisdictions may not have addressed the metadata issue directly, but have addressed the issue of inadvertent transmissions of client confidences. Virginia, for example, provides that it is not ethical for an attorney to keep and use a document that has been transmitted inadvertently (Va. LEO 1702). Virginia’s ethics opinion is guided by an analysis of whether the conduct would reflect poorly on the integrity of the legal profession.

The prudent attorney, however, should not rely solely on ethics opinions to protect a client from an inadvertent disclosure of confidences through metadata. Rather, unless required by law, when an attorney sends an electronic document to a person who is not involved in the representation of a client, the attorney should take steps to erase the metadata. The attorney should know the capabilities of his or her word processing program. Some programs have functions that erase some metadata. An attorney should also consider using other software designed to purge metadata from an electronic document.

One method for erasing most of the metadata in an electronic document could be to transform the document into a portable document format, or .pdf. Many of the programs that create .pdfs will erase metadata such as reviewers’ comments and prior versions.

In the antidumping and countervailing duty context, attorneys are required to submit public versions of documents that contain their client’s business proprietary information. To keep the pagination, some attorneys will simply turn the text white. Then, when the document is printed in hard copy, the text will not be seen. The problem with this approach is that it does not completely delete the hidden information. Even when an attorney transforms that document to a .pdf, the text is still hidden in the document. The text can be revealed simply by using the computer mouse to highlight the area. When sending electronic documents to opposing counsel, therefore, an attorney should avoid turning the text he or she wants to delete white to protect proprietary information.

Technology can make an attorney more efficient. But, if proper safeguards are not taken, technology could result in the inadvertent disclosure of client confidences. A prudent attorney should understand the technology used, and take steps to protect client information from unintended disclosure.

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