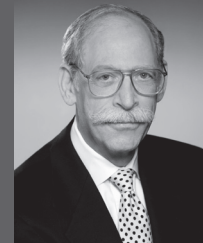


Tips on Technology

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Metadata and the Practice Crossing the Ethical Line

During the last five years, lawyers have become acquainted with metadata as part of the evolution of electronic discovery. It is not used as a precise term of art and has a few different meanings. To most of us, metadata is hidden information regarding a file. It may relate to the creation or modification date of the document; it may show who was blind copied on an e-mail. More importantly, metadata is also thought of as the text associated with “Track Changes” or “Hidden Text” within a Microsoft Word document.

Track Changes is a form of “red lining” which carries the history of the deletions and additions in drafts of a document. These can be hidden so the document looks like a final version on the screen and prints as a final version. However, upon selecting a menu choice, the history of the document is available for viewing. Hidden Text is an annotation or collaboration tool; it is an electronic sticky note which can be hidden, as well.

The question arises as to what is a lawyer’s ethical responsibility to prevent the inadvertent disclosure of client confidences when a Word document carrying Hidden Text or Track Changes is attached to an e-mail? For example, suppose Lawyer 1 uses a prior asset purchase agreement developed for Client A as a template for a new contract for Client B. Lawyer 1’s secretary, using Track Changes, deletes the various names and dollar figures for the agreement, but leaves most of the other language intact. Track Changes is turned off and the document is printed for Lawyer 1’s review. Once satisfied with the new document, Lawyer 1 e-mails it to Lawyer 2. Upon receiving the e-mail, Lawyer 2

opens the attached Word document. He decides to see if there were any changes made to the draft by Lawyer 1 and selects Track Changes and Hidden Text. Both Lawyer 1 and his secretary inadvertently failed to sanitize the document before it was e-mailed. Consequently, all of Client A’s information appears, as do the changes made by Client B prior to the creation of the final version.

Is this simply an academic hypothetical or has Lawyer A violated the Rules of Professional Conduct? As it turns out, a number of venues have considered this issue and have universally opined a lawyer must exercise reasonable care to prevent inappropriate disclosure of client confidences and secrets contained in metadata. Most refer to Rules 1.1 and 1.6 or similar provisions. See for example NY Eth. Op. 782 (12/8/04).

Other jurisdictions have considered the issue within a different context, and that is whether Lawyer 2 has violated the Rules of Professional Conduct by looking to see if there was an inadvertent disclosure within the Track Changes or Hidden Text. In August 2006, the ABA issued Formal Ethics Opinion 06-442. It focused on Rule 4.4(b) which requires a lawyer to notify opposing counsel if it becomes clear an inadvertent disclosure has been made. Since 4.4(b) does not require the document to be destroyed or returned, the ABA opinion concludes there is no harm in looking. This approach has been followed by the District of Columbia.

Opinion 341 in DC makes it abundantly clear a “receiving lawyer is prohibited from reviewing metadata sent by an adversary party 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 Maryland Bar Association’s Ethics Committee reviewed this issue in 2007, also finding no obligation to abstain from reviewing or “mining” for metadata. The opinion (No.2007-09) clearly points out Maryland has not adopted Model Rule 4.4(b) resulting in no obligation to even notify the adversary of the inadvertence.

The ABA approach has not been followed everywhere. For example, New York, Florida, and Alabama opinions clearly find it a violation of the Rules of Professional Conduct to “surreptitiously ‘get behind’ visible documents.” Indeed, New York has been well known for this position since 2001 in NY Eth. Op. 749 (12/14/01). Alabama cites the New York philosophy, noting the “unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of Rule 8.4” (the general catch all rule).

The Commonwealth of Pennsylvania is not sure in what camp it wants to reside: “Thus, the decision of how or whether a lawyer may use the information contained in the metadata will depend upon many factors . . .” Yada, yada, yada. The opinion concludes: “each attorney must determine for himself or herself whether to utilize the metadata contained in the documents . . . based upon the lawyer’s judgment and the particular factual situations.” PA Eth. Op. 2007-500

There is nothing to report in Delaware yet, although for many years our Supreme Court has led the field in Professionalism. It is difficult to envision it condoning the practice of sneaking behind documents to see what is inadvertently left for others to find.

What is clear is our obligation to understand the technology. “The foregoing obligations may necessitate a lawyer’s continuing training and education in the use of technology in transmitting and receiving electronic documents . . .” FL Eth. Op. 06-2 (9/15/06). It is no longer likely we will be able to rely on a defense of “I have never learned computers.”

“If we undertake to use technology in our daily practice, we accept the responsibility to use it reasonably well.”

— *Richard Herrmann, Tips on Technology*, 5/1/2008 