

## FORMAL OPINION NO. 2011-187

### Competency: Disclosure of Metadata

#### Facts:

Lawyer *A* e-mails to Lawyer *B* a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer *B* is able to use a standard word processing feature to reveal the changes made to an earlier draft (“metadata”). The changes reveal that Lawyer *A* had made multiple revisions to the draft, and then subsequently deleted some of them.

Same facts as above except that shortly after opening the document and displaying the changes, Lawyer *B* receives an urgent request from Lawyer *A* asking that the document be deleted without reading it because Lawyer *A* had mistakenly not removed the metadata.

Same facts as the first scenario except that Lawyer *B* has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement.

#### Questions:

1. Does Lawyer *A* have a duty to remove or protect metadata when transmitting documents electronically?
2. May Lawyer *B* use the metadata information that is readily accessible with standard word processing software?
3. Must Lawyer *B* inform Lawyer *A* that the document contains readily accessible metadata?
4. Must Lawyer *B* acquiesce to Lawyer *A*'s request to delete the document without reading it?
5. May Lawyer *B* use special software to reveal the metadata in the document?

#### Conclusions:

1. See discussion.
2. Yes, qualified.

3. No.
4. No, qualified.
5. No.

**Discussion:**

Metadata generally means “data about data.” As used here, metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.<sup>1</sup>

**Lawyer’s Duty in Transmitting Metadata**

Oregon RPC 1.1 requires a lawyer to provide competent representation to a client, which includes possessing the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Oregon RPC 1.6(a) requires a lawyer to “not reveal information relating to the representation of a client” except where the client has expressly or impliedly authorized the disclosure.<sup>2</sup> Information relating to the representation of a client may include metadata in a document. Taken together, the two rules indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.<sup>3</sup>

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<sup>1</sup> Joshua J. Poje, *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, May 3, 2010, <[http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/chartsfyis/metadachart.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/chartsfyis/metadachart.html)>.

<sup>2</sup> There are several exceptions to the duty of confidentiality in Oregon RPC 1.6, none of which are relevant here.

<sup>3</sup> The duty of competence with regard to metadata also requires a lawyer to understand the implications of metadata in regard to documentary evidence. A discussion of whether removal of metadata constitutes illegal tampering is beyond the scope of this opinion, but Oregon RPC 3.4(a) prohibits a lawyer from assisting a

A lawyer must use reasonable care to avoid the disclosure of confidential client information, particularly where the information could be detrimental to a client.<sup>4</sup> With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent.<sup>5</sup> What constitutes reasonable care will change as technology evolves.

The duty to use reasonable care so as not to reveal confidential information through metadata may be best illustrated by way of analogy to paper documents. For instance, a lawyer may send a draft of a document to opposing counsel through regular mail and inadvertently include a sheet of notes torn from a yellow legal pad identifying the revisions to the document. Another lawyer may print out a draft of the document marked up with the same changes as described on the yellow notepad instead of a “clean” copy and mail it to opposing counsel. In both situations, the lawyer has a duty to exercise reasonable care not to include notes about the revisions (the metadata) if it could prejudice the lawyer’s client in the matter.

#### **Lawyer’s Use of Received Metadata**

If a lawyer who receives a document knows or should have known it was inadvertently sent, the lawyer must notify the sender promptly. Oregon RPC 4.4(b). Using the examples above, in the first instance the

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client to “alter, destroy or conceal a document or other material having potential evidentiary value.”

<sup>4</sup> Jurisdictions that have addressed this issue are unanimous in holding lawyers to a duty of “reasonable care.” *See, e.g.*, State Bar of Arizona Ethics Opinion 07-03. By contrast, ABA Formal Opinion 06-442 does not address whether the sending lawyer has any duty, but suggests various methods for eliminating metadata before sending a document. *Id.* But see ABA Model Rule 1.6, comment [17], which provides that “[w]hen 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.”

<sup>5</sup> Such steps may include utilizing available methods of transforming the document into a nonmalleable form, such as converting it to a PDF or “scrubbing” the metadata from the document prior to electronic transmittal.

receiving lawyer may reasonably conclude that the yellow pad notes were inadvertently sent, as it is not common practice to include such notes with document drafts. In the second instance, however, it is not so clear that the “redline” draft was inadvertently sent, as it is not uncommon for lawyers to share marked-up drafts. Given the sending lawyer’s duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in.<sup>6</sup> In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.

If, however, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, Oregon RPC 4.4(b) requires only notice to the sender; it does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document.<sup>7</sup> OSB Formal Ethics Op No 2005-150. Comment [3] to ABA Model Rule 4.4(b) notes that a lawyer may voluntarily choose to return a document unread and that such a decision is a matter of professional judgment reserved to the lawyer. At the same time, the Comment directs the lawyer to Model Rules 1.2 and 1.4. Model Rule 1.2(a) is identical to Oregon RPC 1.2(a) and requires the lawyer to “abide by a client’s decisions concerning the objectives of the representation” and to “consult with the client as to the means by which the objectives are pursued.”<sup>8</sup> Oregon RPC 1.4(a)(2), like its counterpart Model Rule, requires a lawyer to “reasonably consult about the means by

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<sup>6</sup> See *Goldsborough v. Eagle Crest Partners*, 314 Or 336 (1992) (in the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer’s authority from the client and with the client’s consent).

<sup>7</sup> Comment [2] to ABA Model Rule 4.4(b) explains that the rule “requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.” It further notes that “[w]hether 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.”

<sup>8</sup> Although not required by the Oregon RPCs, parties could agree, at the beginning of a transaction, not to review metadata as a condition of conducting negotiations.

which the client's objectives are to be accomplished." Thus, before deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Regardless of the reasonable efforts undertaken by the sending lawyer to remove or screen metadata from the receiving lawyer, it may be possible for the receiving lawyer to thwart the sender's efforts through software designed for that purpose. It is not clear whether uncovering metadata in that manner would trigger an obligation under Oregon RPC 4.4(b) to notify the sender that metadata had been inadvertently sent. Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Oregon RPC 8.4(a)(3).

**Approved by Board of Governors, November 2011.**