

METADATA: WHAT IS IT AND WHAT ARE ITS ETHICAL IMPLICATIONS FOR LAWYERS?

James E. Doyle Chapter of American Inns of Court
November 13, 2013

Attorney Matt Stippich, Digital Intelligence
Attorney Dean Dietrich, Ruder Ware
Attorney Michael Apfeld, Godfrey & Kahn
Honorable Michael R. Fitzpatrick, Rock County Circuit Judge

I. What is Metadata and How Can It Be Managed?

- A. Metadata is information imbedded in e-mails and other materials sent electronically. It shows the history, tracking, and management of the document.
- B. Metadata describes when a document was:
 - 1. Last accessed
 - 2. Saved
 - 3. Changed
 - 4. Sent
 - 5. Received
- C. Metadata describes who:
 - 1. Changed the document
 - 2. Saved the document
 - 3. Sent the document
 - 4. Received the document
- D. Metadata shows:
 - 1. Additions to the document
 - 2. Deletions from the document
 - 3. Red line changes
 - 4. Embedded comments
- E. How can one “mine” for metadata?
 - 1. Programs may be used to mine for metadata
 - 2. Most metadata is unimportant or garbage

F. How can metadata be blocked, scrubbed, or avoided completely?

1. There are programs which assist in this process

G. Discussion: Practical aspects of metadata and its use.

II. Which Wisconsin Supreme Court Rules and Comments Govern the Ethical Use and Handling of Metadata?

A. SCR 20:1.1 and Comment 5:

SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

...

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

B. SCR 20:1.6(a) and Comments 4, 16, and 17:

SCR 20:1.6 Confidentiality

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

...

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.

...

[16] a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the

representation of the client or who are subject to the lawyer's supervision.

...

[17] When 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. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy

C. SCR 20:4.4(b) and Comment 3:

SCR 20:4.4 Respect for rights of 3rd persons

(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.

...

[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.

D. SCR 20:8.4(c) and (g):

SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

...

(g) violate the Attorney's Oath

E. SCR 40.15:

SCR 40.15 Attorney's Oath

...

I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor . . .

I will maintain the confidence and preserve inviolate the secrets of my client . . .

F. ABA Model Rule 8.4(d):

It is professional misconduct to:

...

(d) engage in conduct that is prejudicial to the administration of justice;

G. Please note: These rules are different than discovery rules, or rules concerning the attorney client privilege or work product doctrine.

III. Which Wisconsin Formal Ethics Opinion Addressed Metadata and Ethical Issues?

A. Wisconsin Formal Ethics Opinion 12-01, the Transmission and Receipt of Electronic Documents Containing Metadata, addressed issues concerning the sending and receiving of electronic documents and searches for metadata.

1. Ethics Opinion 12-01 is in the Appendix with this Outline.

B. ABA Formal Opinion 06-442, concerning the review and use of metadata, is in the Appendix with this Outline.

IV. What Are the Ethical Obligations of a Lawyer Transmitting Electronic Documents?

A. SCR 20:1.6(a) and Comment 4 note that a lawyer shall not reveal information relating to the representation of a client, and must safeguard such information, unless impliedly authorized by the client.

B. SCR 20:1.1 and Comment 5 note that a lawyer must be competent.

1. This includes an obligation to competently safeguard information in electronic documents and take reasonable precautions so information does not come into the hands of an unintended recipient.

C. Lawyers are required to stay reasonably informed about metadata and electronic documents generated by their office and how to take steps, when necessary, to remove metadata.

1. Opinion 12-01, footnote 1: “A lawyer must be able to understand the technology in order to understand the risks involved in its use, and thus act competently to preserve the confidentiality of electronically stored or transmitted client information.”
2. A lawyer should not put their head in the sand or say “I’m too old to understand all this.”

D. What are reasonable precautions?

1. That depends on the sensitivity of the information and the method of transmission.

E. Discussion and suggestions.

V. May a Receiving Lawyer Ethically Search for Metadata?

A. There is a split among jurisdictions on this issue.

1. Arizona, Alabama, Maine, New York, and New Hampshire came to the conclusion that searching for metadata violates those states’ ethical rules.
2. ABA Opinion 06-442, Colorado, and Vermont came to the conclusion that searching for metadata does not violate ethical rules.
3. Pennsylvania and Minnesota came to no conclusion and found it must be determined on a case-by-case basis.

B. The minority view on the State Bar Professional Ethics Committee was that searching for metadata violates Wisconsin Supreme Court Rules.

1. The sending of metadata with confidential information should be assumed to be inadvertent.
2. Searching for metadata invades the confidential relationship of adverse counsel with their client.
3. Searching for metadata implicates dishonest activity.
4. Searching for metadata is not honorable or fair.

C. The majority view on the State Bar Professional Ethics Committee was that searching for metadata does not violate any Wisconsin Supreme Court Rule.

1. There is nothing inherently dishonest or deceitful in this behavior.
2. An absolute bar ignores the fact that sometimes there will be a duty of competent representation which requires closely examining an electronic document sent by adverse counsel.

D. Discussion.

1. What factors made a difference in the Ethics Committee’s analysis?

VI. Are Receiving Lawyers Compelled by Their Duty of Competence to Actively Search Documents for Metadata?

A. If a lawyer may ethically search for metadata, must that lawyer search for metadata to satisfy the requirement of competently and zealously representing a client?

B. Answer: No.

1. It is reasonable for the receiving attorney to assume that metadata of material significance which contains confidential information of the sending attorney will not be in the electronic document since it is reasonable to assume that the sending attorney is competent and removed such metadata. SCR 20:1.1 and 20:1.6.
2. Also, it is within the professional discretion of the receiving attorney as to whether to return the metadata unread. SCR 20:4.4, Comment 3 (discussed below).
3. So, generally, there is no requirement to search for metadata.

C. But, it may not be so simple. This section of the Opinion concludes with this sentence:

“The Committee notes, however, that specific circumstances may warrant that a lawyer search a specific document for metadata.”

1. Does this exception swallow the rule?
2. Discussion: What circumstances may require a lawyer to search for metadata?

VII. What are the Receiving Lawyer’s Obligations on Discovering that He or She Received Metadata that Appears to Contain Confidential Information?

A. In other words, now that you have looked and found metadata containing confidential information, what should you do next?

B. D.C. and Colorado take the position that the receiving attorney may not search (or must stop a search) for metadata which contains confidential information if the receiving attorney finds out the confidential information was sent inadvertently.

1. However, D.C. and Colorado have different rules than Wisconsin. Some states, but not Wisconsin, require the attorney who receives confidential information inadvertently to abide by the sender’s instructions.

C. Here is the analysis in Wisconsin:

1. The receiving lawyer finds in metadata confidential information sent by opposing counsel.
2. It is reasonable to assume that the sending attorney acted competently and sent the confidential information inadvertently.
3. That implicates SCR 20:4.4(b) and Comment 3:

“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that a document was inadvertently sent shall promptly notify the sender . . . 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.”

4. So, the receiving lawyer must inform the sending lawyer that confidential information has been found in the metadata but the receiving lawyer’s actions are then governed by the receiving lawyer’s professional judgment.
5. The sending attorney may then take further action after notification.

D. Please note: The receiving attorney’s duty to notify the sending attorney that they received confidential information supersedes the receiving lawyer’s duty to the client. The receiving lawyer must notify the sender even if the receiving lawyer’s client instructs the attorney not to do so.