
ETHICALMYSTERYCURES NEWSLETTER

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METADATA MANIA

So what is new in the area of metadata? Can one peak into an electronic document's metadata to discover hidden treasures? Or is such voyeurism strictly forbidden? Well, the answer to that question may depend upon the jurisdiction in which the issue arises.

In 2006, the ABA released ABA Formal Ethics Op. 06-442. Generally, the ABA Standing Committee On Ethics and Professional Responsibility stated that the Model Rules of Professional Conduct permit an attorney to review and use metadata contained in email and other electronically produced documents. Since that time 10 states have written opinions on the matter, some permitting its use and others not.

For example, in September 2006, Florida rendered its ethics opinion that an attorney has a duty to take reasonable steps to eradicate metadata from a document prior to sending. On the other hand, a receiver of such a document has a duty not to try to mine the metadata. If the receiving attorney inadvertently discovers metadata, he or she has a duty to notify the sending attorney. This opinion did not discuss e-discovery, something now permitted under both the Federal Rules of Civil Procedure and the Ohio Rules of Civil Procedure.

Later that same year, Maryland released its ethics opinion stating that lawyers

may review and use metadata in electronically produced documents in discovery. The sending attorney, according to the Maine opinion has a duty to remove all information subject to attorney-client confidentiality and work product. This opinion does address metadata within the scope of discovery.

The states that do not allow the mining of metadata in email and other electronically produced documents are Alabama (Op. 2007-02); Arizona (Op. 07-03); District of Columbia (Op. 341); Florida (Op. 06-2); Maine (Op. 196) and New York State/New York County Lawyer's Assn. (Op. 738) and New Hampshire (2008-2009/4).

These states reject the ABA's opinion on the basis that such documentation may contain attorney-client and/or work product information. These opinions do not address documentation that must be provided within the course of discovery, where redaction or destruction of metadata may lead to sanctions or other penalties.

Taking the opposite view and following the ABA position are Colorado (Op. 119); Maryland (Op. 2007-09); and Pennsylvania (Op. 2009-100).

These states place the initial burden of eradicating the metadata upon the sending attorney. Unless the information is inadvertently sent, mining this information is permitted. If it is clear that the metadata contains

attorney-client or work product information, however, the attorney has a duty to inform the sender of the receipt of this information.

Indeed, all opinions, whether they adopt the ABA position or reject it, make clear that it is the sending attorney's duty reasonably to ensure that metadata in emails and other electronically sent documentation is eradicated prior to sending. It is what occurs after that reasonable precaution is taken and information nevertheless is transmitted that creates the division. Further departure occurs in the allowance of the affirmative step of actually mining or seeking metadata once an electronic document is received.

Ohio has yet to declare whether it will follow the ABA position on this issue or depart from it as seven other states now appear to have done. The last pronouncement of the Board of Commissioners on Grievances and Discipline regarding inadvertently discovered information is contained in Board Op. 93-011. This opinion permits Ohio attorneys to both read and disclose to his or her client confidential information inadvertently obtained through a public records search. The lawyer has a duty, however, to notify opposing counsel.

Ohio's has yet to declare its position on the mining of metadata. Like Board Op. 93-011, Ohio's Rule 4.4(b) indicates only that where an attorney discovers that documentation (including email and other electronically sent items) was inadvertently sent, the lawyer has a duty to notify the sender. The comparison notes indicate that Ohio's Rule 4.4(b) is identical to Model Rule 4.4(b). Model Rule 4.4(b) was used as the basis for the

ABA's opinion that metadata can be mined.

So, what happens if the sender is in Arizona, which does not permit the mining of metadata, while the recipient is in Colorado, which does allow such conduct? Is the recipient permitted to mine the metadata because his or her jurisdiction permits it?

Such questions will, no doubt, be the next round to be addressed in the ever changing landscape of attorney practice. Likely the answer to such questions will involve issues such as whether the transmission occurred in the course of litigation, the forum state in which the legal matter occurred, which state has subject matter jurisdiction of the matter and things of that nature. Even that, however, may not rule the day.

Since an attorney practicing in another jurisdiction, whether *pro hac vice*, or temporarily via another rule, is subject both to that jurisdiction's disciplinary rules as well as the disciplinary rules of the state of licensure, it will be imperative to discover the rules of both jurisdictions. The best rule of thumb then is to err on the side of caution and use the most restrictive rule.

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