

## Beware of Metadata In Email Documents

In Opinion 782, December 8, 2004, the Committee on Professional Ethics turned to the issue of metadata in email documents. Both MS Word and WordPerfect include features that enable the recipients of email to view metadata. Metadata is generally defined as “data about data” and concerns the content, quality, condition, and other characteristics of data. The Committee defined metadata more precisely as any “data hidden in documents that is generated during the course of creating and editing such documents.”

It may include fragments of data from files that were previously deleted, overwritten or worked on simultaneously. Metadata may reveal the persons who worked on a document, the name of the organization in which it was created or worked on, information concerning prior versions of the document, recent revisions of the document, and comments inserted in the document in the drafting or editing process. The hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, legal advice provided by the lawyer, and other information.

The problem for lawyers is that the email they transmit may contain metadata which reveals information that is privileged, or the disclosure of which would be detrimental or embarrassing to the client. For example, a document transmitted to a party other than the client may contain as metadata prior edits and comments that would be protected as privileged attorney client confidences. Or, a prosecutor may transmit to a second confidential witness a cooperation agreement which reveals within its metadata the name of the first confidential witness, thus exposing the first witness to extreme risk.

DR 4101(B) prohibits a lawyer from “knowingly” (1) revealing a client’s confidence or secret, and (2) using a confidence or secret of a client to the disadvantage of the client. DR 4101(D) states:

A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client...

EC 45 instructs that “care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another.” Also, several earlier Ethics Opinions have confirmed the responsibility of the lawyer to take reasonable steps to ensure the integrity of a client’s confidences and secrets. See, N.Y. State 709 (1998); N.Y. City 9411.

The use of email presents special problems because it depends so extensively on technology beyond a lawyer’s general knowledge or training. Nevertheless, “reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with respect to the mode of transmission. See, N.Y. State 709 (1998), *supra*. The Committee noted but did not adopt the suggestions of some commentators that a lawyer has an

affirmative duty to remove metadata whenever documents are exchanged with opposing counsel or disclosed to the public. The Committee said:

While exercising reasonable care under DR 4101 may, in certain circumstances, require the lawyer to remove metadata (for example, where the lawyer knows that the metadata reflects client confidences and secrets, or that the document is being sent to an aggressive and technologically savvy adversary), in general the level of care required varies with the particular circumstances of the transmission. (Footnote [3].)

The lawyer who receives inadvertent or unauthorized metadata revealing an adversary's confidences or secrets is under a duty not to exploit the information. Use of the information constitutes "an impermissible intrusion on the attorney client relationship in violation of the Code" (quoting N.Y. State 749 (2003)). A lawyer who exploits an unauthorized communication of confidential information is guilty of conduct "involving dishonesty, fraud, deceit or misrepresentation" (DR 1102 (A) (4)), and of conduct which is "prejudicial to the administration of justice." (DR 1102 (A) (5)). See, N.Y. State 700 (1997).

Opinion 782 concluded, "Lawyers have a duty under DR 4101 to use reasonable care when transmitting documents by email to prevent the disclosure of metadata containing client confidences or secrets."