

NYCLA COMMITTEE ON PROFESSIONAL ETHICS

OPINION No. 738

Date Issued: 3/24/08

**Topic**

Searching inadvertently sent metadata in opposing counsel's electronic documents.

**Digest**

A lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents. This opinion does not address electronic documents in the form of document discovery. While attorneys are advised to take due care in sending correspondence, contracts, or other documents electronically to opposing counsel by scrubbing the documents to ensure that they are free of metadata, such as tracked changes and other document property information, an adversary may not ethically take advantage of a breach in the attorney's care by intentionally searching for this metadata. Using the metadata is unethical if the recipient's intent is to investigate opposing counsel's work product or client confidences or secrets or if the recipient is likely to find opposing counsel's work product or client confidences or secrets by searching the metadata. Using the metadata is appropriate in circumstances where the adversary has intentionally sent it, such as where the lawyers are using tracked changes to show one another their changes to a document. Without such a prior course of conduct to the contrary, however, there is a presumption that disclosure of metadata is inadvertent and would be unethical to view.

**Code Provisions**

DR 1-102(A)(4), DR 1-102(A)(5), DR 4-101; EC 4-1; EC 7-1, DR 7-101, DR 7-102(A)(8)

**Question**

Is an attorney ethically permitted to search metadata<sup>1</sup> in electronic documents sent by opposing counsel, which is not in the form of a document production?

**Opinion**

A lawyer who sends opposing counsel correspondence, contracts, or other similar documents electronically – as is now often the case – has the burden to take due care in appropriately scrubbing documents prior to sending them outside of the office or in sending them

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<sup>1</sup> Metadata means information describing the history, tracking, or management of an electronic document, which may include changes that were made to a document and other document properties. See Advisory Committee note to Federal Rule of Civil Procedure 26(f) (Dec. 2006).

in a way that otherwise ensures that the documents are free of metadata.<sup>2</sup> As the ethics committees of several state bar associations and the American Bar Association (“ABA”) have recently opined on the issue of searching metadata in documents and have come to differing conclusions, the NYCLA Ethics Committee has determined that it would be of interest also to consider this issue. This opinion provides guidance under the Code for the lawyer who receives from opposing counsel electronic correspondence, contracts, or other similar documents – not in the form of document discovery – that contain metadata.<sup>3</sup>

While the New York Code of Professional Responsibility (the “Code”) does not directly address this issue, several disciplinary rules and ethical considerations in the Code relate to the topic. A lawyer is prohibited from engaging in conduct that involves “dishonesty, fraud, deceit, or misrepresentation” or is “prejudicial to the administration of justice.” DR 1-102(A)(4); DR 1-102(A)(5). Yet, a lawyer is ethically obligated to represent clients zealously, to assist in achieving their legitimate goals, and to preserve their confidences and secrets. *See* DR 7-101 (“Representing a Client Zealously”); DR 4-101 (“Preservation of Confidences and Secrets of a Client”); EC 4-1. EC 7-1 cautions that a lawyer should represent the client “zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.” Further, DR 7-102(A)(8) prohibits a lawyer from knowingly engaging in conduct “contrary to a Disciplinary Rule.” As is often the case, the ethics issues implicated here involve balancing the duty of zealous representation with the lawyer’s duty of being an officer of the court.

### *Similar to Inadvertent Disclosure*

In a 2002 opinion, the NYCLA Ethics Committee advised on whether a lawyer has ethical obligations when receiving inadvertently disclosed privileged information. NYCLA Op. 730 (2002). The Committee determined that the Code does not directly address the issue, but that Model Rule of Professional Conduct 4.4(b) adopted by the ABA – “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” – provided guidance that New York lawyers should emulate. *Id.* Thus, the Committee instructed an attorney who received an inadvertent disclosure with privileged information to report the disclosure to opposing counsel without further review of the document. *Id.*; *see also* New York City Bar Op. 2003-04 (2003) (opining that in the case of inadvertent disclosure, the receiving attorney must notify the sending attorney of the disclosure).

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<sup>2</sup> Scrubbing means removing metadata such as tracked changes and comments from a document. A document may be scrubbed using commercially available software, but this software is not always successful in removing all metadata. Other forms of electronically sending material in a protected manner include sending the document as a PDF after scanning it. *See* Roy Simon, Simon’s New York Code of Professional Responsibility Annotated, at 589 (2007 ed.) (“[I]t is more and more difficult for lawyers to justify ignorance about metadata or to justify sending sensitive metadata to another lawyer, and more and more likely that ‘reasonable care’ includes removing metadata before sending a document.”).

<sup>3</sup> This opinion does not address electronic documents that have been produced in the way of discovery, which often includes metadata that by agreement may be viewed by attorneys in the course of litigation. For recent discussions in other jurisdictions of ethics in reviewing metadata in the context of electronic document discovery, *see* Maryland State Bar Opinion 2007-09 (2007) and District of Columbia Ethics Opinion 341 § B (2007).

By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. *See* NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5).

Other situations may arise where it is not clear whether supplying a document containing metadata is an "inadvertent" disclosure. For example, if a lawyer sends material clearly showing tracked changes, the recipient will have to determine from the circumstances in that matter whether the sender intended to send a document showing changes or whether it appeared to be a mistake and the document is likely to contain privileged material. If the receiving lawyer reasonably believes that the disclosure was intentional because, for example, they had been using tracked changes to show one another the changes that each was making, it is not unethical for the receiving lawyer to review the metadata. Without such a prior understanding or course of conduct to the contrary, however, there is a presumption that disclosure of metadata is inadvertent and would be unethical to view.

Also, a situation may arise where a lawyer has a reason for investigating metadata that is not for the purpose of intending to uncover attorney work product or client confidences or secrets or if the lawyer is likely to find such privileged material. For example, if a lawyer is facing a *pro se* litigant and suspects that a lawyer is nonetheless drafting the pleadings for the *pro se* litigant, the lawyer who searches the properties to see whether a lawyer has drafted the material is not likely to uncover attorney work product or client confidences or secrets and may not be intending to uncover such material because a *pro se* litigant does not have the attorney work product protection. And, as mentioned above, this opinion does not consider electronic documents in the form of document discovery.

### ***ABA and NYSBA Difference of Opinions***

The ABA Ethics Committee issued an opinion in 2006 that permitted review of metadata in documents opposing counsel sends electronically. *See* ABA Formal Op. 06-442 (2006). The ABA explained that its ethics committee disagrees with authorities that have related the issue of metadata in an adversary's electronic documents to a lawyer's honesty. *Id.* (disagreeing with New York State Bar Association ("NYSBA") Ethics Opinion 749 (2001), *aff'd* by NYSBA Op. 782 (2004), that did not permit mining for such metadata).<sup>4</sup> Further, the ABA explained that

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<sup>4</sup> The ABA also disagreed with a Florida Bar Professional Ethics Committee proposed opinion, which has since been adopted, that was similar to the NYSBA opinion. *See* Prof'l Ethics of the Florida Bar Op. 06-2

Model Rule of Professional Conduct 4.4(b), which relates to a lawyer's receipt of inadvertently sent information, is the "most closely applicable rule" but determined that the issue is not sufficiently related. *Id.* at 3 & n.7 ("The Committee does not characterize the transmittal of metadata either as inadvertent or as advertent, but observes that the subject may be fact specific."). Instead, the ABA focused on the duties of the attorney sending the electronic data to scrub the data properly to avoid disclosing client confidences and secrets. *See id.*

As noted above, the NYSBA Ethics Committee advised that a lawyer may not use available technology to "surreptitiously examine" electronic documents. NYSBA Op. 749 (2001). The NYSBA found that by mining for metadata, a lawyer would "violate the letter and spirit" of the disciplinary rules that promote "the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship." *Id.* (citing DR 1-102(A)(4), (5); DR 4-101; DR 7-102(A)(8)).<sup>5</sup>

While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document.

This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.

## Conclusion

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(2006). Since the ABA opinion came out, the Alabama and Arizona state bar associations have also issued ethics opinions that prohibit mining an adversary's inadvertent electronic metadata. *See* Alabama State Bar Op. 2007-02 (2007); State Bar of Arizona Ethics Op. 07-03 (2007). The District of Columbia has recently issued an ethics opinion that prohibits a lawyer from mining an adversary's electronic metadata only where the lawyer has actual knowledge that the metadata was inadvertently sent. D.C. Ethics Op. 341 § A (2007).

<sup>5</sup> While New York does not follow the ABA Model Rules and thus is not bound by an ABA ethics opinion, the conflicting opinions still may affect New York lawyers. *See* Roy Simon, Simon's New York Code of Professional Responsibility Annotated, at 589 (2007 ed.):

Given that lawyers in most jurisdictions in the United States have adopted the ABA Model Rules, a [New York] lawyer sending a digital attachment to an out-of-state lawyer should assume that the receiving lawyer may ethically study the metadata embedded in the document as long as the lawyer notifies the sending lawyer that the metadata has been received. Indeed, if a receiving lawyer believes that the metadata was sent deliberately rather than inadvertently – often a plausible conclusion, given the ease of removing metadata – then the lawyer need not even notify the sender that the metadata has been received and even in New York may freely exploit it.

A lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents. While attorneys are advised to take due care in sending correspondence, contracts, or other documents to opposing counsel by scrubbing the documents to ensure that they are free of metadata, an adversary may not ethically take advantage of a breach in the attorney's care by intentionally searching for metadata. Using the metadata is unethical if the recipient's intent is to investigate opposing counsel's work product or client confidences or secrets or if the recipient is likely to find opposing counsel's work product or client confidences or secrets by searching the metadata. Without a prior understanding to the contrary, there is a presumption that disclosure of metadata is inadvertent and would be unethical to view.