OPINION NO. 22

A Lawyer's Ethical Obligations Regarding Metadata

A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. *See* Minn. R. Prof. Cond. 1.1 and 1.6. The lawyer's duties with respect to such information extends to and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents.

If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Minn. R. Prof. Cond. 4.4(b).

Adopted: March 26, 2010.

Comment

Metadata Generally

Metadata, sometimes defined as data within data, is used in this Opinion to refer to information generated and embedded in electronically created documents. Metadata is generated automatically by software when an electronic document is created, accessed and modified and typically may include such information as the date the document was created, the author, and the date changes were made to the document. Other times metadata may be purposely created, such as when the author adds comments or other information visible in the document's electronic format but which may not be visible in its printed version. When electronic documents are transmitted electronically - for example, as a Word document attached to an e-mail - the metadata is transmitted with the document.

Metadata con be "scrubbed" or removed from an electronic document by various means, including the use of special software programs or by scanning a printed copy of the document and sending it in a PDF format. Transmission of metadata can also be avoided by transmitting hard copies of the document rather than electronic copies or by faxing the document.

Metadata embedded in an electronic document can be "mined" or viewed by a recipient of the document. Some metadata can be accessed simply by right-clicking a mouse or selecting "properties" or "show markup" on a Word document. Other metadata can be accessed by the use of special software programs.

There are many types of metadata, many ways of creating metadata, and many means for removing and accessing metadata, all of which will undoubtedly continue to expand and evolve with technological innovation.

Most metadata is not confidential, and the disclosure of metadata may often be intentional and for the mutual benefit of clients with adverse interests. Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the

document by not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Due to the hidden, or not readily visible, nature of metadata and the ease with which electronic documents can be transmitted, a potential exists for the inadvertent disclosure of confidential or privileged information in the form of metadata in both a litigation and non-litigation setting, which in turn could give rise to violations of lawyer's ethical duties.

Applicable Rules

Minn. R. Prof. Cond. 1.1 states that "[a] lawyer shall provide competent representation to a client." Comment 5 to Rule 1.1 provides that "[c]ompetent handling of a particular matter includes . . . use of methods and procedures meeting the standards of competent practitioners."

As noted in American Bar Association Formal Opinion 06-442 (2006) at 1:

> *In modern legal practice, lawyers regularly receive e-mail, sometimes with attachments such as proposed contracts, from opposing counsel and other parties. Lawyers also routinely receive electronic documents that have been made available by opponents, such as archived e-mail and other documents relevant to potential transactions or to past events. Receipt may occur in the course of negotiations, due diligence review, litigation, investigation, and other circumstances.*

Competence requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, that recipients of the documents can access metadata, and that actions can be taken to prevent or minimize the transmission of metadata.

Minn. R. Prof. Cond. 1.6(a) states that, "[e]xcept when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client." Comment 2 to the rule explains that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." Comment 15 provides that "[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"; and Comment 16 further provides that "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."

Opinion No. 22 makes clear that the duty imposed by Minn. R. Prof. Cond. 1.6(a) regarding client information extends to and includes metadata in electronic documents. Thus, a lawyer must take reasonable steps to prevent the disclosure of confidential metadata. See ABA/BNA Lawyers' Manual on Professional Conduct 55:401 (2008) ("When a lawyer sends, receives, or stores client information in electronic form, the lawyer's duty to protect that information from disclosure to unauthorized individuals is the same as it is for information communicated or kept in any other form.").

Minn. R. Prof. Cond. 4.4(b) states that "[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." Comment 2 to the Rule explains that lawyers sometimes receive documents that were mistakenly sent and that "[i]f a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to

promptly notify the sender in order to permit that person to take protective measures." Comment 2 states that "[f]or purposes of this rule, 'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form. Opinion No. 22 makes clear that the duty imposed by Minn. R. Prof. Cond. 4.4(b) regarding documents extends to metadata in electronic documents.

"Whether 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." Comment 2 to Minn. R. Prof. Cond. 4.4.

The generation, transmittal and receipt of documents containing metadata also implicates ethical obligations under Minn. R. Prof. Cond. 5.1 and 5.3.

Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.

A layer may be subject to a number of obligations other than those provided by the MRPC in connection with the transmission and receipt of metadata, including obligations under the Federal Rules of Civil Procedure and the Minnesota Rules of Civil Procedure. Removing metadata from evidentiary documents in the context of litigation or in certain other circumstances may be impermissible or illegal. Opinion No. 22 addresses only a lawyer's ethical obligations regarding metadata under the Minnesota Rules of Professional Conduct.