You are working on the sale of a division and have just received a draft of the proposed transaction documents from the general counsel's office of the buyer. The thought occurs to you that maybe there's some information embedded in the document that you should take a look at—prior versions, notations, and possibly some analysis of the pros and cons. Wouldn't extracting such information constitute zealous advocacy within ethical norms? After all, everyone knows about metadata and should be aware of how to "scrub" an electronic document of any confidential information before sending it out for others to view. Can it be wrong to mine the opposing counsel's draft for metadata?

Fool's Gold: Mining of Metadata

BY JOHN K. VILLA

Hold that shovel! There are limits to zealous advocacy and apparently the ethics rules protect those who don't protect themselves.

While it's probably true that most everyone in the known world now knows about metadata and the existence of methods for cleaning an electronic document, it doesn't necessarily follow that you can ethically unearth metadata that may contain confidential or privileged information. In fact, most state ethics commissions that have addressed the issue outside the discovery context[1] have concluded that it is unethical for a lawyer to review or use metadata inadvertently included in a transmission of electronic documents—even if inclusion of the metadata resulted from a lapse on the part of the sending lawyer to clean the documents. The origins and evolution of this rule suggest that ethics committees initially viewed mining for metadata as the moral equivalent of dumpster diving—which is frowned upon (and unhealthy too) but the rule has survived through to today when arguably it has been overtaken by increased consciousness of these risks. Since the opinions vary in their reasoning—and a few, in their conclusions—let's take a closer look.

In the first opinion to address the mining of metadata, the New York State Bar Association's Committee on Professional Ethics concluded that the use of available computer technology to surreptitiously examine the hidden information contained in electronic documents "constitutes an impermissible intrusion on the attorney-client relationship in violation of the Code."[2] Writing in 2001, when knowledge of metadata's existence and methods for its removal was not well known, the committee opined that any disclosure of the hidden information would be neither a knowing or voluntary act on the part of the sending lawyer.[3] Instead, such disclosure would be the result of "a deliberate act by the receiving lawyer"[4]—an act that would violate "the letter and the spirit" of the disciplinary rules proscribing conduct "involving dishonesty, fraud, deceit, and misrepresentation," and that which "is prejudicial to the administration of justice."[5] According to the committee, prohibiting such conduct would not only promote the strong public policy in favor of preserving confidentiality within the context of the attorney-client relationship, but would also be "consistent with [existing] ethical restraints on uncontrolled advocacy."[6] You can understand the committee's conclusion because few lawyers understood the risks of metadata in 2001 and would not take steps to protect it. What is surprising is that the rule, as they say, has legs now that it is simple to avoid the disclosure.

Since 2001, both state and local ethics committees in New York have reaffirmed the position that the mining of metadata is ethically impermissible. For example, while recognizing that a lawyer must exercise reasonable care to prevent the disclosure of confidential or secret information when sending an electronic document to opposing counsel or third parties, the state bar association's Committee on Professional Ethics cited its 2001 opinion and reiterated that lawyers who receive electronic documents "also have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets."[7] And, more recently, the ethics committee of the New York County Lawyers' Association opined that when a lawyer receives correspondence or other material containing metadata, the presumption exists that the disclosure of the metadata was inadvertent;[8] therefore, the receiving lawyer "may not ethically search the metadata in those electronic documents with the intent to find privileged material . . . if finding privileged material is likely to

JOHN K. VILLA is a partner with Williams & Connolly LLP in Washington, DC. He specializes in corporate litigation (civil and criminal) involving financial services; directors', officers', and lawyers' liabilities; securities; and related issues. He is an adjunct professor at Georgetown Law School and a regular lecturer for ACC. He is also the author of *Corporate Counsel Guidelines*, published by ACC and West. He can be contacted at jvilla@wc.com.

occur from the search."[9] As explained by the committee, even though the sending lawyer "has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur" that should not be taken advantage of by the receiving lawyer.[10]

Other state ethics commissions concur with the New York view, though not necessarily on all of the same grounds. The state ethics commission in Alabama has opined that the unauthorized mining of metadata to uncover confidential information constitutes a violation of Rule 8.4 of the Alabama Rules of Professional Conduct which, like its New York counterpart, prohibits conduct involving "dishonesty, fraud, deceit, or misrepresentation" or conduct "prejudicial to the administration of justice."[11] State ethics commissions of Arizona and Florida largely base their opposition to metadata mining on their respective versions of Rule 4.4 dealing with inadvertent disclosures, as well as on their rules governing client confidentiality.

Pursuant to Rule 4.4(b) of Arizona's Rules of Professional Conduct, a lawyer who receives a document that she knows or reasonably should know was inadvertently sent has the obligation to notify the sender "and to preserve the status quo for a reasonable period of time to permit the sender to take protective measures." According to the ethics committee of the Arizona State Bar, this rule applies to electronic documents containing embedded metadata that reveals confidential information.[12] Although acknowledging that the sender of an electronic document has the duty to take reasonable measures to prevent the inadvertent disclosure of confidential client information, the ethics committee has also recognized that because "it may not be possible for the sending lawyer to be absolutely certain that all of the potentially harmful metadata has been 'scrubbed' from the document[,]" the receiving lawyer has a corresponding duty not to mine the document for any embedded metadata.[13] Where a lawyer receives an electronic document and innocently discovers the existence of metadata that the lawyer knows or reasonably should know is revealing confidential or privileged information, the committee has concluded that the recipient lawyer must follow the notification and document preservation procedures set forth in Rule 4.4(b).[14]

Like Rule 4.4 of the Arizona Rules of Professional Conduct, Florida's version of this rule also requires the recipient of an inadvertent disclosure of confidential information to notify the sender of her receipt of this material.[15] While recognizing that a sender of electronic information has a duty to take reasonable steps to safeguard confiden-

tial information that may be included in metadata, the ethics committee of the Florida Bar, like the Arizona ethics committee, has similarly concluded that under this rule a recipient lawyer has an ethical duty to refrain from mining metadata for confidential client information that the recipient knows or should know is not intended for her, and to notify the sender if she "inadvertently obtains information from metadata that [she] knows or should know was not intended for" her receipt.[16]

Ah, but there is a discordant strain: Not all ethics commissions turn up their noses at metadata mining.

For example, the American Bar Association (ABA) has concluded that, in the absence of a specific prohibition in the Model Rules, it is generally permissible for a recipient lawyer to review and use metadata embedded in an electronic document sent by opposing counsel.[17] According to the ABA, even if the transmission of metadata is regarded as inadvertent under Model Rule 4.4(b)—the same version adopted by Florida—that rule is silent as to the imposition of any additional duties on the part of the recipient lawyer other than the duty to notify the sender.[18] Contrary to the Florida ethics committee, the ABA refused to imply any further obligations under that rule or under general principles pertaining to a lawyer's honesty, but instead, shifted the focus on the sending lawyer and the methods available to reduce or eliminate the transmittal of embedded metadata:

> *Some authorities have addressed questions related to a lawyer's search for, or use of, metadata under the rubric of a lawyer's honesty, and have found such conduct ethically impermissible . . . . The committee does not share such a view, but instead reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on the receiving lawyer's conduct found in other Rules . . . .*
>
> *The committee observes that counsel sending or producing electronic documents may be able to limit the likelihood of transmitting metadata in electronic documents. Computer users can avoid creating some kinds of metadata in electronic documents in the first place . . . . Computer users also can eliminate or "scrub" some kinds of embedded information in an electronic document before sending, producing, or providing it to others. . . .*[19]

Under the ABA's view, therefore, once the recipient lawyer has fulfilled her duty to notify the sender of the inadvertent transmittal of embedded metadata, she is free to review and use the hidden information.

Like those in Alabama, the professional conduct rules adopted by the District of Columbia impose a twofold obligation on a lawyer who receives inadvertent disclosures of confidential information: a duty to notify and a duty to await the instructions of the sending lawyer as to the proper disposition of the inadvertently disclosed information.[20]

But unlike the Alabama rules, the duties imposed by Rule 4.4(b) of the DC Rules of Professional Conduct are only implicated when the recipient lawyer "knows, before examining the writing, that it has been inadvertently sent."[21] In the absence of such actual prior knowledge, the Legal Ethics Committee of the DC Bar has concluded that the recipient lawyer has no ethical obligation to refrain from reviewing the metadata.[22]

Finally, in Maryland, the remaining jurisdiction to have reported a decision as to the ethical propriety of unearthing metadata,[23] the Maryland State Bar's Committee on Ethics has opined that a recipient lawyer may ethically review and use metadata without first ascertaining whether inclusion of the metadata was intended by the sender.[24] In making this determination, the committee relied on the difference between the Maryland professional conduct rules governing inadvertent disclosures and those of the ABA: While the ABA imposes a duty to notify of an inadvertent disclosure, there is no such duty under the Maryland rules.[25]

It is difficult to tell where the law will go on mining of metadata. The author's prediction is that the initial rule, adopted at a time when metadata was largely unknown, will soon fall by the wayside. It will be deemed that a lawyer must take reasonable steps to protect metadata as well as other confidential aspects of the attorney-client relationship, and that the failure to do so will constitute a waiver. But until then, check your local ethics committee before pulling out that shovel.

Oh yes, and, dumpster diving is unethical.[26]

Editor's Note: There are a number of resources on the web about removing metadata from your work. For example, see http://support.microsoft.com/kb/223396.

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1. Many of the opinions are expressly limited to the propriety of metadata mining outside the discovery process since the issue, when raised during discovery, may be subject to electronic discovery rules, such as those set forth in the Federal Rules of Civil Procedure. *See, e.g.*, DC Bar Legal Ethics Op. No. 341 (2007).
2. N.Y. State Bar Ass'n Comm. On Prof'l Ethics, Formal Op. 749 (2001).
3. *Id.* at ¶ 10 (analogizing to inadvertent or careless disclosures of confidential information, and noting that the use of technology to mine metadata from electronic documents "present[s] an even more compelling case against surreptitious acquisition and use of confidential or privileged information than that presented by the 'inadvertent' or 'unauthorized' disclosure decisions.").

4 *Id.*
5 *Id.* at ¶ 6 (referencing DR 1-102(A)(4) and DR 1-102(A)(5), respectively, of the *N.Y Code of Professional Responsibility*).
6 *Id.* at ¶ 11.
7 N.Y. State Bar Ass'n Comm. On Prof'l Ethics, Formal Op. 782 (2004), at ¶¶5-6.
8 N.Y.C.L.A. Comm. on Prof'l Ethics, Op. No. 738 (2008), at ¶ 9 (recognizing, however, that such a presumption would not exist where there was a prior understanding or a course of conduct between the parties to the contrary).
9 *Id.* at ¶ 14.
10 *Id.* at ¶ 13.
11 Ala. State Bd. Disciplinary Comm., Op. No. 2007-02 (2007), at ¶ 15.
12 State Bar of Ariz., Comm. on the Rules of Prof'l Conduct, Formal Op. 07-03 (2007), at ¶ 18.
13 *Id.* at ¶ 17.
14 *Id.* at ¶¶18-21.
15 *See* Fla. Rules of Prof'l Conduct, Rule 4.4(b), providing 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." Unlike the Arizona version, there is no additional duty to preserve the status quo, after notification, in order to enable the sender to take protective measures, though this purpose for the duty to notify is set forth in the commentary to the rule.
16 Prof'l Ethics of the Fla. Bar, Op. No. 06-02 (2006), at ¶ 11.
17 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006), at ¶¶2, 6.
18 *Id.*
19 *Id.* at ¶¶6-7 (footnotes omitted).
20 *See* D.C. Rules of Prof'l Conduct, Rule 4.4(b).
21 *Id.*
22 D.C. Bar Legal Ethics Comm., Eth. Op. 341 (2007), at ¶ 9. According to the committee, actual knowledge exists if the recipient lawyer is told by the sending lawyer of the inadvertence prior to the recipient lawyer's review of the document, or if, upon immediate review of the metadata, it is clear to the recipient lawyer that protected information was inadvertently included. *Id.* at ¶ 11.
23 While the Committee on Legal Ethics and Professional responsibility of the Pennsylvania Bar has addressed this issue, it has found that the Pennsylvania Rules of Professional Conduct neither prohibit nor condone a lawyer's mining of metadata inadvertently included in a transmission of electronic documents; therefore, it has concluded that under these rules, the decision as to whether to utilize the metadata is a matter for the lawyer to make based upon the lawyer's judgment and the particular factual situation. *See* P.B.A. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2007-500, an abbreviated version of which is available at 30 Pa. Lawyer 46 (Jan.-Feb. 2008).
24 Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007).
25 *Id.* at ¶¶4-5.
26 *See* Alaska Bar Ass'n Eth. Comm., Op. 79-2 (Sept. 9, 1979) (opining that "digging through and removing opposing counsel's trash" is improper since "[it] violates, if not the express letter of the Code of Professional Responsibility, then at least the spirit of it[.]").

STEP UP TO THE CHALLENGE

TIMOTHY J. MAYOPOULOS
Executive Vice President and General Counsel
Bank of America Corporation

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