

## **Lawyers Receiving Electronic Documents are Free to Examine 'Hidden' Metadata: ABA Ethics Opinion**

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Lawyers who receive electronic documents are free to look for and use information hidden in metadata information embedded in electronically produced documents even if the documents were provided by an opposing lawyer, according to a new ethics opinion from the American Bar Association.

The opinion is contrary to the view of some legal ethics authorities, which have found it ethically impermissible as a matter of honesty for lawyers to search documents they receive from other lawyers for metadata or to use what they find, according to the ABA Standing Committee on Ethics and Professional Responsibility.

But the ABA committee said the only provision in the ABA Model Rules of Professional Conduct relevant to the issue merely requires a lawyer to notify the sender when the lawyer receives what the lawyer should reasonably know were inadvertently sent documents. It does not require the recipient to return those documents unread. The committee also made clear that it was not addressing situations in which documents are obtained through criminal, fraudulent, deceitful or otherwise improper conduct.

The ABA committee noted metadata is ubiquitous in electronic documents, and includes such information as the last date and time that a document was saved and by whom, data on when it was accessed, the name of the owner of the computer that created the document and the date and time it was created, and a record of any changes made to the document or comments written into it.

Other types of metadata may or may not be as well known and easily understandable ... Moreover, more thorough or extraordinary investigative measures sometimes might permit the retrieval of embedded information that the provider either did not know existed, or thought was deleted, said the opinion. And while the opinion said most metadata probably is of no import, it added that the metadata can sometimes reveal such critical information as who knew what when, or negotiating strategy and positions.

Lawyers who are sending, producing or providing documents to opposing counsel can limit the likelihood of transmitting metadata by avoiding creation of it in the first place, in such ways as not redlining or embedding comments in the document, or by scrubbing the metadata out before they transmit the documents, according to the opinion. As another option, they can provide the same document in a different format, such as hard copy or facsimile.

Lawyers also may be able to limit the harm of revealing metadata through negotiating confidentiality agreements or protective orders to prevent introduction of evidence based on the information, but Of course, if the embedded information is on a subject such as her clients willingness to settle at a particular price, then there might be no way to pull back that information, said the opinion.

The ABA Standing Committee on Ethics and Professional Responsibility periodically issues ethics opinions for the guidance of lawyers, courts and the public interpreting and applying the ABA Model Rules of Professional Conduct to specific issues of legal practice and client-lawyer relationships.

ABA members may download complimentary copies of ethics opinions for a period of one year after they are released, at the Center for Professional Responsibility website, [www.abanet.org/cpr/pubs/home.html](http://www.abanet.org/cpr/pubs/home.html). Information about how nonmembers can obtain copies of opinions also is posted there.

With more than 413,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.