

# Ethical Implications of Electronic Metadata in Documents

BY JOHN R. BIELEMA

Consider the following hypothetical situation: In recently filed litigation, you and your opposing counsel are in the process of preparing a preliminary report and discovery plan for filing with the court, as required by that court's rules. After reviewing the draft, your client sends you a version marked with track changes, deleting and modifying portions of the statement of the case and adding comments that question the validity of some of the asserted defenses, as well as emphasizing that the goal is to settle the case early. You incorporate your client's changes and modify the text to meet the substance of his comments, save the document, and then forward your proposed draft by email to opposing counsel for comments. Have you done anything wrong?

A recent, first-of-its-kind opinion by the New York State Bar Association suggests that, indeed, you may have violated an ethical rule. In an opinion late last year, the New York State Bar Association's Committee on Professional Ethics issued an opinion holding that, due to the presence of electronic metadata on certain computer-generated drafts, such a transmission may violate DR 4-101(B) of the Applicable Code of Professional Responsibility.<sup>1</sup> That provision states that a lawyer shall not "knowingly" reveal a client's confidence or secret. In order to understand how the simple transmission of a document by email to opposing counsel or a third party could violate this provision, it is first necessary to understand what metadata is.

Metadata is information contained in an electronically generated document that is not visible to the naked eye but is nonetheless accessible. It is present in documents created in Microsoft Word and WordPerfect, among other word processing systems, and includes a variety of information, such as who has accessed the document, the drafting history of the document, comments and revisions to the document, and time spent editing the document. While metadata is not immediately visible upon opening an electronically transmitted document, it is nonetheless there and can be accessed relatively easily.

It is the presence of metadata in electronically generated documents that could implicate the ethical rule about not knowingly revealing a client confi-

dence, and it is the reason why, in the example at the outset of this article, you may have run afoul of this rule by transmitting your draft to opposing counsel, complete with your client's revisions and comments buried within the document. The Committee on Professional Ethics's reasoning appears to be based on a belief that the concept of metadata is, or at least should be, known widely enough that to transmit a document without removing metadata can essentially constitute a "knowing" betrayal of client confidence. The opinion therefore holds that "Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by email to prevent the disclosure of metadata containing client confidences or secrets."

The committee has also previously found that exploration of the other side's privileged or confidential communications, discovered by snooping around in metadata, is itself "an impermissible intrusion on the attorney-client relationship" in violation of the code.<sup>2</sup> That prohibition, however, would not apply to nonlawyer third parties who receive documents laden with confidential information in the form of metadata.

Plenty of software programs are available to allow the sender of an electronically generated document to remove metadata before email transmission, and many lawyers and law firms already use them. Many of these programs will automatically prompt the user with the message "Would you like to remove metadata from this document?" prior to allowing transmission of the draft by email. In light of this recent opinion from the New York Bar Association, implementing such a software program, or otherwise learning how to remove metadata prior to transmission, is not only prudent but may be essential to avoid a potential violation of the ethical rules. ■

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<sup>1</sup> New York State Bar Association, *Committee on Professional Ethics*, Opinion 782, Dec. 8, 2004.

<sup>2</sup> New York State Bar Association, Opinion 749 (2003).