

ETHICS OPINION 2009-1

“Metadata” refers to electronically stored information about electronic documents. Metadata often is included in files that are stored electronically. It may be apparent on the face of an electronic document, or may be hidden. Some metadata may be innocuous and unimportant, revealing basic information about dates an electronic file was created and edited. On the other hand, however, sensitive and confidential information, including comments reflecting attorney-client communications and tracked changes revealing work product, may also be contained in metadata embedded in electronic documents. When documents are transmitted and received electronically, tools may be available that enable the recipient to search for hidden metadata.

In this opinion, the Vermont Bar Association Professional Responsibility Section concludes that the Vermont Rules of Professional Conduct (“VRPC”) do not compel a specific answer to the question whether a lawyer can search for metadata within an electronic document prepared by and received from opposing counsel. The Section further concludes that a lawyer who receives an electronic document from opposing counsel that contains inadvertently disclosed, privileged and confidential metadata must notify the sending lawyer, with the question whether the receiving lawyer can use this information being decided by a court of competent jurisdiction. With respect to discovery practice in the litigation context, the Section concludes that, with limited exceptions relating to privileged matters, lawyers are obligated to disclose all responsive information including metadata to opposing counsel, and nothing prohibits the recipient from searching for electronic information about the history of the document or file.

Questions Presented:

The Vermont Bar Association Board of Managers has posed a series of questions to the Professional Responsibility Section about metadata.

The Board first inquires as follows about situations where a lawyer receives an electronic file from opposing counsel: (a) Can the receiving lawyer use tools in the program that created the file to mine¹ for metadata?; (b) Can the receiving lawyer use more specialized tools to mine for metadata?; (c) Can the receiving lawyer engage the “track changes” function to review the history of edits made to the document; (d) Is the receiving lawyer’s responsibility different if the sending lawyer has inadvertently left the “track changes” function engaged, so that the entire history of changes to the document are exposed without any action being taken by the receiving lawyer.

The Board also inquires about disclosure of and searching for metadata during discovery in the litigation context, including whether (a) in the absence of a court order addressing discovery issues relating to metadata, lawyers or parties can mine for metadata in documents received from the opposing party during discovery; and (b) whether it is permissible for a party to remove metadata from documents before disclosing them during discovery.

¹ The Section notes that the term “mine” appears to be a pejorative characterization of the use of electronic tools to analyze electronic documents. Throughout this Opinion, the phrase “search” is used in place of the phrase “mine,” because it characterizes the search for embedded metadata in a more neutral manner.

Analysis

The questions presented by the VBA Board of Governors pose a number of inquiries. First, does a lawyer who sends electronic documents to opposing counsel have a duty to exercise reasonable care to avoid disclosing confidential metadata? Second, can a lawyer who receives electronic documents from opposing counsel search those documents for metadata? Third, what steps should be taken by a lawyer who becomes aware that electronic documents received from opposing counsel contain metadata? These questions have been the subject of a growing body of ethics opinions issued by the American Bar Association and various State Bar Associations. This opinion now summarizes the conclusions of these opinions and expresses its view on each.

Potentially Applicable Provisions of the Vermont Rules of Professional Conduct

As discussed in detail below, no provisions of the VRPC speak directly to the questions presented in this Opinion, although recently adopted VRPC 4.4(b), which becomes effective September 1, 2009, does address the obligation of a lawyer who receives inadvertently disclosed documents. The following provisions of the Rules, reprinted below in the form in effect in Vermont as of September 1, 2009, have formed the legal bases for Ethics Opinions issued by other Bar Associations reaching contradictory conclusions about the questions presented.

VRPC 1.1 Competence:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

VRPC 1.3 Diligence:

A lawyer shall act with reasonable diligence . . . in representing a client.

VRPC 1.6(a) Confidentiality of Information:

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent

VRPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
. . . . or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

VRPC 4.4 Respect for Rights of Third Persons:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) 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.

VRPC 8.4 Misconduct:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in a "serious crime," defined as illegal conduct involving any felony or involving any lesser crime a necessary element of which is interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime";

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice

Duty of Sending Lawyer

The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process. See Alabama Ethics Op. RO 2007-02; Arizona Ethics Op. 07-03; Colorado Ethics Op. 119 (2008); DC Ethics Op. 341 (2007); Florida Ethics Op. 06-2; Maryland Ethics Op. 2007-09; New Hampshire Ethics Op. 2008-2009/4; New York City Lawyers Ass'n Ethics Op. No. 738 (2008); New York State Ethics Op. 782 (2004). A number of other ethics opinions note that a sending lawyer has tools available to prevent against the risk of disclosing client confidences when electronic documents are transmitted to opposing counsel, but do not affirmatively address the scope of the sending lawyer's duty to take these steps. See Pennsylvania Formal Ethics Op. 2007-500; ABA Formal Ethics Op. 06-442.

This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file. This duty has its roots in VRPC 1.1, which requires lawyers to provide competent representation; VRPC 1.3, which requires lawyers to exercise diligence; and VRPC 1.6, which requires lawyers to protect confidential client information.

The Professional Responsibility Section notes that various tools are available to comply with this duty to exercise reasonable care, including programs to “scrub” metadata from electronic documents before they are dispatched, converting electronic documents to a read-only, PDF format before transmission, or insisting on transmission of sensitive documents only on paper. The steps that should be taken by the sending lawyer in specific instances depend on the circumstances, and are beyond the scope of this opinion.

Duty of Receiving Lawyer

The duty of the receiving lawyer is a matter that has been the subject of substantially more disagreement.

In the following ethics opinions, various State Bar Ethics Committees have concluded that applicable rules of professional conduct prohibit a receiving lawyer from searching for metadata in documents that are received electronically. See Alabama Ethics Op. RO 2007-02; Arizona Ethics Op. 07-03; Florida Ethics Op. 06-2; New Hampshire Ethics Op. 2008-2009/4; New York City Lawyers Ass’n Ethics Op. No. 738 (2008); New York State Ethics Op. 782 (2004). The foundations for the conclusions reached in these Opinions are located in the rules of professional conduct protecting confidential information; prohibiting lawyers from engaging in conduct that is dishonest, deceitful, or prejudicial to the administration of justice; and requiring respect for the rights of others. Through various chains of inference, and based on Professional Conduct Rules drafted differently from the Rules in Vermont, these opinions conclude that a lawyer who searches for metadata is unjustifiably attempting to intrude on the confidential relationship between the opposing lawyer and client, which is conduct that is dishonest or deceitful, and prejudicial to administration of justice.

On the other hand, a series of other ethics opinions reach the opposite conclusion, finding that the Rules of Professional Conduct do not contain any prohibition, whether express or implied, on searching electronic documents for embedded metadata, and that characterization of such searching as “deceitful,” “dishonest,” and “prejudicial” is not supported by the Rules. See Colorado Ethics Op. 119 (2008); DC Ethics Op. 341 (2007); Pennsylvania Formal Ethics Op. 2007-500; ABA Formal Ethics Op. 06-442.

Reviewing the language of the Vermont Rules of Professional Conduct quoted above, the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file’s

content, including metadata.² A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel. None of the Rules in effect in Vermont either state or imply that lawyers must refrain from thoroughly reviewing documents and information received from opposing counsel, regardless of the medium in which the document is transmitted. The Rule where such an obligation would most likely be found -- VRPC 3.4 Fairness to Opposing Party and Counsel -- is wholly silent on this issue. Neither do VRPC 4.4 Respect for Rights of Third Persons, or VRPC 8.4 Misconduct, directly address this issue. On the other hand, there is a clear basis for an inference that thorough review of documents received from opposing counsel, including a search for and review of metadata included in electronically transmitted documents, is required by VRPC 1.1 Competence, and VRPC 1.3 Diligence.

The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section's authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review.

Duty Imposed Upon Lawyer Who Learns Of Receipt Of Inadvertently Disclosed Privileged Information

Answering the question whether a lawyer can search for metadata does not, however, end the analysis. The more critical inquiry arguably is whether inadvertently disclosed confidential information, including metadata, can be used by the lawyer who receives it.

Whether inadvertent disclosure of privileged information constitutes a waiver of the document's privileged status is a question of substantive law. Different approaches have been taken by courts throughout the United States when addressing this issue, but research has not revealed any case law in Vermont addressing the impact of inadvertent disclosure of privileged documents.

Given that the attorney-client privilege is intended to protect the client, many courts have chosen to protect the privilege when inadvertent disclosure occurs, focusing on whether the client intended the disclosure to occur and whether counsel had authority to disclose. *See, e.g., Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954-55 (N.D.Ill. 1982); *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995); *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933, 941 (Me. 1999). However, alternate approaches that are less protective of the attorney-client privilege also have been adopted. One such approach provides that inadvertent disclosure destroys the privilege if the lawyer and client did not take adequate steps to protect confidentiality. *See, e.g., Gray v. Bicknell*, 86 F.3d 1472, 1483-84 (8th Cir. 1996). Effective September 19, 2008, the Federal Rules of Evidence were amended to add a variation of this position. Current Federal Rule of Evidence Rule 502(b) provides that, in Federal Court proceedings, inadvertent disclosure does not result in waiver of the attorney-client privilege or

² Given this conclusion, this Opinion does not separately analyze the four different mechanisms for locating metadata that are listed in the questions presented by the VBA Board of Governors.

work product protection if reasonable steps to prevent disclosure were taken by the holder of the privilege or protection, and reasonable steps were promptly taken by the holder of the privilege or protection to respond to the inadvertent disclosure. Adoption of Rule 502 arguably overruled the holdings of previous Federal Court decisions, including International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), and Federal Dep. Ins. Corp.v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992), which took the blanket position that inadvertent disclosure waives the privilege, because confidentiality had been lost.

It is beyond the scope of this Ethics Opinion to address what analysis the Vermont Supreme Court should adopt on the question of inadvertent disclosure. However, the steps that lawyers should take upon learning that inadvertently disclosed privileged information has come into their possession is a matter that has been the subject of substantial discussion in the Ethics Opinions and is at the core of the inquiry posed by the VBA Board of Governors. Accordingly, this Opinion now turns to this issue.

In 1992, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 92-368. This Opinion advised that a lawyer who receives materials which appear on their face to be privileged and clearly appear not to be intended for the receiving lawyer must not look at those materials, must contact the sending lawyer, and must follow the sending lawyer's instructions relating to those materials. Substantial debate followed issuance of this Opinion, and the ABA Ethics Committee ultimately added Model Rule of Professional Conduct 4.4(b), which provides:

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.

Pursuant to amendments to the Vermont Rules of Professional Conduct promulgated on June 17, 2009, Rule 4.4(b) becomes effective in Vermont on September 1, 2009.

As explained in its Comments, the purpose behind Rule 4.4(b) is to ensure that lawyers who inadvertently disclose privileged and confidential documents to opposing counsel can take protective measure in an effort to limit or eliminate damage to their client's interests. The Comment continues by recognizing, however, that questions including whether additional remedies may be available to the sending lawyer, and whether inadvertent disclosure leads to waiver of the privilege, depend on substantive law and are beyond the scope of the Rules.³

With the adoption of Rule 4.4(b), Vermont lawyers are subject to the obligation to notify opposing counsel if they receive documents that they know or reasonably should know were inadvertently disclosed. Whether inadvertent disclosure results in waiver of the attorney client privilege or the work product protection, and whether the receiving lawyer can review and use the inadvertently disclosed information, remain issues of substantive law.

³ As a result of the amendment of Model Rule 4.4(b), including its clear requirements for the steps that must be taken when confidential documents are inadvertently disclosed, ABA Formal Opinion 05-437 withdrew Formal Opinion 92-368.

Litigation Context

The inquiry posed by the VBA Board of Governors relating to the litigation context poses somewhat different considerations. While it is beyond the scope of this Opinion to address the discovery rights and obligations of parties in the litigation context, the Section makes the following observations.

The provisions of the VRPC that are cited above, including the requirements of acting competently, diligently, and in a manner that protects client confidences and respects the rights of third parties, apply to all of an attorney's legal related activities, including in the litigation context. Basic rules of diligence, competence, and prudence caution a lawyer who is preparing to disclose documents during discovery thoroughly to review those documents in order, among other things, to ensure that communications protected by the attorney client privilege and the work product doctrine are not being disclosed. This rule applies with equal force to electronic discovery, where basic rules of competence now require lawyers to be aware that discoverable information may be included in electronic documents, and that privileged and confidential information may be embedded in electronic files, including in hidden metadata.

Standard practice and procedural rules in litigation matters allow lawyers to withhold documents containing privileged and confidential communications when serving discovery responses, and those rules apply with equal force to production of electronic documents. Where such materials are being withheld from discovery disclosures, applicable rules may require preparation and service of a privilege log, which also should list any privileged and confidential electronic documents that are being withheld from production. See, e.g., Fed. R. Civ. P. 26(b)(5)(A) (requiring party that withholds otherwise discoverable information based on privilege or work product claim to make the claim expressly and describe the documents being withheld from production).

Except to this extent, the Professional Responsibility Section is aware of no authority or support for the proposition that a lawyer can redact, remove, or withhold metadata from electronic client documents that are being disclosed during discovery. Neither is the Committee aware of any restriction on the ability of the receiving lawyer or party fully to analyze electronic documents received during discovery, including use of any available tools to search for metadata embedded within those electronic files.⁴

⁴ It should be noted, however, that recent amendments to the Federal Rules of Civil Procedure codify a procedure for use in Federal Court when inadvertent disclosures occur. Pursuant to Fed. R. Civ. P. 26(b)(5)(B), when a party inadvertently discloses materials that it believes are privileged or work product and provides notices to opposing counsel, the recipient has the duty, among other things, promptly to return, destroy, or sequester the information, and not to use or disclose the information until the privilege or work product claim has been resolved. These recent amendments to Rule 26 provide clear direction to lawyers confronted with inadvertent disclosure issues, and the Professional Responsibility Section believes it could be useful for the Vermont Supreme Court to consider the possibility of making similar amendments to the Vermont Rules of Civil Procedure.