

MARYLAND STATE BAR ASSOCIATION, INC.

COMMITTEE ON ETHICS

ETHICS DOCKET NO. 2007-09

Ethics of Viewing and/or Using Metadata

You have raised several questions, in the context of litigation, concerning the ethics of viewing and/or using metadata under The Maryland Lawyers' Rules of Professional Conduct ("Maryland Rules of Professional Conduct" or "Maryland Rule"). For purposes of this Opinion, the Ethics Committee adopts your definition of "metadata" as being information within programs (e.g., Microsoft Word/Excel/Power Point, Corel Word Perfect/Quattro Pro, Adobe Acrobat, etc.) which is not readily visible but which is accessible and which may include data such as author, dates of creation/printing, number of revisions, content of those revisions/previous versions, editing time, etc.

You raise three questions in your inquiry: first, whether it is ethical for the attorney recipient to view or use metadata in documents produced by another party; second, whether the attorney sender has any duty to remove metadata from the files prior to sending them; and third, whether the attorney recipient has any ethical duty not to view or otherwise use the metadata without first ascertaining whether the sender intended to include such metadata in the produced documents. By referring to "attorney," we include non-lawyer assistants over whom the attorney has supervisory responsibility. See Maryland Rule 5.3.

The questions you raise have not previously been considered by the Ethics Committee. Because of the relatively recent growth of electronic discovery, technology associated therewith, and developing rules of procedure and case law, there is not a lot of precedent and, furthermore, it is impossible to cover every conceivable situation which may arise with respect to the issues raised by your inquiries. Accordingly, the scope of this Opinion will be general in nature, recognizing that some of the general principles discussed below may be subject to modification depending upon specific factual situations and/or legal requirements.

The Committee believes that your first and third inquiries can be discussed together, namely whether the recipient attorney of electronic discovery containing metadata may view or use that metadata without first ascertaining whether the sender attorney inadvertently or intentionally included the metadata in the production of the electronic discovery. Subject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical

violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata. The Committee's opinion in this regard is heavily influenced by the difference between the Maryland Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. In February 2002, the ABA Model Rules of Professional Conduct were amended to add Rule 4.4(b), which 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." In Formal Opinion 05-437, the ABA Standing Committee on Ethics and Professional Responsibility pointed out that while Rule 4.4(b) obligated the receiving lawyer to notify the sender of the inadvertent transmission promptly, the Rule did "not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." Comment 2 to Model Rule 4.4 explains that "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."

The Maryland Rules of Professional Conduct, however, have not been amended to include Model Rule 4.4(b). Accordingly, the Maryland Rules of Professional Conduct do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials. Of course, the receiving lawyer can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate. See generally Rule 1.4 (communications with client concerning certain matters involving the representation).[1]

Although this Committee does not opine on legal issues, the Committee believes it is appropriate in this instance to point out how the lack of an ethical obligation to notify the sender or to return the privileged or work-product documents to the sender may be impacted, at least in terms of federal court litigation, by certain amendments to the Federal Rules of Civil Procedure which go into effect on December 1, 2006 and which pertain to electronic discovery. Recognizing the complexity of electronic discovery and, perhaps, anticipating that inadvertent production of privileged or work product material may well be an ongoing problem, proposed Federal Rule 16(b)(5) and (6) as part of the requirement that the parties confer and work out an initial scheduling order, encourages the parties to meet and discuss possible provisions for disclosure or discovery of electronically stored information, and try to reach agreements concerning the assertion of claims of privilege or protection as to trial-preparation materials even after production of such documents. Any such agreements would supersede the ethical standard described above because the parties, and their counsel, would be obligated to conduct themselves in accordance with the terms of any such agreement; otherwise, the attorney could well be in violation of Rule 8.4(b) by engaging in conduct that is prejudicial to the administration of justice.

Proposed Federal Rule 26(b)(5) provides as follows:

"Information produced. If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved."

Accordingly, the lack of any ethical prohibition concerning the review and/or use of metadata discussed earlier in this Opinion would, at least in the arena of federal litigation, be superseded by the legal requirements set forth in the Federal Rules which go into effect on December 1, 2006, and any violation of those Federal Rules would in all likelihood constitute a violation of Rule 8.4(d) as being prejudicial to the administration of justice.[2]

Finally, you inquire as to whether the attorney sending the electronic discovery has a duty to remove metadata from the files prior to production thereof. The Committee believes that, absent an agreement with the other parties (such as is contemplated in proposed Federal Ruls 16(b)(5) and (6), the sending attorney has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery. The Committee believes that this ethical obligation arises out of a combination of Rule 1.1, which provides that a lawyer shall provide competent representation to a client, together with Rule 1.6, which obligates the lawyer not to reveal confidential information relating to the representation of a client. See generally, New York State Bar Association Committee on Professional Ethics Opinion 782 (2004), concluding that attorneys have an obligation to "stay abreast of technological advances" and to behave reasonably in accordance with the risks involved in the technology they use. This is not to say, however, that every inadvertent disclosure of privileged or work product material would constitute a violation of Rules 1.1 and/or 1.6 since each case would have to be evaluated based on the facts and circumstances applicable thereto.

We thank you for your inquiry and hope that the foregoing is responsive thereto. Opinions of the Committee may be obtained from the MSBA web site: [www.msba.org](http://www.msba.org).

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[1] Comment 3 to ABA Model Rule 4.4 states that where an attorney is not required by applicable law to return an inadvertently produced document, "the decision to voluntarily

return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4."

[2] For a detailed discussion of problems and suggested solutions concerning electronic discovery, the inadvertent disclosure of privileged or work-product materials, and the legal standards for waiver under federal law and Maryland law, see the excellent opinion of Magistrate Judge Grimm in *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228 (2005).