

CHARLES LUCE'S METADATA CRIB NOTES

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A. **Metadata Defined:** A compound of “meta,” meaning “situated behind or beyond,” and “data,” meaning “information.” In short, metadata is data about data.

B. **Types of Metadata Typically Found in MS Word Documents (the Short List):**

- Author information (who worked on the document)
- Document revisions
- Comments
- Previous version information
- Company name
- Computer name
- File locations (where they worked on the document)
- Hidden text

C. **Recent Ethics Opinions about Metadata:**

Colorado Bar Ass'n Ethics Committee, Opinion 119 (May17, 2008). Holding that a sending attorney must use reasonable care to guard against the disclosure of metadata containing Confidential Information. A receiving attorney may generally search for metadata unless s/he believes it contains Confidential Information, in which case the receiving attorney should assume the Confidential Information was sent inadvertently and contact the sending attorney. If, before examining the metadata the receiving attorney receives notice from the sender that Confidential Information was inadvertently included in metadata, the receiving attorney must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata.

New York County Lawyers' Ass'n Comm. on Professional Ethics, Opinion 738 (24 March 2008). Holding that, outside of discovery, sending attorney should scrub electronic documents to avoid inadvertent breach of client confidentiality, but receiving lawyer may not intentionally search for metadata, as such conduct is deceitful and harmful to the justice system.

Arizona State Bar Comm. on the Rules of Professional Conduct, Opinion 07-03 (November 2007). Holding that sending attorney must exercise reasonable care to not disclose metadata, and receiving attorney may not use technology to obtain confidential or privileged information. A recipient attorney who unintentionally uncovers metadata that reveals apparently

confidential or privileged information must notify the sender and preserve the status quo for a reasonable period of time.

Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500. Finding no specific rule regarding metadata, and concluding that attorneys must exercise judgment on an *ad hoc* basis whether to examine metadata.

District of Columbia Bar, Opinion 341 (September 2007). Holding that, outside of discovery, sending attorney must exercise reasonable care to not disclose metadata, while receiving attorney may not view metadata but only when he has actual knowledge that the metadata was inadvertently provided, but must notify the sender and abide by sender's instructions. In discovery, attorney may not be permitted to scrub metadata.

Alabama State Bar Disciplinary Comm., Opinion 2007-02 (14 March 2007). Holding that sending attorney must exercise reasonable care to not disclose metadata when transmitting electronic documents, but receiving attorney may not “scour” e-documents for secret metadata.

Maryland State Bar Ass'n Comm. on Ethics, Opinion 2007-09 (19 October 2006). Holding that Maryland attorneys who produce electronic documents must take reasonable measures to avoid the disclosure of confidential information, including metadata, and that recipients have no duty to refrain from mining or using metadata.

ABA Formal Opinion 06-442 (5 August 2006). Holding lawyers have no duty to refrain from mining and exploiting metadata in electronic documents received from opposing counsel or parties.

New York State Bar Ass'n Comm. on Professional Ethics, Opinion 782 (8 December 2004). Holding attorneys must exercise reasonable care to prevent the disclosure of client confidences contained in metadata, but further holding that lawyers that receive electronic documents have an obligation not to exploit inadvertent or unauthorized transmissions of client confidences or secrets.

New York State Bar Ass'n Comm. on Professional Ethics, Opinion 749 (14 December 2001). “A lawyer may not use computer software applications to surreptitiously ‘get behind’ visible documents or to trace e-mail.”

Florida Advisory Opinion 06-2 (15 September 2006). Holding that recipients of electronic documents may not mine metadata. “I have no doubt that anyone who receives a document and mines it . . . is unethical, unprofessional, and un-everything else.” Florida Bar Board of Governors Member Jake Schickel.

D. **Colo. RPC 4.4(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.”

E. **Tips for Keeping Your Briefs Clean:**

- Switch off “track changes”
- Be alert to whether “track changes” is turned in a document you have received from a third party
- Convert your documents to PDF format
- Fax your documents
- Turn off Word’s “track changes” and “fast save” features (and purchase a real redlining program)
- Use third-party software to search and clean metadata
- Use Microsoft’s add-in program

F. **Metadata Detection and Cleaning Software:**

PayneGroup, www.payneconsulting.com

Esquire Innovations (iScrub), www.esqinc.com