

# Metadata and Various Jurisdictions Ethics Opinions

By: American Bar Association

Metadata is loosely defined as "data about data." More specifically, the term refers to the embedded stratum of data in electronics file that may include such information as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.

While metadata is often harmless, it can potentially include sensitive, confidential, or privileged information. As such, it presents a serious concern for attorneys charged with maintaining confidentiality -- both their own and their clients. Professional responsibility committees at several bar associations around the country have weighed in on attorneys' ethical responsibilities regarding metadata, but there is no clear consensus on the major metadata issues. To help track current views on metadata and ethics, we've assembled the following chart.

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p><b>ABA</b> American Bar Association Standing Committee on Ethics and Professional Responsibility</p> <p><a href="#">Formal Opinion 06-442</a></p> <p><a href="#">Formal Opinion 05-437</a></p>	<p><b>NONE</b></p> <p>No explicit duty regarding metadata is imposed, but a number of methods for eliminating metadata (including "scrubbing," negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are "concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata." [06-442]</p> <p>Presumably, a lawyer's general duties with regard to the confidentiality of client information under <a href="#">Rule 1.6</a> apply to metadata.</p>	<p><b>YES</b></p> <p>After noting that some authorities have found metadata mining "ethically impermissible," the Committee states that it "does not share such a view, but instead reads the recent addition of <a href="#">Rule 4.4(b)</a> identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on receiving lawyer's conduct found in other Rules." [06-442]</p>	<p><b>YES</b>, if lawyer knows or reasonably should know that transmission was inadvertent.</p> <p>ABA Formal Opinion 05-437 cites the <a href="#">Rule 4.4(b)</a> provision 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." [05-437]</p> <p>The Opinion goes on to state that <a href="#">Rule 4.4(b)</a> "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly" but "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." [05-437]</p>
<p><b>ALABAMA</b> Alabama State Bar Office of General Counsel</p> <p><a href="#">Formal Opinion</a></p>	<p><b>REASONABLE CARE</b></p> <p>The Alabama State Bar Commission found that "an attorney has an ethical duty to exercise reasonable care</p>	<p><b>NO</b></p> <p>The Commission found that "the receiving lawyer also has an ethical obligation to refrain from mining an</p>	<p><b>NOT ADDRESSED</b></p>

<p>2007-02</p>	<p>when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." [2007-02]</p> <p>The Commission went on to specify that the relevant factors in determining whether reasonable care was exercised "include steps taken by the attorney to prevent the disclosure of metadata, the nature and scope of the metadata revealed, the subject matter of the document, and the intended recipient." [2007-02]</p>	<p>electronic document." [2007-02]</p> <p>The Commission then went on to provide that "mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." [2007-02]</p>	
<p><b>ARIZONA</b> State Bar of Arizona Ethics Committee</p> <p>Ethics Opinion 07-03</p>	<p><b>REASONABLE CARE</b></p> <p>In discussing the issue, the State Bar of Arizona Ethics Committee cited a comment Arizona Ethical Rule 1.6 providing that when "transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients" and that "'reasonable' in the circumstances depends on the sensitivity of the information, the potential consequences of its inadvertent disclosure, whether further disclosure is restricted by statute, protective order, or confidentiality agreement, and any special instructions given by the client." [07-03]</p> <p>The Committee concluded by stating that lawyers "must take reasonable care not to violate any duty of disclosure to which the lawyer or the lawyer's client is subject." [07-03]</p>	<p><b>NO</b></p> <p>Arizona's Committee stated that lawyers "should refrain from conduct that amounts to an unjustified intrusion into the client-lawyer relationship that exists between the opposing party and his or her counsel" and in its conclusion provided that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it." [07-03]</p>	<p><b>YES</b></p> <p>The Committee noted that metadata "may be discovered by the recipient through inadvertent or relatively innocent means" and they "do not mean to imply that all such activity necessarily rises to the level of ethical concern." Nonetheless, they stated that if a recipient "discovers metadata by any means, and knows or reasonably should know that the sender did not intend to transmit the information, the recipient has a duty to follow the procedures set forth in [Ethical Rule] 4.4(b)." [07-03]</p> <p>Ethical Rule 4.4(b) requires that the recipient in such a situation "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." [ER 4.4(b)]</p>
<p><b>COLORADO</b> Colorado Bar Association Ethics Committee</p> <p>Ethics Opinion 119</p>	<p><b>REASONABLE CARE</b></p> <p>The Colorado Bar Association Ethics Committee provided that the sending lawyer must "use reasonable care to ensure that metadata that contain Confidential Information are not disclosed to a third party," and later states that the "Sending</p>	<p><b>YES</b>, unless sender notifies recipient of inadvertent transmission of confidential information before recipient views metadata.</p> <p>According to Ethics Opinion 119, "a Receiving Lawyer generally may ethically search for and review metadata embedded in an</p>	<p><b>YES</b></p> <p>When the "Receiving Lawyer knows or reasonably should know that a Sending Lawyer (or non-lawyer) has transmitted metadata that contain Confidential Information, the Receiving Lawyer</p>

	<p>Lawyer may not limit the duty to exercise reasonable care in preventing the transmission of metadata that contain Confidential Information by remaining ignorant of technology relating to metadata or failing to obtain competent computer support." [119]</p>	<p>electronic document that the Receiving Lawyer receives from opposing counsel or other third party." [119]</p> <p>If, however, the recipient is notified by the sender <i>before the recipient examines the metadata</i> that confidential information was inadvertently transmitted in the metadata, then the "Receiving Lawyer must not examine the metadata and must abide by the Sending Lawyer's instructions regarding the disposition of the metadata." [119]</p>	<p>should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived." In that situation, the recipient "must promptly notify the Sending Lawyer (or non-lawyer sender)." [119]</p>
<p><b>FLORIDA</b> The Florida Bar Ethics Department  Ethics Opinion 06-02</p>	<p><b>REASONABLE CARE</b></p> <p>"It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications." [06-02]</p>	<p><b>NO</b></p> <p>"It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient." [06-02]</p>	<p><b>YES</b></p> <p>"If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must 'promptly notify the sender.'" [06-02]</p>
<p><b>MAINE</b> Maine Board of Overseers of the Bar Professional Ethics Commission  Opinion #196</p>	<p><b>REASONABLE CARE</b></p> <p>"...the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information." [196]</p> <p>This duty "requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information." [196]</p>	<p><b>NO</b></p> <p>"...we find that an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated." [196]</p>	<p><b>NOT ADDRESSED</b></p> <p>Maine's Commission does not provide explicit guidance on this question, though it does favorably reference the Florida approach to confidential metadata, which includes a requirement that the recipient notify sender of inadvertently transmitted metadata. [196]</p>
<p><b>MARYLAND</b> Maryland State Bar Association -</p>	<p><b>REASONABLE CARE</b></p> <p>Note: the Maryland opinion is</p>	<p><b>YES</b></p> <p>"Subject to any legal</p>	<p><b>NO</b></p> <p>The Committee stated</p>

<p>Committee on Ethics</p> <p>Ethics Docket No. 2007-09 (MSBA Members Only)</p>	<p>set "in the context of litigation," but given the "relatively recent growth of electronic discovery, technology associated therewith, and developing rules of procedure and case law" and the corresponding lack of precedent, the "scope of this Question will be general in nature." [2007-09]</p> <p>The Maryland Committee went on to state that "absent an agreement with the other parties (such as is contemplated in proposed Federal [Rules] 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 adds a caveat that not "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." [2007-09]</p>	<p>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." [2007-09]</p>	<p>that, because Maryland's Rules of Professional Conduct had not been amended to include ABA Model Rule 4.4(b), they "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." Nevertheless, the Committee stated that "the receiving attorney 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." [2007-09]</p>
<p>MINNESOTA Lawyers Professional Responsibility Board</p> <p>Opinion No. 22</p>	<p><b>REASONABLE CARE</b></p> <p>"A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. See Rules 1.1, 1.6, MRPC. The lawyer's duties with respect to such information extends to and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents." [No. 22]</p>	<p><b>FACT SPECIFIC</b></p> <p>Opinion 22 does not establish a bright-line rule regarding the mining of metadata. Instead, the Board wrote that the opinion "is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this opinion." [No. 22]</p>	<p><b>YES</b></p> <p>"If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC." [No. 22]</p>
<p>NEW HAMPSHIRE</p>	<p><b>REASONABLE CARE</b></p>	<p><b>NO</b></p>	<p><b>YES</b></p>

<p>New Hampshire Bar Association - Ethics Committee</p> <p>Opinion 2008-2009/4</p>	<p>Identifying that the "[e]xchange of electronic documents is an essential part of modern law practice," the New Hampshire Bar Association's Ethics Committee held that "a sending lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against disclosure of metadata that might contain confidential communication." [2008-2009/4]</p> <p>The committee added that "what constitutes reasonable care will depend upon the facts and circumstances" and therefore "there can be no <i>per se</i> rule on transmission of metadata." [2008-2009/4]</p>	<p>"The objective standard dictates a conclusion that receipt of confidential information in the form of metadata is the result of inadvertence, just as receipt of attorney notes stapled to a draft document would necessarily be the result of inadvertence. As a result, Rule 4.4(b) imposes an obligation on the receiving lawyer to refrain from reviewing the metadata." [2008-2009/4]</p>	<p>"To the extent that metadata is unintentionally reviewed, receiving lawyers should abide by the directives set forth in Rule 4.4(b)." [2008-2009/4]</p> <p>New Hampshire's Rule 4.4(b) provides that a "lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal." [NHRPC 4.4(b)]</p>
<p><b>NEW YORK</b> New York State Bar Association - Committee on Professional Ethics</p> <p>Opinion 749 Opinion 782</p> <p>Association of the Bar of the City of New York - Committee on Professional and Judicial Ethics</p> <p>Formal Opinion 2003-04</p>	<p><b>REASONABLE CARE</b></p> <p>The New York State Bar Association's Committee on Professional Ethics noted generally that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances." The extent of reasonable care "will vary with the circumstances." [782]</p> <p>With regard specifically to metadata, the NYSBA Committee concluded its opinion by stating that "[l]awyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets." [782]</p>	<p><b>NO</b></p> <p>The Committee held that "in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of these Disciplinary Rules." [749]</p>	<p><b>YES</b></p> <p>The ABCNY's Committee on Professional and Judicial Ethics concluded that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected ... is not barred, at least as an ethical matter, from using the information," but also stated that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure." [2003-04]</p>
<p><b>PENNSYLVANIA</b> Pennsylvania Bar Association - Committee on Legal Ethics and Professional Responsibility</p>	<p><b>REASONABLE CARE</b></p> <p>The Pennsylvania Committee "believes that the Pennsylvania Rules of Professional Conduct require that the responsibility of</p>	<p><b>CASE-BY-CASE</b></p> <p>The Pennsylvania Committee does not take a definitive stance on the mining of metadata. Rather, it suggests that attorneys</p>	<p><b>YES</b></p> <p>In its opinion, the Committee noted that "attorneys in Pennsylvania who receive inadvertently</p>

<p>Formal Opinion 2009-100 (PBA Members Only)</p>	<p>keeping client confidences is primarily that of the sending attorney" and thus the "transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to a third party." [2009-100]</p>	<p>must determine whether to use metadata on a case-by-case basis, factoring in their duties to the client under Rules 1.1, 1.2, and 1.4. Those "duties must be evaluated in light of relevant substantive and procedural law." [2009-100]</p> <p>The Committee concludes that a receiving lawyer:</p> <p>"(a) must then determine whether he or she may use the data received as a matter of substantive law;</p> <p>(b) must consider the potential effect on the client's matter should the lawyer do so; and,</p> <p>(c) should advise and consult with the client about the appropriate course of action under the circumstances." [2009-100]</p>	<p>disclosed documents have an ethical obligation to promptly notify the sender." And thus, if the recipient of an electronic document "concludes that the disclosure of metadata was inadvertent, the lawyer must promptly notify the sender of the receipt of the materials containing metadata." [2009-100]</p>
<p><b>VERMONT</b> Vermont Bar Association Professional Responsibility Section</p> <p>Ethics Opinion 2009-1</p>	<p><b>REASONABLE CARE</b></p> <p>Citing the "virtually unanimous" view on the topic amongst other bar associations, Vermont "agrees that, based upon the language of the [Vermont Rules of Professional Conduct], a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product document 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." [2009-01]</p>	<p><b>YES</b></p> <p>After reviewing other opinions, "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." The Section suggests that such a rule would limit "the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." [2009-01]</p> <p>The Section does not address whether inadvertent disclosure via metadata constitutes a waiver of a document's privileged status. That is a "question of substantive law" and the Section's research did not reveal "any case law in Vermont addressing the impact of inadvertent disclosure of privileged documents." [2009-01]</p>	<p><b>YES</b></p> <p>The Section states that, under VRPC 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." [2009-01]</p>
<p><b>WASHINGTON, D.C.</b></p>	<p><b>REASONABLE CARE</b></p>	<p><b>NO</b>, if actual knowledge that metadata was sent</p>	<p><b>YES</b>, if the recipient has actual knowledge that</p>

D.C. Bar - Legal Ethics Committee

D.C. Opinion 341

Outside of a discovery/subpoena context, lawyers transmitting documents have an obligation under Washington, D.C. rules "to take reasonable steps to maintain the confidentiality of the documents in their possession," which "includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either a confidence or a secret and to employ reasonably available technical means to remove such metadata before sending the document." [341]

inadvertently.

While identifying that the exchange of metadata is most often "mutually helpful or otherwise harmless," the Washington, D.C. Committee concluded that "[w]here there is ... actual prior knowledge by the receiving lawyer as to the inadvertence of the sender, then notwithstanding the negligence or even ethical lapse of the sending lawyer, the receiving lawyer's duty of honesty requires that he refrain from reviewing the metadata until he has consulted with the sending lawyer to determine whether the metadata includes privileged or confidential information." If such information is present, "the receiving lawyer should comply with the instructions of the sender." [341]

transmission of metadata was inadvertent.

The receiving lawyer in such a situation must consult "with the sending lawyer to determine whether the metadata includes privileged or confidential information" and "comply with the instructions of the sender" if that is the case. [341]

If the recipient is "uncertain whether the sender intended to include particular information" he or she "should contact the sending lawyer to inquire." [341]

The Committee also specifies that a receiving lawyer has "actual prior knowledge if he is told by the sending lawyer of the inadvertence" before reviewing the document, or if the receiving lawyer "immediately notices upon review of the metadata that it is clear that protected information was unintentionally included." [341]

**WEST VIRGINIA**  
West Virginia Bar Association,  
Lawyer Disciplinary Board

L.E.O. 2009-01

#### REASONABLE CARE

A lawyer's duties under Rule 1.1 and Rule 1.6 "includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either confidential or privileged, and to employ reasonable means to remove such metadata before sending the document. Accordingly, lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures." [2009-01]

**NO**, if actual knowledge that metadata was sent inadvertently.

The Board stated that "if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review metadata before consulting with the sending lawyer to determine whether the metadata includes work-product confidences." [2009-01]

However, the Board also noted that "[i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching

electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue." [2009-01]