

## **The Duty to Notify: The Ethical Use of Inadvertently Disclosed Metadata in Oklahoma**

Dealing with metadata is a reality of practicing law in today's legal environment. Attorneys continually create and receive electronic documents. Each of these documents may contain hidden "metadata." Metadata, when accessed, can reveal information that was never intended to be disclosed by the author of the document.<sup>1</sup> For example, metadata could identify the date an electronic document was created, authored, as well as disclose previous versions and edits to the electronic document. Notably, metadata may be found in virtually any type of electronic file including pictures, video clips, documents or other types of digital files. The effective use of metadata can give one side a distinct advantage.

Much has been written regarding the role of electronically stored information and metadata in the discovery process; but recently there has been less focus on the role of metadata in an attorney's everyday correspondence and negotiations.<sup>2</sup> The Rules of Professional Conduct likewise place ethical restraints on a lawyer's use of metadata in the normal course of electronic document exchange, such as contract negotiations, advisory opinions, and other electronic communications.

Specific questions not yet addressed by early ethics opinions are whether the receipt of metadata outside the course of discovery is considered an inadvertent disclosure of confidential information, and if so, how may the receiving attorney ethically use such disclosed metadata? Oklahoma has not made an authoritative ruling regarding the ethical use of metadata and this article will look to other jurisdictions' rulings for their analyses.

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<sup>1</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 06-422 (2006).

<sup>2</sup> For more information on metadata as it relates to the discovery process, the authors recommend starting with Elliott Paul Anderson, *What Lies Beneath: Native Format Production and Discovery of Metadata in Federal Court*, 78 OKLA. B.J. 999 (2007).

Several authorities have issued written opinions discussing an attorney's ethical obligation when receiving metadata in an electronic document. Unfortunately, these opinions have not utilized the same analysis or reached the same conclusion. For example, the ABA's Standing Committee on Ethics and Professional Responsibility and the Florida Bar Professional Ethics Committee found that an attorney who receives metadata, may use that metadata in some instances, but likely has an obligation to notify the disclosing attorney.<sup>3</sup> The relevant authorities in New York and Alabama, on the other hand, have discussed metadata in conjunction with the general prohibition on "conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>4</sup> Ultimately, these authorities found that an attorney who receives metadata, may only use such metadata if it does not contain confidential client information. The Maryland State Bar Association's Committee on Ethics has taken perhaps the most liberal view of the issue, stating that an attorney has no ethical duty or obligation upon receiving inadvertently disclosed metadata.<sup>5</sup> As the Oklahoma authorities have not explicitly addressed this issue, a more in-depth review of the different authorities' reasoning is helpful.

The next time you receive an electronic document be cautious. Your treatment of the metadata contained in that document may result in a violation of the Oklahoma Rules of Professional Conduct. In any event, the majority view suggests that any use of metadata be conditioned on your notification to the sending party.

Drew Palmer & Cherish K. Ralls, *The Duty to Notify: The Ethical Use of Metadata in Oklahoma*, 78 Okla.B.J. 3141 (2007).

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<sup>3</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 06-422 (2006); Prof'l Ethics Comm. of the Fl. B., Op. No. 06-2 (2006).

<sup>4</sup> N.Y. State B. Ass'n Comm. on Prof'l Ethics, Formal Op. 749 (2001); Ala. St. B. Disciplinary Commission, Op. RO-2007-02 (2007).

<sup>5</sup> Md. St. B. Ass'n Ethics Comm., Op. 2007-09 (2007).

