

Looking at the Other Side's Metadata? Not So Fast!

From the Committee on Professional Responsibility, William Freivogel, Chair

What is Metadata?

Metadata is a form of information contained in all office productivity file documents (Word, WordPerfect, Excel, etc.) that cannot be seen on the face of the document. Metadata could include when the document was created or edited, who wrote it, and who worked on it. Other forms of hidden data may include changes and editorial notes. For brevity we will refer to all hidden data as "metadata." In many cases anyone with access to a document can retrieve its metadata. Software is available to minimize or eliminate this access.

Ethics and Metadata

While metadata is just one form of data hidden in electronic documents, for brevity, we will refer to all such data as metadata. The following opinions hold that looking for metadata in documents received from other parties is unethical: Ala. State Bar Office of Gen. Counsel Op. 2007-2 (March 2007); D.C. Bar Legal Ethics Comm. Op. 341 (Sept. 2007); Fla. Bar. Prof'l Ethics Comm. Op. 06-02 (Sept. 2006); and N.Y. State Bar Ass'n Comm. On Prof'l Ethics Op. 749 (Dec. 2001). Opinions to the contrary are A.B.A. Comm. on Ethics and Prof'l Responsibility Op. 06-442 (Aug. 2006); and Md. State Bar Ethics Comm. Op. 2007-09 (Oct. 2006).

Discipline? We are not aware of any instance in which a lawyer has been charged by disciplinary authorities for metadata mining.

Disqualification? While we are not aware of any cases where a lawyer was disqualified from a matter for obtaining metadata from opponents' documents, we are aware of analogous situations where law firms have been disqualified for possessing opponents' privileged information, e.g., *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001); and *Arnold v. Cargill, Inc.*, 2004 U.S. Dist. LEXIS 19381 (D. Minn. Sept. 24, 2004) (citing *Jain*).

We are not in a position to advise readers of the extent to which metadata mining could be a problem for any given lawyer. However, it would seem that, at a minimum, before a lawyer starts looking at metadata received from other parties, that lawyer should confirm whether or not an opinion such as those cited above has been issued in the jurisdiction in which the lawyer is admitted.