The Ethics of Metadata

Hans P. Sinha
Clinical Professor
National Center for Justice and the Rule of Law
University of Mississippi School of Law

Objectives
After this presentation you should be able to:
- Describe the existence of metadata in electronic documents.
- Identify the discovery and non-discovery distinction in terms of metadata ethics
- Recognize the ethical parameters pertaining to an attorney sending electronic documents
- Recognize the ethical parameters pertaining to an attorney receiving electronic documents
- Summarize the current divergence in ethical opinion pertaining to the metadata
- Identify the metadata ethics camp of your state

Metadata
- Metadata
  - Non-visible information in electronic documents
  - Data about data
- Ethics opinions
  - Rules of Professional Conduct
- Outside formal discovery / subpoena context.
Metadata Examples
- Dennis Rader, aka BTK killer
- Church and “Dennis”
- Merck Vioxx lawsuit
- Negative info deleted for study
- White House and Blair House
- Author and Classified material
- Microsoft 1999 annual report
- Drafted on an Apple computer

Typical Example
- Florida firm emailed brief
- Document— only text visible
- Recipient “mined” metadata
  - Who worked on it
  - How long
  - Every change / revision
  - Client’s comments
    - Had been removed before emailed
- All recovered by other law firm

Mundane Metadata
- Computer generated
- Software program
- Date and time
- Revisions
- Authors
- Properties section / Document Inspector
- Microsoft Word issue
Confidential / Privileged
1. Attorney produced
2. Edits
3. Comments, Red-lines, Track changes
4. Litigation strategies
5. Bottom settlement amount
6. Purposeful mining

Ethical Issues

Sending lawyer
1. Steps to prevent dissemination of confidential material?
2. Scrubbing

Receiving lawyer
1. Search, view, use metadata in an electronically transmitted document?
2. Mining

Applicable Rules
Model Rules and State Variations

Sending Lawyer
1. Confidentiality - 1.6
2. Competence - 1.1

Receiving Lawyer
1. Respect for Rights of Third Persons - 4.4(b)
2. Diligence - 1.3
3. Misconduct - 8.4
4. Competence - 1.1
5. Scope of Rep. - 1.2
6. Communication - 1.4
Model Rule 4.4
Respect for Rights of Third Persons

(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.

Metadata Camps

Mining Prohibited
- New York
- Florida
- Alabama
- Arizona
- Maine
- New Hampshire

Mining permitted
- ABA
- Maryland
- Colorado
- District of Columbia
- Pennsylvania
- Vermont
- West Virginia

Alternating Ethics Opinions
- New York 2001
- ABA 2006
- Florida 2006
- Maryland 2006
- Alabama 2007
- DC 2007
- Arizona 2007
- Pennsylvania I 2007
- Colorado 2008
- Maine 2008
- Pennsylvania II 2009
- New Hampshire 2009
- West Virginia 2009
- Vermont 2009
Mining of Metadata Unethical
- Ethically impermissible
- Surreptitious
- Dishonesty
- Deliberate act deceive
- Deliberate act acquire confidential / privileged
- Unfair advantage
- Prejudicial to Administration of Justice

Mining of Metadata
Not Unethical
- No prohibition in rules
- Not prohibited where none in rules
- Closest rule (4.4) only notice
- Confidentiality duty of sender
- Diligence duty of receiver
- If find confidential, not view, notify

New York (12/14/2001)
Ethically Impermissible to Mine

A lawyer may not make use of computer software applications to surreptitiously “get behind” visible documents or trace email.
New York Rationale

- Using technology to
  - Surreptitiously obtain information
  - Get behind visible intended information
- Disclosure unknown and unwilling
- Mining deliberate and dishonest
- Violates the letter and the spirit of Disciplinary Rules

ABA (8/5/06)
No Ethical Prohibition to Mine

No specific prohibition against a lawyer reviewing and using embedded information in electronic documents...

ABA Rationale

- No rule prohibiting mining
- Rule 4.4(b) closest
  - Pre 4.4(b) - Refrain, notify and abide
  - Post 4.4(b) – Only notify
- May choose to do more
  - Professional judgment
- Rejects Rule 8.4 dishonesty reasoning
ABA Suggestions

- Sender to abide by Rule 1.6
- Safeguard against inadvertent disclosure
- Reasonable precautions prevent dissemination
- Use non-metadata format
  - Hard copy, PDF, fax
- Scrub
- Know when creating metadata

NCJRL.org

Florida (9/15/06)

- Mining prohibited
- Metadata is to be considered by the receiving lawyer as confidential information that was not intended to be sent.

NCJRL.org

Florida

Sending Lawyer Duty

- Reasonable steps safeguard confidentiality of all electronic communications sent to lawyers or third parties
- Protects all confidential information, including information contained in metadata, that may be included in electronic communications.

NCJRL.org
Florida
Receiving Lawyer Duty

- Not try to obtain from metadata information relating to the representation of sender’s client that the recipient knows or should know is not intended for recipient.
- Metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit.

NCJRL.org

Florida
Inadvertent Disclosure

- If 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.

NCJRL.org

Florida
Competence

Obligations may necessitate a lawyer obtaining training and education in the use of technology in transmitting and receiving electronic documents in order to protect client information.

NCJRL.org
Maryland (10/19/06)

No ethical violation if recipient attorney reviews or makes use of metadata without first ascertaining whether the sender intended to include such metadata.

Maryland

No Notification Duty

- No guidance from Rules
- No MD equivalent of Model Rule 4.4(b)
- Absence of Rule 4.4(b)
  - Mining not prohibited
  - No duty to notify sender

Maryland

Discovery

- Discovery context different
- Federal Rules of Civil Procedure
  - Rule 16 – Confer, scheduling orders, confidentiality agreements
  - Rule 26 - Claw-back and Quick peek provisions
- Breach of voluntary agreements
  - Conduct prejudicial to administration of justice (Rule 8.4(b))
Alabama (3/14/07)

Mining 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.

NCJRL.org

Alabama

- Mining
  - Per se knowing and surreptitious activity
  - Using technology to access client confidences
  - An impermissible intrusion on the attorney-client relationship
  - Violation of Rule 8.4

NCJRL.org

Alabama – Sending Attorney

- Duty exercise reasonable care ensure does not disclose client secrets and confidences
- Reasonable care factors
  - Steps prevent disclosure
  - Nature and scope of metadata
  - Intended recipient
  - Advocate vs. Neutral Court

NCJRL.org
District of Columbia (9/07)

Receiving lawyer ethically prohibited from reviewing metadata only when the lawyer has actual knowledge that the metadata was sent inadvertently.

NCJRL.org

D.C. - Receiving Lawyer

No actual knowledge inadvertently sent
- No prohibition to review
- If actual knowledge inadvertently sent
  - May not review
- Once actual knowledge
  - Duty of Honesty
  - Not review
  - Consult with sender
  - Determine if confidential/privileged
  - Honor sender request
  - Reserve right to challenge in court

D.C. - Actual Knowledge

Mere uncertainty
- Not trigger ethical obligation to refrain
Actual knowledge:
- Told of inadvertence
- Immediately notices confidential information.
- Contact sender if uncertain as to his / her intent

NCJRL.org
D.C. - Sending Lawyer

- Rule 1.6 duty
  - Reasonable steps preserve confidences
  - Ensure not sent inadvertently
  - Know and use scrubbing technology
  - Implement office safeguards to minimize inadvertent release of metadata with confidential information

D.C. – Discovery Sender Duty

- Additional Rules
  - Civil Procedure
  - Court Rules
  - Discovery agreements
  - Criminal law
- Rule 3.4 (Fairness to opposing party/counsel)
  - Not obstruct access to evidence
- Removal of metadata
  - Violation of court order or rule

D.C. – Discovery Receiver

- Assume metadata intentionally sent
  - Sender may not remove
  - Sender would not violate Rule 1.6
- May review, use and preserve
  - Competent and Diligent may require it
- If actual knowledge inadvertence
  - May not review
  - Follow Rule 4.4(b) - Notify and abide
Arizona (11/07)

- A receiving lawyer may not examine an electronic communication for the purpose of discovering the metadata embedded in such document
- Except for specific circumstances

Arizona - Sender Duties

- Reasonable precaution prevent information to unintended recipient
- Realize comments may not be confidential
- Use new pleadings
- Non-lawyer not bound by ethical rules
- Discovery or legal obligations when scrub

Arizona - Receiving Duties

- May not use computer technology to surreptitiously obtain privileged or confidential information
- May not try to get info from metadata
- Emphasis on client-lawyer relationship
- Lawyer must refrain from conduct of unjustified intrusion into the client-lawyer relationship.
Arizona vs. ABA

- ABA impractical burden on sending lawyer
- Not certain successfully scrubbed all metadata
- Forego using electronic documents
- Sending lawyer at mercy of receiving lawyer
- NY, FL, AL prohibition better

Arizona – Exception to Ban

- May mine metadata if:
  - Consent of sender
  - Authorization by court or law
- But, if knows or reasonably should know not intended - follow 4.4(b).
- Arizona 4.4(b) more extensive than Model
  - Notify
  - Preserve status quo for reasonable period of time
  - Permit sender to take protective action

Pennsylvania I (11/20/07)

- Each attorney must resolve the issue through the exercise of sensitive and moral judgment guided by the basic principles of the Rules, and thus, in metadata situation, determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situations.
Pennsylvania I - Factors

- Judgment of lawyer
- Facts of case
- Lawyer’s view obligation under the Rules
- Nature of information received
- How and from whom info received
- Atty-client privilege / work product rules
- Common sense, reciprocity
- Professional courtesy
- Race to proverbial bottom?

Colorado (5/17/08)

A receiving lawyer generally may ethically search for and review metadata embedded in an electronic document.

NCJRL.org

Colorado

- Red states incorrect assumptions
  - Not all metadata of significance
  - Not all metadata confidential
  - Not all metadata inadvertently sent
  - Not all mining active or surreptitious
- Focus on disclosure of confidential material
- Not the Act of mining

NCJRL.org
Colorado
Sender Ultimate Responsibility
- Enforce and expect compliance with rules and duties
- Rule 1.1 Competence
  - Cannot limit duty by technological ignorance
- Rule 1.6 Confidentiality
  - Duty not alleviated by banning mining on back end

Colorado
- Like ABA, no rule on point
  - Mining not ethically prohibited
- CO Rule 4.4(b)
  - Notice
- CO Rule 4.4(c)
  - Comply with sender if prior notice of inadvertence
  - Absent prior notice, continued review of metadata not ethically prohibited
  - As a matter of professionalism, may decide to act differently.

Maine (10/21/08)
- Receiver may not mine
- Ethically impermissible
- Seek uncover metadata embedded in electronic document
- Received from counsel for another party
- In effort to detect confidential information
- That should be reasonably known to have not been intentionally communicated
- Without court authorization
Maine

- Sender
  - Use reasonable care
  - When transmitting electronic document
  - Prevent disclosure of metadata containing confidential information.
- If in doubt
  - Use PDF or paper copies

Pennsylvania II  4/2009

- 2007 opinion insufficient guidance to recipient and no correlative guidance to sending attorneys
- Noted critique of earlier opinion
- Re-affirmed 2007 opinion
  - Receiving attorney may generally examine and mine metadata
- Nuanced and thorough rationale

Pennsylvania II  4/2009

Sending Attorney

- Primary burden for client confidences
- Rule 1.1 – Competent representation
  - Ensuring client information not disclosed
- Rule 1.6 – Confidentiality
  - Mandated – “shall not reveal…”
- 1.1 & 1.6 together
  - Sender duty protect confidentiality
Pennsylvania II  4/2009
Receiving attorney
Focus on duties to own client
- The lawyer's duty to the lawyer's own client trumps any theoretical responsibility to protect the right of confidentiality as between another lawyer and that lawyer's client.
- Rule 1.1 Competence
  - How would review affect case
    - Court and opposing counsel relations
- Rule 1.4 Communication
  - Keep client informed
- Rule 1.2 Scope of Representation and Allocation of Authority
  - Final call whether to use metadata up to client

Most Recent Opinions
- New Hampshire  4/14/09
  - Sender
    - Confidentiality and competence duty
  - Receiver
    - Know all confidential material inadvertent
    - NH 4.4(b) unique
    - Notify and "...shall not examine..."
  - West Virginia
    - Mining could be unethical
    - If actual knowledge of inadvertence, may not review
- Vermont  4/09
  - Sender
    - Confidentiality and competence duty
  - Receiver
    - No rule prohibiting mining
    - Such rule would limit diligence duty to analyze material from opposing counsel, regardless of format
    - Know of inadvertence
    - Must notify

Final Tally
Mining Prohibited
- New York
- Florida
- Alabama
- Arizona
- Maine
- New Hampshire

Mining permitted
- ABA
- Maryland
- Colorado
- District of Columbia
- Pennsylvania
- West Virginia
- Vermont
Multi-Jurisdictional Problem

Mining Prohibited
- New York
- Florida
- Alabama
- Arizona
- Maine
- New Hampshire

Mining Permitted
- ABA
- Maryland
- Colorado
- District of Columbia
- Pennsylvania
- West Virginia
- Vermont

Bilateral Agreements
Parties Agree Mining Permissible

- Mining permitted states
  - No concerns
- Mining prohibited states
  - No longer surreptitious, inadvertent, misconduct.
  - Both parties may mine
  - Contracting out of ethical duty?
Bilateral Agreements
Parties Agree Mining Not Permitted

- Mining prohibited states
  - No problems with such party agreements
- Mining permitted states
  - Parties agreeing to higher ethics?
  - May take higher road
  - Professionalism

Unilateral Notification
One Party Notice - I Will Mine

- Both parties in mining permitted states
  - No problems with such unilateral notice
  - Either party may mine with/without notice
- Notice party in may mine states
  - He can mine
  - Regardless of opponent’s state
- Notice party in may not mine states
  - Cannot mine
  - State’s ethical opinion governs

Unilateral Notification
Notice to opponent - Do not mine my documents

Unilateral notice prevents opponent from mining

- Both parties in mining prohibited states
  - Cannot mine
- Opposing party in mining prohibited state
  - Cannot mine
- Reaffirms state’s ban on mining

- Both parties in mining permitted states
  - Cannot mine
- Opposing party in mining permitted state
  - Cannot mine
  - Notice = actual knowledge
  - Inadvertence and confidential
The Ethics of Metadata

To be Continued...?

Hans P. Sinha
Clinical Professor
National Center for Justice and the Rule of Law
University of Mississippi School of Law

NCJRL.org