Metadata and Legal Ethics: A Selected Bibliography

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Ethics Opinions

Minnesota Bar Association Lawyers Professional Responsibility Board Opinion No. 22 (March 26, 2010); http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2022.pdf

Vermont Bar Association Professional Responsibility Section Opinion 2009-1; http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Electronic%20Documents/09-01.pdf

New Hampshire Bar Association Ethics Comm., Op 2008-2009/4 (April 16, 2009); http://www.nhbar.org/uploads/pdf/EthicsOpinion2008-9-4.pdf

Pennsylvania Bar Association, Committee on Legal Ethics and Professionalism Responsibility, Formal Op. 2009-100

West Virginia Bar Association Op. 2009-1 (2009)

Maryland State Bar Association, Inc., Committee on Ethics, Ethics Docket No. 2007-09; http://www.msba.org/events/soloconference/08/materials/pdfs/04iwpypRaschkeMDEthicsOp2007-09.pdf

Maine Board of Overseers of the Bar Op. 196 (October 21, 2008); http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=63337&v=article

Colorado Bar Association Ethics Committee Formal Opinion 119 (May 17, 2008); http://www.cobar.org/index.cfm/ID/386/subID/23789/CETH//

New York County Lawyers Association Committee on Professional Ethics Opinion No. 738 (March 24, 2008); http://www.nycla.org/siteFiles/Publications/Publications1154_0.pdf

State Bar of Arizona Ethics Opinion 07-03 (November 2007); http://www.myazbar.org/Ethics/opinionview.cfm?id=695

District of Columbia Bar Association Op. 341 (September 2007); http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm

Alabama Bar Association Op. 2007-02 (March 14, 2007); http://www.alabar.org/ogc/fopDisplay.cfm?oneId=412

Florida Bar Association Ethics Department Op. 06-2 (September 15, 2006); http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-442 (August 5, 2006); http://www.pdfforlawyers.com/files/06_442.pdf

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 05-437 (October 1, 2005);

New York State Bar Association, Committee on Professional Ethics, Opinion 782 (December 9, 2004); http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=13630&TEMPLATE=/CM/ContentDisplay.cfm

New York State Bar Association, Committee on Professional Ethics, Opinion 749 (December 14, 2001); http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6533

[NOTE: For a side-by-side comparison of several of these opinions, see *Metadata Ethics Opinions Around the U.S.,* http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html]

Articles and Other Sources on Metadata Mining:

*Michel-Adrien Sheppard, *Lawyers' Ethical Responsibilities Relating to Metadata* (June 2, 2010); http://www.slaw.ca/2010/06/02/lawyers-ethical-responsibilities-relating-to-metadata/

*Luigi Benetton, *The Ins and Outs of Metadata Mining* , The Lawyers Weekly (September 24 2010); http://www.lawyersweekly.ca/index.php?section=article&articleid=1256

*Canadian Bar Association, *Guidelines for Practicing Ethically with New Information Technologies* (September 2008); http://www.cba.org/cba/activities/pdf/guidelines-eng.pdf

Jim Calloway, Metadata - What Is It and What Are My Ethical Duties? (January 5, 2009); http://www.llrx.com/features/metadata.htm

American Bar Association, Can You Peek? The Ethics of Mining Metadata (October 28, 2008); http://www2.americanbar.org/sitetation/Lists/Posts/Post.aspx?ID=14

* Specific to Canada

Tomas J. Garcia and Shane T. Tela, *Jurisdictional Discord in Applying Ethics Guidelines to Inadvertently Transmitted Metadata*, 23 Geo. J. Legal Ethics 585 (2010)

Steven C. Bennett and Jeremy Cloud, *Coping With Metadata: Ten Key Steps*, 61 Mercer L. Rev. 471 (2010)

Andrew M. Perlman, *The Legal Ethics of Metadata Mining*, 43 Akron L. Rev. 785 (2010)

Andrew J. Cavo, *The Ethics of "Mining for Metadata,"* 20 Alb. L.J. Sci. & Tech. 231 (2010)

Hans P. Sinha, *The Ethics of Metadata: A Critical Analysis and a Practical Solution*, 63 Me. L. Rev. 175 (2010)

Mark E. Porada, *Ethics and Metadata: The Pitfalls of Digging Too Deeply*, 24 Me. B.J. 86 (2009)

Elizabeth W. King, *The Ethics of Mining for Metadata Outside of Formal Discovery*, 113 Penn St. L. Rev. 801 (2009)

Emily N. Litzinger, Note, *The Ethical Dilemma of Scrubbing Metadata: The Pathway to a Better Approach,* 36 N. Ky. L. Rev. 611 (2009)

Bradley H. Leiber, *Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata,* 21 Geo. J. Legal Ethics 893 (2008)

Boris Reznikov, *To Mine or Not To Mine: Recent Developments in the Legal Ethics Debate Regarding Metadata*, 4 Shidler J. L. Com. & Tech. 13 (2008)

Practical Tips to Avoid Inadvertent Disclosure of Metadata in Documents Sent Outside Your Organization[1]

1. The simplest and easiest method is to use a "metadata scrubber" - a software application that eliminates some or all metadata - whenever you send a document outside your organization's firewall.

2. If you do not have access to a "metadata scrubber," the next best thing to do is to print the document - and either scan it to .pdf or send it as a fax - both of which are images of the document that do not contain metadata.

3. There is no absolute guarantee that documents that are electronically converted to .pdf files will not contain some metadata, such as revision histories.

4. If you need to send a document showing "tracked changes" - either print the document showing the revision marks and send it as a scanned .pdf or fax - or do a "red-line" ("compare") showing the changes from the original version, and then scrub the new document for metadata before sending it out.

5. Adobe Acrobat Versions 8.0 and 9.0 Professional appear to have effective redaction tools.

There is also a software application called Redax 4.5 - manufactured by Appligent Inc. - which is a plug-in redaction application for Adobe Acrobat Standard or Professional Versions 6, 7, and 8 - but not free Adobe Acrobat Reader - that promises to permanently remove information from .pdf documents.

You can also download the free software Word 2007 Redaction Tool as an add-in for Microsoft Word 2007.

However, you should always test any redaction tool before you employ it.

6. Finally, if you do not have access to a proven and reliable redaction tool, the best thing to do is to print the document - either redact it with a permanent black magic marker or redacting tape - and then scan it to .pdf or fax it.

[1] Merri A. Baldwin *et al.*, *Should I Friend the Judge and Other Current Ethical Challenges for Lawyers*, Practicing Law Institute Twelfth Annual Institute on Privacy and Data Security Law (2011).