

Embedded Metadata and Unintended Consequences

By Alan D. Pratzel

The concern over a lawyer's inadvertent transmission of confidential information to opposing counsel or third parties is not new. In the not too distant past, for example, an attorney might have mistakenly mailed the draft of a contract or other document containing the lawyer's handwritten comments to the wrong party. More recently, the lawyer had to take care to ensure that a draft document being sent via facsimile machine was sent to the appropriate person using the correct fax number. Now, with the increased reliance on computer-generated electronic and digital transmissions between parties, the scope of the risk of inadvertent transmission of confidential information to unintended recipients has been heightened. Most of us have heard stories about a lawyer who inadvertently sends an e-mail intended for a client to opposing counsel or to another third party.

The inadvertent transmission of electronic files can violate ethical duties. For example, Rule 4-1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized or the disclosure is otherwise permitted by the rule. The comments to Rule 4-1.6 provide that the lawyer must act

competently to safeguard client information against inadvertent or unauthorized disclosure and that the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.¹

Prior to the 2007 amendments to the Rules of Professional Conduct, Missouri had no clear authority regarding the ethical obligations of a lawyer who receives an inadvertently transmitted document, even if he or she becomes aware that a document contains privileged information.² The amended Rule 4-4.4, however, contains a new subsection (b) that requires a lawyer who receives inadvertently produced privileged information to notify the producing party that such apparently inadvertent production has occurred. The new Rule 4-4.4(b) provides as follows:

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. Amended Missouri Supreme Court Rule 4-4.4(b).

Comments 2 and 3 to Rule 4-4.4 provide as follows:

[2] Rule 4-4.4(b) recognizes that lawyers sometimes receive documents that were mistakenly

sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then Rule 4-4.4 requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of the document has been waived. Similarly, Rule 4-4.4 does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of Rule 4-4.4, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 4-1.2 and 4-1.4.

Even with the clarification provided by the amended rule, we are left with the question of what to do about unintended transmission of metadata. Documents that are drafted, revised and transmitted electronically often contain embedded data about the document, called “metadata.” For example, attorneys who utilize Microsoft Word and employ Word’s “track changes” feature in order to assist in the drafting and revision of an electronic file are creating metadata within that file. Such a file contains data embedded within it that reveal important and potentially confidential information regarding the document, such as the name of the author, the date the document was drafted, the dates of all revisions to the document, the specific revisions made to the document and even comments inserted by those collaborating on the document.

Historically, ethics analysis of the inadvertent transmission issue has assumed that the transmitted information was confidential and that its transmission was inadvertent. The potential that a transmitted document will contain metadata presents a new twist challenging the standard analysis. What ethical obligations are imposed on an attorney who receives an electronic file that contains embedded metadata?

One must inquire whether or not embedded metadata in an electronic file received by opposing counsel is “inadvertently sent” within the meaning of Rule 4-4.4(b). While it is hard to imagine that a lawyer would ever

intentionally include confidential information in the form of metadata in an electronically transmitted document, the ABA has recently rejected the proposition that embedded data is always unintentionally sent.³ Thus, the ABA has stated that the production of metadata in an electronic document may not be inadvertent and suggests that the question must be answered on a case-by-case basis. The ABA seems to conclude that in those cases where metadata is found not to have been inadvertently sent, Rule 4-4.4(b) is inapplicable and the receiving attorney is under no obligation to notify the sender.⁴

How should an attorney avoid transmitting metadata that is embedded in an electronic file? One obvious remedy is not to utilize those programs in Microsoft Word and Corel WordPerfect that track revisions and thereby create embedded metadata; this, however, would reduce the efficiencies of the lawyer and his or her administrative staff.

Saving and transmitting an electronic document in “pdf” format will largely reduce the amount of metadata transmitted. However, the effectiveness of transmitting a document in “pdf” format to a client or lawyer within a law firm for further revision is problematic because a “pdf” document is not easily revised.

Finally, utilizing available software programs to “scrub” a document and thereby attempt to remove embedded metadata prior to its electronic

transmission offers another means to clean-up a file, or at least establish that any embedded information contained therein was sent inadvertently within the meaning of Rule 4-4.4(b).

It is hoped that the applicability of Rule 4-4.4(b) to the issue of metadata embedded within electronically transmitted files will develop in the future. For now, the analysis will necessarily be conducted on a case-by-case basis. As a result, lawyers would be well-advised to take appropriate steps to remove embedded metadata from their files prior to transmitting them electronically to third persons.

ENDNOTES

1. See Comments 15 and 16 to Rule 4-1.6 of the Rules of Professional Conduct.

2. See generally, *Michael Downey, Ethical Obligations Upon Receiving Inadvertently Disclosed Privileged Metadata*, ST. LOUIS LAWYER (December 2006). Mr. Downey is a partner at the St. Louis law firm of Fox Galvin, L.L.C. and has written extensively regarding the ethical and discovery considerations raised by the issue of metadata embedded in electronic files.

3. See ABA Formal Opinion 06-442 (August 5, 2006).

4. *Id.*



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