Florida Attorneys' Ethical Obligations Regarding Metadata

Florida attorneys are well versed in the Bar Rules' requirements for the protection of confidential client information and the procedures for handling the unintentional disclosure or receipt of confidential information. More specifically, Fla. Bar Rule 4-1.6 identifies the attorney-client confidentiality as a "fundamental principle" relating to the representation of clients. The rationale is simple – attorney-client confidentiality encourages full and frank communications with the lawyer, even when discussing embarrassing or legally damaging information. As a result, attorneys have an ethical obligation to take reasonable steps to protect confidential information, regardless of the method of communication – including electronic documents and communications. Similarly, Bar Rule 4-4.4(b) provides the ethical duty to notify the sender upon discovery of the inadvertent receipt of confidential information.

In 2006, the Board of Governors of the Florida Bar directed the Committee on Professional Ethics to issue an opinion to determine the ethical duties when lawyers send and receive electronic documents in the course of client representation. *See* Florida Prof. Eth. Comm. Op. 06-2 (September 15, 2006). In its opinion, the Committee recognized the issued posed by metadata on the unintentional disclosure of confidential information, including but not limited to: (1) name of the author; (2) the identification of the computer on which the document was created; (3) the names of previous document editors; (4) previous revisions prior to the final document, including additions, deletions and comments; and (5) any other data not immediately apparent from the document itself that may convey confidential information not intended for disclosure.

In an effort to provide guidance to Florida attorneys, the Committee specifically identified three ethical obligations with regard to the sending of and/or inadvertent receipt of metadata:

1. The sending attorney has the obligation to take reasonable steps to safeguard the confidentiality of all communication sent by electronic means to other lawyers or third parties, and to protect all confidential information – including information contained in metadata – from disclosure.

2. The receiving attorney has a concomitant obligation, upon receiving an electronic communication or document from another attorney, not to attempt to obtain information regarding the sending attorney's client representation that may be contained in metadata. Simply stated, the recipient cannot mine metadata to obtain information the attorney knows or reasonably should know was not intended for disclosure. "Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit." Florida Prof. Eth. Comm. Op. 06-2, p.3.

3. If the receiving attorney obtains information from metadata that he or she knows or should know was not intended for disclosure, the attorney must "promptly notify the sender." *Id*.

The Committee recognized that continuing training on the ethical obligations when handling metadata should be included in the continuing study and education of Florida attorneys.

In an opinion issued the year before, the American Bar Association's Standing Committee on Ethics and Professional Responsibility agreed that metadata should be treated as inadvertently disclosed information, however failed to condemn the intentional attempts to mine documents for metadata, instead, relied solely on the ethical obligation of the receiving attorney to notify the sender of the inadvertent disclosure. *See* ABA Op. 05-437 (October 1, 2005).

An attorney may avoid the unintentional disclosure of metadata by:

- Printing and sending documents by facsimile;
- Printing and scanning documents, then sending the image of the document – e.g. via pdf;
- Using software to scrub metadata from electronically stored or sent communications or documents.