Metadata 101: Beware Geeks Bearing Gifts

By Erik Mazzone

There was a time when a lawyer who was uninterested in technology could happily and successfully run her practice without knowing her AOL from her elbow. (Readers under the age of 30: kindly consult Wikipedia on what AOL is.) Much like AOL's internet hey-day, those halcyon days of technology-free law practice are behind us. For good or ill, the practice of law has dragged itself from the primordial sea and now walks on land, breathing air and pecking out emails on an iPhone.

For those attorneys of the tech nerd persuasion, this change (to call it an "evolution" would imply a qualitative improvement, at which, doubtless, many attorneys would take umbrage) is cause to rejoice. It gives hope to us nerds; hope that at long last, our colleagues at the bar may cease to roll their eyes and writhe in agony during our painstakingly (some might say, painfully) detailed dissertations on the relative merits of Windows 7 versus Windows XP. (This author has, sadly, not yet found this to be the case.)

For the rest of the bar—those of you who inexplicably prefer time with loved ones and sunshine to blogs and the soft blue glow of a computer monitor—the increased role of technology in legal practice has often been cause for shrugged shoulders, deep sighs, and a collective murmur of, "great...what new thing do I need to worry about now?" We have learned to be wary of geeks bearing gifts—for every time-saving and practice-enhancing app we giddily load on our iPads, a new danger or frustration lurks around the next technological bend.

Over the past few years, perhaps no such technological danger has been less understood yet more commonly present in law practice than that posed by metadata. Even the name itself is impenetrable, conjuring an unholy blend of metaphysics and data that probably makes you want to put down this article and turn on *Dancing with the Stars*. More frustrating still, a plea to our modern oracle—the internet—fails to provide any useful insight as to the nature of metadata. Merriam Webster helpfully defines it as "data that provides information about other data."

Well, that clears that up. Any questions?

What many of us do know, however, is that metadata is important enough that the North Carolina State Bar has issued a formal

ethics opinion (2009 FEO 1) on the topic. So, with the renewed clarity of purpose that only an existential threat to our law licenses can provide, let us tackle this topic of metadata and provide some measure of relief to our collectively furrowed brow.

Metadata: What Is It?

When one creates a digital document, the software used to create the document will often keep a log about the creation and editing of that document. Metadata, as the ethics opinion states, is embedded information in digital documents that can contain information about the document's history, such as the date and time the document was created, "redlined" changes, and comments included in the document during editing. In other words, long after a document has been finished, metadata about the process of creating and editing the document is left behind like fingerprints at a crime scene.

Unlike actual fingerprints (at least if the current crop of crime scene investigation television shows is to be believed) metadata is easy for an untrained, tech-novice to uncover. Searching Google for "how to find metadata in a Word document" will yield over 3 million results, including step-by-step instructions that any technophobe could easily follow. There is nothing objectively good or bad about metadata—it's just data. You've likely never wiped down a room for your fingerprints before (and this being the magazine of the State Bar, if, for some reason you routinely wipe down your prints, please keep that revelation to yourself) so too worrying about metadata in most facets of your life is unnecessary. The one facet of your life where you do, however, need to worry about metadata—where indeed you are duty-bound to worry about it—is in your practice.

Metadata: Why Do You Need to Care?

If you have never, in the course of your professional practice, created, edited, read, received, or sent a digital document, you may now skip to the next article in this magazine.

Still there?

As an attorney, you need to care about metadata because it is a client confidentiality time bomb hidden in the middle of your practice. As attorneys, we are prohibited from revealing confidential client information without the informed consent of the client by RPC 1.6(a). You know this. I know you know this. I further know that you would never knowingly reveal client confidences purposefully. The very real possibility remains, though, that if in the course of your practice you have ever shared digital document with an opposing counsel, you may have unknowingly and inadvertently revealed confidential client information in the form of metadata.

Since you probably have your law license hanging on your office wall right now (as I do), I probably don't need to elaborate further on why you need to care about metadata. But to err on the side of caution I offer a syllogism that would make my old Jesuit logic professor reconsider my grade:

We have an ethical duty to maintain client confidences.

Metadata may contain client confidences.

Sending metadata which contains client confidences to an opposing counsel or party is a violation of our ethical duty.

Metadata: What Do You Do About It?

You now know what metadata is and why you, as an attorney, need to care about it. All that remains is to know what to do about it.

For the answer to that question and more, please send me a check or money order for $19.95 to… just kidding. None of the foregoing matters much if you don't know what to do when you close this magazine and go back to your office.

If you have not yet read 2009 FEO 1 on metadata, reading that opinion is your first step. Go on; it's on the State Bar website. I'll wait.

Read it now? Great.

You now know that there are two primary questions surrounding your ethical duty relating to metadata: 1) what is your duty to prevent disclosing confidential client information in metadata; and, 2) if you receive digital information from opposing counsel, what may you do with any confidential client information contained therein?

Duty When Sending Digital Information

Your duty when sending digital information is to "take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients." (2009 FEO 1) The opinion goes on to state, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication." (2009 FEO 1 quoting RPC 215) What steps and precautions would be considered reasonable will depend on the circumstances. So as not to leave you adrift wondering what you can do to satisfy this reasonable precaution standard, let me share with you the way I advise the members of the North Carolina Bar Association in the course of my work.

The obvious precaution to take is to remove the metadata from a digital document before sending it. There are several ways to do this, ranging from the free and clunky to the expensive and elegant. The best way to do this in my opinion (which, it should be noted, along with $1.75 will buy you a cup of coffee and should under no circumstances be confused with a State Bar Ethics Committee Get Out of Jail Free card) is to purchase a stand-alone metadata removal product (often referred to as a "metadata scrubber"). It's not unlike redacting confidential information from a document.

If you work at a law firm with an IT department, chances are you already have a metadata scrubber product in place. If, however, you are one of the many lawyers in North Carolina who works at a firm without an IT department I would suggest looking at Payne's Metadata Assistant ($89 at www.payneconsulting. com). Payne's Metadata Assistant removes metadata from Microsoft Word, Excel, and PowerPoint. It integrates nicely with Microsoft Outlook (as well as GroupWise and Lotus Notes) and pops up helpful reminders just before you send an email with a digital document attached.

If the purchase of a stand-alone product is not in your budget, the word processing programs Microsoft Word and Corel WordPerfect each contain metadata removal tools or settings, as well. For WordPerfect users, using the included metadata removal tools is likely to be your best option—Payne's Metadata Assistant does not work for WordPerfect. For Microsoft Word users, though, for $80 you can purchase a product whose sole function is to remove metadata—it may not be a Get Out of Jail Free card, but it certainly ought to help demonstrate that you took reasonable precautions to prevent the disclosure of confidential information.

For the sake of completeness, I'll briefly address some other possible solutions. One less elegant and less green but nevertheless effective solution: printing out documents and scanning them back in as PDF files.

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thing—happened. Our citizens deserve a government that investigates allegations of crime to both thwart frivolous charges and to adequately prosecute meritorious cases.

North Carolina should consider eliminating private warrants and provide law enforcement with the necessary resources to investigate and charge—or not charge—under these circumstances. Perhaps the law should permit a citizen to petition the district attorney to bring charges if law enforcement declines to act. While eliminating private warrants would increase the burden on law enforcement, simply allowing folks to file charges without an independent law enforcement investigation is even more burdensome to the justice system and the public.

Should Magistrates Set Bonds in Domestic Violence Cases?

Historically, magistrates set bonds in all cases except murder. About 15 years ago, the General Assembly established a new general rule requiring that district court judges set bonds in domestic violence cases. N.C.G.S. Section 15A-534.1. The rule provides that once a defendant is arrested in a domestic violence case, he or she is supposed to be brought before a district court judge for consideration of bond. If court is not in session, then the defendant will likely be held overnight and brought before a judge the next morning when court resumes. If there is not a session of court within 48 hours after the defendant's arrest (during the weekend, for example), then a magistrate sets the bond after the 48 hour period expires. *State v. Thompson*, 349 N.C. 483 (1998).

No doubt the change in the law is supposed to provide an added measure of protection to victims of domestic violence based upon the assumption that district court judges are better at setting bonds than magistrates. Observing this rule in practice, however, raises two concerns: (1) a magistrate is structurally better positioned than a district court judge to get accurate information to set a bond and (2) when court is not in session, everyone in a domestic relationship is in jeopardy of spending an extended period of time—up to 48 hours—in jail based upon a false charge.

First, a magistrate is in a better position to get accurate information because a magistrate speaks to the victim or the law enforcement officer when the case is charged. Also, the same magistrate is often on duty and speaks to the defendant when he or she is arrested. Instead of the magistrate setting the bond with information from both sides of the case, under current law the case is now likely added onto a crowded docket either that day or the next day that court is in session. In ten years of setting bonds in these cases, I can only remember a handful of times when either the law enforcement officer or the alleged victim in one of these cases appeared in the courtroom when I set the bond. Instead of having information from both sides of the case, all the district court judge has to rely on in setting the bond is the written charge, the defendant's version of events, the defendant's record, and perhaps, some notes or recommendation from the magistrate. It seems to me that divorcing the responsibility for setting the bond from best information is a poor practice.

Second, since this rule also applies in private warrant cases, too often the actual victim of domestic violence is charged by the perpetrator, and must wait overnight or longer until his or her bond is set. If a false charge is brought Friday after court has concluded, then the innocent defendant (the actual victim) will likely spend 48 hours in jail before his or her bond is set. Thus, the law, in these instances, has terrible consequences for those it was intended to help.

Should North Carolina Establish a Legal Retreat?

Science, for example, has been advanced by leading scientists gathering for informal retreats to discuss problems and ideas in their fields. A similar small gathering of legal community leaders—judges, lawyer-legislators, prosecutors, private practitioners, magistrates, and legal educators—would likely produce improvements in our law and judicial system. How our various statutes fit together, problem areas in the law such as the two I have mentioned above, funding for the judiciary, judicial selection, and other topics could be explored with collective input from leaders with broad perspectives to help the participants move beyond preconceived notions. It would provide a forum to not only identify and discuss problems, but it would also develop relationships necessary to collaboratively address them.

As most readers know, the UNC School of Government does an outstanding job providing formal training to governmental employees and informally answering their questions on an as needed basis. The school could plan an excellent continuing legal education retreat that would benefit all North Carolinians. I would welcome the opportunity to volunteer to help in any capacity. ■

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Metadata 101 (cont.)

Proponents of this approach often choose it based on cost, though given the cost of paper and printer ink, I'm not convinced it is more economical. Printing a word processing document into a PDF document will remove much of the metadata as well. If it were my license at stake though, I'd purchase a standalone metadata scrubber and some piece of mind.

Duty When Receiving Digital Information

2009 FEO 1 is clear and straightforward on this point: a lawyer may not search for metadata (often referred to as "mining" for metadata—a description which belies the relative ease with which it can be done). If a lawyer unintentionally views another party's confidential information within the metadata of a given document, she must notify the sender and may not use the information without consent of the other lawyer or party.

Conclusion

Not nearly as thorny and difficult to grasp and deal with as its name would imply, metadata is a fact of life in the modern law office. You now know what it is, why you need to care about it, and what to do about it. Purchase a metadata scrubber or otherwise put into place a procedure to deal with metadata in your practice. Then unfurrow your brow, and go back to enjoying time with your loved ones and sunshine. And, of course, your iPhone. ■

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