

# OREGON LAW PRACTICE MANAGEMENT

## Guarding and Exploiting Metadata under OSB Opinion 2011-187

In this month's issue of the [Oregon State Bar Bulletin](#), [OSB General Counsel Helen Hirschbiel](#) discusses [OSB Formal Opinion 2011-187](#). Here are key excerpts:

### Sender's Duties

- Competency in relation to metadata requires a lawyer who uses electronic communications to maintain at least a basic understanding of the technology and the risks of revealing metadata or to use adequate technology support. [OSB Formal Op. No. 2011-187](#).
- Acting competently does not require that the lawyer be free of any and all mistakes. On the contrary, the Oregon Supreme Court has made clear that an isolated mistake does not necessarily amount to incompetence. Instead, it simply requires that lawyers use reasonable care to avoid disclosure of client confidences.
- "With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent." [OSB Formal Ethics Op No 2011-187](#). Such steps might include scrubbing the metadata from the document prior to electronic transmission or converting the document to a format (such as PDF) that does not include the metadata. What constitutes reasonable care will change as technology changes.

### Recipient's Duties

- If a lawyer who receives a document knows or should have known that the document was inadvertently sent, the lawyer must notify the sender promptly. RPC 4.4(b). [OSB Formal Ethics Op No 2011-187](#) reads this rule to apply to the inadvertent disclosure of metadata as well.
- How is a lawyer expected to know that a document or its embedded information has been inadvertently sent? Factors to consider may include: whether the document was sent in its native application or was converted to PDF; the nature of the information; how easily the data may be viewed (is it readily apparent on the face of the document, or hidden beneath several layers); the standard of practice between lawyers generally and between the lawyers in a given situation.
- Assuming that the metadata was inadvertently sent, RPC 4.4(a) requires the recipient lawyer to promptly notify the sender in order to give the sender the opportunity to take steps to protect the confidentiality of the information after its transmission. Thus, when in doubt about the intent of sending the information, a lawyer may decide that giving notice is the most cautious approach.
- Lawyers should carefully consider the advantages and disadvantages before using inadvertently sent documents or metadata. Lawyers should also consult with their clients before making the decision. OSB Formal Op No 2005-187. The ultimate decision of whether to return or retain, however, is left to the lawyer's professional judgment.

### Learn More

On January 27, 2012 the [Professional Liability Fund](#) presented a lively CLE on Metadata. If you did not attend the live program or listen via Webcast, order the CD or DVD and download the handout at no charge through the [PLF Web site](#) > Programs on CD/DVD > Metadata: Complying with Oregon Formal Opinion 2011-187.

Read Helen's full article [here](#).

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