

## ABA Ethics Opinion Allows Litigators More Freedom to Review Adversaries' Metadata

*State bar associations, however, take more restrictive approach*

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**T**he ABA and several state bar associations are at odds over whether lawyers may seek to extract metadata from documents produced by opposing counsel. Metadata includes embedded file information contained within an electronic document and may reveal its creation date, author's name, tracked changes, and deleted text.

In Formal Opinion 06-442, the ABA Standing Committee on Ethics and Professional Responsibility concludes that "the Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party."

Some state bar associations, however, take a different view. The New York State Bar Association's Committee on Professional Ethics has concluded that an attorney's attempt to glean metadata from an adversary's document could violate state ethics rules. The opinion says it is unethical to seek to obtain privileged or confidential information in this manner. The Florida Bar, in turn, has issued a similar ethics opinion.

Whether metadata may be mined from an adversary's electronic communications entails "a fact-intensive inquiry that depends on the types of data involved and the specific claim of privilege being

made," says David S. Coale, Dallas, Co-Chair of the Section of Litigation's Commercial and Business Litigation Committee.

"One way to solve these kinds of problems is to reach an understanding in advance regarding a confidentiality agreement with a clawback provision for inadvertently disclosed data or documents," Coale advises. The underlying questions that drive the

debate regarding metadata are similar to issues involving inadvertent disclosure of other privileged materials, he notes.

"It is important to draw the distinction between metadata properly obtained through

discovery and metadata contained in active day-to-day communications between counsel," adds Carol C. Payne, Dallas, Co-Chair of the Section's Professional Liability Litigation Committee. "In the context of discovery, metadata can be very important and entirely appropriate to discover," she says.

Given these ethics opinions, however, Payne warns that counsel sending electronic documents may have an obligation to scrub from them any existing confidential metadata. She notes: "Many lawyers now use scrubbing programs that eliminate metadata from documents before they are sent. If you do not take this or a similar precaution, you may be inadvertently disclosing otherwise protected client confidences." □

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### Resources:

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006). ABA members may download complimentary copies of this and other opinions for one year. Go to [www.abanet.org/cpr/pubs/home.html](http://www.abanet.org/cpr/pubs/home.html) for details.

Florida Bar Op. 06-2, available at [www.floridabar.com](http://www.floridabar.com). Click "Ethics Opinions."

New York State Bar Ass'n Formal Ops. 749 and 782, discussing metadata, available at [www.nysba.org](http://www.nysba.org). Click "Publications."