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What's in your document?

Board says it's unethical to mine hidden data from e-texts

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The Bar Board of Governors is asking whether an ethics opinion or Bar rule is needed to regulate mining of metadata from electronic documents, but in the meantime, governors didn't want to leave any doubt how they felt about it.

The board, at its December 16 meeting in Amelia Island, voted unanimously for a motion to express its sentiment that metadata mining is something lawyers should not do.

"I have no doubt that anyone who receives a document and mines it . . . is unethical, unprofessional, and un-everything else," said board member Jake Schickel, who made the motion that the board express its disapproval at the practice.

If you're unfamiliar with metadata, you are not alone. Several board members said they hadn't heard of it until it came up at their December meeting.

Basically, metadata is information a word processing or document creation program keeps about the history of that document. This history includes changes, deletions, additions, which persons have accessed the document, and electronic notes that have been attached at various times. Such information is not visible on the screen, but it can be held in the background.

And this information usually accompanies the document when it is electronically transmitted.

President-elect Hank Coxe gave the board a graphic example of what that means. He said a senior partner in his firm was working on a brief which was requested by another firm for a case it was working on. When the partner finished the brief, he offered to fax it, but the other firm asked that it be e-mailed.

That firm then mined it for metadata. What they got, Coxe said, was a history showing every change that had been made to the document, as well as who had worked on it. At one point, the client had been e-mailed for input and the client had replied by e-mail. Both had been attached to the document as it was being prepared and later deleted; and both communications were recovered by the other law firm.

"This is a major issue," Coxe told the board.

"When you file a document, either a [Microsoft] Word or a WordPerfect document or even a PDF [Adobe print document format], there is software available that can go in and reveal what has been done to that document," said board member Steve Chaykin, chair of the Board Review Committee on Professional Ethics, which brought the issue to the governors.

Bar Executive Director John F. Harkness, Jr., reminded the board the problem will only get worse as the legal system relies more on electronic data and less on paper. He noted that next year the Florida Supreme Court will no longer accept paper filings and briefs and will require all filings by attorneys to be electronic.

The board approved the motion from the BRC to refer the issue to the Professional Ethics Committee, which will be asked two basic questions. The first is whether it is unethical for a lawyer to mine metadata from an electronic document he or she receives from another party. The second is whether an attorney has an affirmative duty to take reasonable precautions to ensure that sensitive metadata is removed from an electronic document before it is transmitted.

The board also asked the PEC if it was better to address the issue with an ethics opinion or an amendment to Bar rules.

That motion passed unanimously, as did Schickel's follow-up motion to express the board's sentiment.

"Our state needs to be on the forefront of this," said board member Scott Hawkins. "There are corresponding duties of both the receiving and the transmitting lawyers, and I recommend that all law firms develop policies."

How to cleanse metadata from your e-documents

The *News* asked J.R. Phelps, director of the Bar's Law Office Management Assistance Service, for a quick rundown on what lawyers can do to protect inappropriate information from remaining in documents they transmit electronically.

Here's his advice:

There are a number of options to reduce or eliminate metadata from your documents.

Word, PowerPoint, and Excel users should turn off the Fast Saves feature. To do this click on Tools, then Options, then the Save tab, and uncheck "Allow Fast Saves." Fast saves allows a computer to quickly save a file by not removing deleted text from it. When computers were

much slower, it was perhaps a helpful feature. However, with more powerful computers in use today, you won't notice any difference with this feature turned off.

WordPerfect has a feature called Undo/Redo History, it allows you to view past changes in a document in terms of what was cut, copied, and even deleted. Click on the Option button, and then uncheck "Save Undo/Redo Items with Document" to turn it off. This does not remove all metadata. WordPerfect users should visit the Corel knowledge base at <http://support.corel.com/> and search for "minimizing metadata."

Converting files to PDF format with AdobeAcrobat will strip out *most* metadata. For this reason many law firms today have adopted a practice of sending only PDF documents to clients or opposing counsel, especially if the recipient doesn't need to edit the document.

For Word, Excel, and PowerPoint users, the most widely used metadata scrubber is the Metadata Assistant sold by Payne Consulting Group (www.payneconsulting.com). Other metadata removal programs for the Microsoft suite of products include ezClean by SoftWise Consulting (www.kkl.com) and Workshare Protect by Workshare (www.workshare.net).

Unfortunately, there is no software program for easily and automatically removing metadata from WordPerfect documents.

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