

	<p><b>INSIDE...</b></p> <ul style="list-style-type: none"> <li>■ Big Changes Made to Attorney Discipline System – p. 4</li> <li>■ CLE Wrapup: A Successful Year with More to Come – p. 11</li> <li>■ Quarles &amp; Brady Team Up for the Environment – p. 16</li> <li>■ Justice Ryan Retiring This Month – p. 18</li> </ul>	<p><b>AUGUST 2010</b> Volume 29, Number 8</p> <p>Official Publication of the <b>MCBA</b> MARICOPA COUNTY BAR ASSOCIATION</p>
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Where The Legal Community Connects

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## Metadata Rules – Are You Complying?

In states across the U.S., the debate surrounding an attorney's professional responsibility regarding metadata continues. Historically, opinions on whether there is a significant risk with metadata and, if so, what must be done to address that risk have varied between attorneys, IT departments, management, bar associations and other governing entities.

In the last few years, a multitude of governing bodies have drafted and issued opinions regarding metadata. The Arizona State Bar has issued an opinion specifically addressing an attorney's ethical obligations regarding metadata. Law firms should address their management of metadata and develop specific policies or update existing policies to ensure they are in accordance.

As more states sound off on metadata and an attorney's responsibility, Arizona firms with practices in multiple states should also make sure that their policies are acceptable in every jurisdiction in which they practice.

The Arizona State Bar's Committee on the Rules of Professional Conduct released Opinion 07-03: Confidentiality; Electronic Communications; Inadvertent Disclosure, which deals with a lawyer's ethical obligations regarding metadata, as follows:

*"Lawyers who send communications or other documents electronically must be aware that such activity has inherent risks. Therefore, the lawyer must take reasonable measures to prevent the inadvertent disclosure of confidential client information."*

For the full draft of the opinion including the applicable rule and other published opinions on metadata, visit

<http://www.myazbar.org/Ethics/opinionview.cfm?id=695>.

Interestingly, the Arizona Supreme Court ruled on October 29, 2009 that the metadata attached to public records is itself public and cannot be withheld in response to a public records request.

According to the ruling *"The metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page."*

The Supreme Court's unanimous decision is believed to be the first by a state supreme court on whether a public records law applies to so-called "metadata."

### What is Metadata?

Succinctly defined, metadata is "data about data."

Microsoft Word, Excel and PowerPoint include automated features to aid in document production and collaboration.

These features embed electronic information (metadata) in a file which can reveal the identity of those who edited the document (revision authors); track the time, date, and frequency of edits (track changes and revisions); reveal inserted comments and the document template; and other data employed to control the document's text and format.

It is the commonly held opinion that this information should be removed before a file is shared outside the firm's electronic walls to avoid violating attorney client privilege, disclosing sensitive information to third parties and so on.

Many people think of tracked changes when they think of metadata. There have been numerous high profile cases where tracked changes inadvertently left in a document have had embarrassing, not to mention legal and ethical consequences. This mistake can be easily made. An attorney switches on the Track Changes function to make edits to a document. After collaborating with his assistant and associates, he is satisfied with the changes. He decides to send it to the client for review by changing the document to "Final" in the "Tracking" section.

The tracked changes disappear from the document. He assumes

they are no longer there, clicks on Send via e-mail and sends the document to his client. The client opens the document to see all of the tracked changes displayed. This happened because the attorney did not accept all of the changes in the document, he merely hid them from view. When the client opened the document, her “Display for Review” settings were set by default to “Final Showing Markup”, thus revealing all of the changes in the document. If the firm had a metadata policy in place that detailed when and how documents should be “cleaned” before being sent externally, this situation would have been avoided.

A rule of thumb when understanding metadata is that every time a document is opened, edited and saved, metadata is added by the application, the operating system or the user. While track changes may provide an obvious example, many other metadata scenarios can cause a law firm problems.

For example, an attorney is creating a contract for a new client. The contract requires some standard language. Since she has prepared similar contracts before, the attorney opens up a contract created previously for another client in Microsoft Word, when she worked at a different firm. Using “Save As” she saves the document under a new name, makes edits as needed and e-mails it to her client.

Upon receipt the client opens the document and, since they have heard about metadata, opens “File” and then “Properties” to view any data. By viewing the “Statistics” tab the client sees a “Created” date of one year before they were a client and a “Modified” date indicating the date the attorney emailed the document. Even more puzzling in the “Summary” tab

they see a different firm listed in the “Company” field. The client now has access to a history that reveals information the attorney should have not revealed. That history will stay with the document until it is “cleaned” using a metadata management tool. The firm may also not want to reveal this type of information to a client being billed time for creating the document.

There are three key components to developing a metadata policy - Establish, Enforce and Educate.

### **Establish a Metadata Policy**

Educate yourself about metadata and review Arizona’s opinion (and other states’ and entities’ opinions and guidelines, as needed) regarding metadata.

Review firm documents (on internal networks and published on external networks). Is your firm inadvertently sharing confidential information?

Involve attorneys and your IT department and establish a firm approach based on your findings. If necessary, bring in a consultant to advise your firm on a metadata policy.

Moving forward, review your policy on a routine basis to address any new rulings on metadata.

### **Enforce the Policy**

Consider purchasing metadata management software. The software you choose should be flexible enough to execute firm policy, automated enough to enforce firm policy and easy enough for users to understand and utilize.

The latest Microsoft Office program includes a metadata tool called “Document Inspector.” Since Microsoft applications add metadata to files, it presents a somewhat contradictory position

for Microsoft to provide a tool for removing that metadata. Firms who already practice a metadata policy have found that the main weakness with Document Inspector is the lack of automation. The onus is on individual users to “inspect” documents and then decide the metadata to remove, proving to be ineffective in enforcing a metadata policy throughout an organization.

Metadata management software, on the other hand, removes metadata more thoroughly and is designed to help firms automate and therefore enforce metadata policies. The most popular products available for metadata management can be found by searching for “metadata management software” in Google.

### **Educate**

The success of any policy hinges on the execution. A firm’s metadata policy will be more successful if staff can grasp what metadata is, when it can be useful, when it can be harmful and how to manage the metadata in documents. Consider bringing in outside trainers to help educate your firm with hands on training.

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