WORKING GROUP ON ETHICAL ISSUES INVOLVING METADATA IN ELECTRONIC DOCUMENTS

REPORT AND RECOMMENDATIONS

September 14, 2015

Chair: Hon. Anne M. Patterson

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INTRODUCTION

The New Jersey Supreme Court created the Working Group on Ethical Issues Involving Metadata in Electronic Documents to consider whether a lawyer who receives an electronic document may, consistent with the rules governing attorney ethics, review metadata in that document. The Working Group also considered related issues involving metadata in the contexts of discovery and electronic filing of documents with the Judiciary.

"Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications. This embedded electronic information may include privileged information, information subject to the work product privilege, information that has not been requested in discovery, information that has been requested in discovery but is subject to an objection on which a court has not yet ruled, non-discoverable information, and private or proprietary information. Some metadata is of little or no use to a party or counsel in a litigated dispute or transactional matter. Other metadata is directly material to a factual or legal issue. If the sender has not affirmatively minimized ("scrubbed" or "stripped") metadata in the document, some information may be revealed by simple computer keystrokes, while other metadata may be "mined" by the use of sophisticated computer software.

The Working Group divided into two subcommittees. Subcommittee 1 considered ethics issues and Subcommittee 2 considered issues relating to discovery and e-filing of documents by

parties in court actions. The full Group reviewed the Subcommittee recommendations, pertinent Court Rules on ethics and discovery, ethics opinions issued by other jurisdictions, and other materials.

The Working Group respectfully submits its Report and Recommendations to the Supreme Court. It recommends that an Official Comment be added to Rule of Professional Conduct 4.4(b) stating that lawyers who receive electronic documents may review unrequested metadata, provided that the receiving lawyer reasonably believes that the metadata was not inadvertently sent. The Group further recommends that the civil discovery rules be amended, and new Official Comments added, to highlight issues pertaining to metadata. The Group recommends that steps be taken to minimize the disclosure of metadata in documents electronically filed with the Judiciary. Finally, the Group recommends that judges, lawyers, and law students be educated about metadata issues as a component of judicial education programs, continuing legal education, and law school curricula.

I. ETHICS - UNREQUESTED METADATA AND RULE OF PROFESSIONAL CONDUCT 4.4(b)

The first issue considered by the Working Group is whether a lawyer to whom unrequested metadata is produced with a requested document, and who reviews the metadata, should be deemed to have reviewed inadvertently sent information in violation of Rule of Professional Conduct 4.4(b).

A. Background to the Working Group's Recommendation Regarding Rule of Professional Conduct 4.4(b)

1. New Jersey Rules of Professional Conduct 4.4(b) and 1.1

Three Rules of Professional Conduct are relevant to the Working Group's inquiry: Rule of Professional Conduct 4.4(b), a subpart of the Rule addressing the obligation of lawyers to respect the rights of "third persons," Rule of Professional Conduct 1.1, that sets forth the requirement of lawyer competence, and Rule of Professional Conduct 1.6(a), that prohibits disclosure of confidential information relating to a representation without client consent. With respect to Rules 4.4(b) and 1.1, New Jersey's approach differs significantly from the approach of the American Bar Association (ABA) Model Rules of Professional Conduct, which many jurisdictions follow.

Rule of Professional Conduct 4.4(b), as currently drafted, provides:

> (b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

Rule of Professional Conduct 4.4(b) protects the attorney-client relationship from unwarranted intrusion by imposing an obligation on a lawyer who inadvertently receives a document, particularly one containing confidential or privileged information, to stop reading the document.

Stengart v. Loving Care Agency, 201 N.J. 300, 325-26 (2010). The Rule encompasses e-mails and other electronic forms of transmission. Ibid. (citing Model Rule of Professional Conduct 4.4 comment 2 (2004)).

In its 2003 report to the Supreme Court regarding New Jersey's Rules of Professional Conduct, the Pollock Commission acknowledged that as recommended, Rule of Professional Conduct 4.4 would impose requirements beyond those in the ABA Model Rule. The Model Rule allows the receiving lawyer to read and use inadvertently sent information and merely requires that the receiving lawyer notify the sending lawyer of the inadvertent disclosure. In contrast, New Jersey's Rule absolutely prohibits the receiving lawyer from reading or using inadvertently sent information ("shall not read the document"). See Kevin H. Michels, New Jersey Attorney Ethics: The Law of New Jersey Lawyering § 29:3-7 at 687 (2015).

New Jersey Rule of Professional Conduct 4.4 thus strictly protects documents that are inadvertently produced, whether or not those documents contain information subject to the attorney-client privilege or work product privilege. A lawyer who continues to read a document that the lawyer has "reasonable cause to believe" was inadvertently produced, or who fails to notify the sender and return such a document, could be found to have violated Rule of Professional Conduct 4.4.

A second rule relevant to the Working Group's analysis is Rule of Professional Conduct 1.1:

> A lawyer shall not:
>
> (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
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> (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

In this respect as well, the New Jersey Rule differs from the ABA Model Rule of Professional Conduct and other jurisdictions that have adopted the Model Rule formulation. Model Rule of Professional Conduct 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The ABA Model Rule 1.1 definition of competence, which is the basis for the approach taken by several jurisdictions to metadata issues, has no counterpart in the New Jersey ethics rules.

Finally, Rule of Professional Conduct 1.6(a) provides that, subject to certain exceptions set forth in the Rule, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation[.]" That Rule codifies a lawyer's long-recognized obligation to "preserve the confidences and secrets of a client," so that clients are "assured that the secrets and confidences they repose with their attorney will remain with their attorney, and their attorney alone." Reardon v. Marlayne, 83 N.J. 460, 470 (1980).

2. Other Jurisdictions' Approaches to Ethics Issues Arising From Inadvertently Produced Metadata

Notwithstanding the distinctions between New Jersey's Rules of Professional Conduct 4.4 and 1.1 and the corresponding rules of most other jurisdictions, the Working Group reviewed ethics opinions of other jurisdictions and considered the guidance those opinions provided to practitioners. The Working Group found no consensus – indeed, no clear majority view – in the opinions of other jurisdictions with respect to the ethical implications of a lawyer's review of unrequested metadata in a document transmitted to that lawyer.

The ABA and several jurisdictions have concluded that lawyers transmitting documents have the burden of technological competence to "scrub" electronic documents prior to sending them, based on Rule of Professional Conduct 1.1, the Rule imposing an affirmative duty of competence; as noted above, that Rule has no counterpart in New Jersey. ABA 06-442 (8/5/2006) ("Review and Use of Metadata"); Colorado Opinion 119 (5/17/2008) ("Disclosure, Review, and Use of Metadata"); Maryland Ethics Opinion Docket No. 2007-09 (10/19/2006) ("Ethics of Viewing and/or Using Metadata"); Minnesota Opinion No. 22 (3/10/2010) ("A Lawyer's Ethical Obligations Regarding Metadata"); Oregon Formal Opinion No. 2011-187 (11/2011) ("Competency: Disclosure of Metadata"); Pennsylvania Formal Opinion 2009-100 (2009) ("Ethical Obligations on the Transmission and Receipt of Metadata"); Vermont Ethics Opinion 2009-1 (2009); Washington Advisory Opinion 2216 (2012) ("Metadata"); Washington, D.C. Ethics Opinion 341 (October 2007) ("Review and Use of Metadata in Electronic Documents"); West Virginia LEO 2009-01 (6/10/2009) ("What is Metadata and Why Should Lawyers Be Cautious?"); Wisconsin Ethics Opinion EF-12-01 (10/2012) ("Prevent Disclosure of Metadata"). One jurisdiction, Vermont, further suggested that a lawyer is permitted to "mine" metadata in documents that he or she receives in furtherance of the duty to provide competent and diligent representation.

Other jurisdictions take the opposite view, concluding that the interest in maintaining confidentiality of information relating to representation and protecting the attorney-client relationship outweighs other interests. Alabama Ethics Opinion RO-2007-02 (3/14/2007) ("Disclosure and Mining of Metadata"); Arizona Ethics Opinion 07-03 (11/2007) ("Confidentiality; Electronic Communications; Inadvertent Disclosure"); Florida Opinion 06-2 (9/15/2006); Maine Opinion #196 (October 21, 2008) ("Transmission, Retrieval and Use of

Metadata Embedded in Documents"); New Hampshire Ethics Opinion 2008-2009/4 ("Disclosure, Review and Use of Metadata in Electronic Materials"); New York Opinion 749 (12/14/2001) ("Use of Computer Software to Surreptitiously Examine and Trace E-Mail and Other Electronic Documents"); New York Opinion 782 (12/8/2004) ("E-mailing Documents That May Contain Hidden Data Reflecting Client Confidences and Secrets"); North Carolina 2009 Formal Ethics Opinion 1 (1/15/2010) ("Review and Use of Metadata"). A few of these jurisdictions (Alabama, Maine, New York, and North Carolina) have found that "mining" unrequested metadata is conduct prejudicial to the administration of justice.

Because virtually all of these opinions emanate from ethics rules that have no New Jersey counterpart, and in light of the conflicting views of ethics authorities in other jurisdictions, the Working Group found little guidance in the approach taken by other jurisdictions.

B. Recommendations

The question whether unrequested metadata should be considered "inadvertently produced" under Rule of Professional Conduct 4.4 has significant consequences for lawyers in a broad variety of practice areas. Metadata may appear in correspondence, draft transactional documents, information exchanged in discovery and settlement documents, among many other categories. Lawyers conducting discovery in litigated cases often specifically request metadata in electronic documents. In many cases, such metadata is relevant and discoverable, as in a matter that hinges on the date and time when a document was created or the identity of individuals who had access to the document at a particular time. However, not all counsel seeking documents request that metadata be produced as a component of the document production. In the absence of a request for metadata, documents produced to opposing lawyers

may inadvertently be produced in a format that contains metadata, in some cases because the sending lawyer is unaware of its presence or the methods that exist to minimize it.

In that regard, we note that there is a significant gap between technological resources available to lawyers in various types of practices. Some firms and organizations typically purchase software that routinely "scrubs" metadata in outgoing electronic documents or reveals metadata in incoming documents. Lawyers practicing in other firms or organizations may not have that software, and accordingly may be unaware of the full scope of information contained in the documents that they send and receive. In formulating our recommendations, the Working Group has been mindful of that disparity in technological sophistication and resources.

As members of the Working Group with technological expertise confirmed, the methods to reveal metadata encompass a broad range of activity. Some metadata, such as tracked changes in a Word document, can be revealed by a receiving lawyer with nothing more than the selection of a view function or the use of a cursor on an ordinary personal computer screen. A lawyer may unintentionally press a computer key and, by doing so, reveal metadata in a document. Other metadata may only be accessed through the use of special software and/or expert assistance.

If metadata that has not been requested is deemed to be "inadvertently produced" information within the meaning of Rule of Professional Conduct 4.4, a lawyer who reviews the metadata – even such simple information as tracked changes – may find himself or herself in violation of the ethics rule. Thus, inclusion of metadata in the category of "inadvertently produced" information in Rule of Professional Conduct would put many lawyers – particularly lawyers who are technologically unsophisticated – at risk of an ethics violation. On the other hand, by providing a powerful incentive for lawyers to proceed cautiously when they receive information that may be inadvertently sent, inclusion of metadata in Rule of Professional

Conduct 4.4 protects lawyers who send documents from unintentional violations of Rule of Professional Conduct 1.6(a), legal malpractice claims and other consequences of production. With those competing interests in mind, the Working Group considered whether the purpose of Rule of Professional Conduct 4.4, and the administration of justice, would be advanced by the inclusion of unrequested metadata in the definition of inadvertently produced information that is subject to the ethics rule.

Three recommendations emerged from the Group's review of this issue.

First, to minimize the risk that lawyers unintentionally violate Rule of Professional Conduct 1.6(a) or commit malpractice, the Group recommends that education on issues pertaining to metadata be made widely available to members of the New Jersey bar, and that law students and lawyers be strongly encouraged, if not required, to gain a basic understanding of the technology that they routinely use and its impact on their ethical obligations. The Working Group shares the view of many commentators that basic technological competence is crucial to the responsible practice of law in the twenty-first century. Most lawyers do not need to be experts in sophisticated technology in order to adequately represent their clients. All lawyers, however, should have at least a baseline familiarity with the risks and benefits of relevant technology to practice effectively. All lawyers who send documents electronically should be aware that metadata will accompany the documents and such metadata may be readily revealed by receiving lawyers using simple computer keystrokes. While lawyers have differing levels of technological sophistication, all must take measures to ensure that they do not inadvertently send material metadata to other lawyers. Despite the absence of a formal definition of attorney competence in New Jersey Rule of Professional Conduct 1.1, lawyers should be aware of this important issue in the representation of their clients.

Second, the Working Group recommends that "electronic information" be included in the definition of "writing" in Rule of Professional Conduct 1.0, and an Official Comment be added to provide a definition of metadata:

> (o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, [and] e-mail, and embedded information (metadata) in an electronic document. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
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> Official Comment:
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> "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins.

Third, in light of the many different circumstances in which lawyers confront metadata issues, the Working Group concludes that a rule that either defines a lawyer's review of any unrequested metadata as a violation of Rule of Professional Conduct 4.4(b), or globally excludes metadata from the rule, inadequately balances the competing interests at stake and fails to take into account the many nuanced situations that lawyers encounter.

Accordingly, the Working Group recommends the following revision to Rule of Professional Conduct 4.4(b):

> (b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading [the document,] it. The lawyer shall (1) promptly notify the sender[,] and (2) return the document or information to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

The Working Group recommends an Official Comment that permits lawyers to review unrequested metadata in electronic documents, provided the receiving lawyer reasonably

believes that the metadata was not inadvertently sent, based on the nature of the document and the content of the metadata.

Official Comment:

> Lawyers should be aware of the presence of metadata in electronic documents. "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.
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> A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic "mining" software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simple computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.

This proposed Rule and Comment address metadata consistent with the manner in which other information is treated under Rule of Professional Conduct 4.4(b). It puts the burden on the receiving lawyer who detects metadata in a transmitted document to make a prompt determination as to whether the metadata was inadvertently sent, based on the nature of the document and the content of the metadata itself, and provides guidelines as to whether particular

categories of metadata may or may not be reviewed. The Comment also makes clear that if unrequested metadata cannot be reviewed without the assistance of "mining" software, it is likely that the metadata was inadvertently sent, and accordingly should not be reviewed by the receiving lawyer.

The Working Group's proposed revision to Rule of Professional Conduct 4.4(b) and Comment differ in two respects from the recommendation of the Special Committee on Attorney Ethics and Admissions, which recently submitted its comprehensive analysis and recommendations to the Court. The Special Ethics Committee proposed that Rule of Professional Conduct 4.4(b) be amended to provide:

> (b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading [the document,] it. The lawyer shall (1) promptly notify the sender[,] and (2) return the document or information to the sender and, if in electronic form, delete it.
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> * * *
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> Official Comment:
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> A lawyer receiving a document electronically should not examine any accompanying metadata unless the metadata was specifically requested.

The Working Group concurs with the Special Committee that references to electronic information should be integrated into the text of Rule of Professional Conduct 4.4(b). It recommends one addition to the Rule that was not included in the Special Committee's draft: that the direction that a lawyer "delete" inadvertently produced information be clarified with the additional language, "and take reasonable measures to assure that the information is inaccessible." The purpose of that recommended language is to clarify that a lawyer's obligation to delete electronic information is met when inadvertently produced information is no longer

accessible to the lawyer and others working on the matter. The lawyer would not be required to "delete" information so that it is eradicated from the lawyer's server and any backup media; that task that may be burdensome or impossible to accomplish.

The Working Group respectfully disagrees with the Special Committee's proposed comment that "a lawyer receiving a document electronically should not examine any accompanying metadata unless the metadata was specifically requested." In the view of the Working Group, the rule advocated by the Special Committee would unnecessarily expose lawyers – particularly those without the expertise to understand that they are viewing inadvertently produced metadata – to unintentional violations of the ethics rules. The Working Group believes that its proposed approach better addresses the range of documents and information, and the variety of situations, that may be encompassed in Rule of Professional Conduct 4.4(b).

The Working Group acknowledges that its approach imposes a burden on the lawyer who sends an electronic document to be aware that the document may contain metadata, and transmit documents in a form that minimizes that metadata. This burden is consistent with the obligations imposed by Rule of Professional Conduct 1.6(a), which prohibits the disclosure of information relating to the representation unless the client has consented. With advances in technology, an informative explanation of metadata in the rules, and an effective educational program, lawyers may take simple steps to ensure that no privileged or confidential information is transmitted in the form of metadata.

II. DISCOVERY - METADATA IN ELECTRONIC DOCUMENTS

Early in the Working Group's discussions of metadata and Rule of Professional Conduct 4.4(b), it became apparent that the ethical issues raised by metadata were inextricably

intertwined with the production of metadata in discovery, particularly in civil cases. The Working Group focused on the obligations of lawyers when they send or receive metadata in documents produced in discovery and the need for judges to recognize the special concerns that disputes about metadata may raise. Given the broad variety of issues that may arise, the distinctions among different categories of cases, and the range of technological expertise in the bench and bar, the Group decided not to recommend any particular approach to metadata in discovery as a general default position. Rather, it recommends that metadata in electronic documents be highlighted in the discovery rules, thereby providing notice to litigants, lawyers, and judges that unique issues may arise in discovery disputes, and facilitating judicial review and determination of such disputes.

Accordingly, the Working Group recommends that the general Civil Part discovery rule, Rule 4:10-2, be amended to specifically address metadata in electronic documents. Rule 4:10-2(f) currently refers to electronically stored information but its focus is on producing such information when the request is to obtain it "from sources that the party identifies as not reasonably accessible because of undue burden or cost." The Group recommends that paragraph 2(f) be expanded to address the related but distinct issue of metadata that may be revealed in electronic documents produced in discovery. The subtitle of paragraph 2(f) would be changed to "Electronic Information" and new subparagraph (1) would address metadata, while subparagraph (2) would reflect the existing language of paragraph (f). The Group recommends:

> (f) Electronic Information.
>
> (1) Metadata in Electronic Documents. A party may request metadata in electronic documents. When parties request metadata in discovery, they should consult and seek agreement regarding the scope of the request and the format of electronic documents to be produced. Absent an agreement between the parties, on a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that

the request presents undue burden or costs. Judges should consider the limitations of R. 4:10-2(g) when reviewing such motions.

(2) Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court nevertheless may order discovery from such sources if the requesting party establishes good cause, considering the limitations of R. 4:10-2(g). The court may specify conditions for the discovery.

Official Comment:

"Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.

The Group further recommends that an Official Comment be added to Rule 4:18-1 regarding metadata. Rule 4:18-1(b)(2)(B) currently provides:

> (B) if a request does not specify the form or forms for producing electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably useable.

The Group finds that the language regarding the form in which documents are "ordinarily maintained" or "reasonably useable" does not adequately address the concerns parties may have about metadata. The format for production of an electronic document can be a significant decision, as the selection of format can determine the amount of metadata included in the electronic document and is likely to affect the cost of production. For example, it could be burdensome for the producing party to "strip" all responsive documents and put them in "TIFF" format (an image of the document with no metadata). It could also be burdensome for the

producing party to review documents to find privileged information in "native" format documents for a privilege log prior to producing those documents. ("Native" documents are in their original format, unaltered and usually retaining all the metadata.) Courts should be aware that the choice of format affects the costs imposed on parties, and should be evaluated in light of the scope and complexity of the underlying case. The burden on the producing party triggered by the requesting party's preference as to format of documents produced in discovery should be considered and appropriately balanced against the requesting party's need for metadata.

Accordingly, the Group recommends that an Official Comment be added to Rule 4:18-1 highlighting distinct issues raised by metadata in electronic discovery. The Group recommends:

> Official Comment:
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> Parties may request metadata in electronic documents. Metadata is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.
>
> Litigants and lawyers should be aware that metadata may be present in electronic documents produced in discovery. Parties are encouraged to meet and confer about the format in which they will produce electronic documents. Parties also should seek agreement on whether the receiving party may review unrequested metadata in electronic documents. For example, the parties may agree not to "strip" documents of metadata (due to spoliation concerns), or to refrain from reviewing metadata in electronic documents when metadata has not been specifically requested in discovery. If lawyers are permitted to review metadata in electronic documents submitted in discovery, they should agree on the manner in which metadata will be addressed in a privilege log.
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> The selection of the format of electronic documents sought in discovery can determine the amount of metadata to be produced, and significantly affect the cost of discovery. Those considerations should be evaluated in light of the scope and complexity of the case. The burden on the producing party caused by the selection of format of documents sought in discovery should be considered and appropriately balanced against the requesting party's need for metadata. Judges, when reviewing a motion to compel discovery or for a protective order, should also consider the limitations of R. 4:10-2(g).

If electronic documents are provided in response to a discovery request, the receiving lawyer should consider his or her obligations under Rule of Professional Conduct 4.4(b) before reviewing metadata.

Parties have an obligation to preserve metadata in electronic documents, subject to a standard of reasonableness.

The Working Group's recommendations focus on metadata in discovery in Civil Part cases. It is aware that, in Family Part cases, these issues may be more appropriately addressed in the pretrial conference. Similar issues may also arise in Criminal Part cases. The Group respectfully requests that the Court bring these issues to the attention of the Family and Criminal Practice Committees for their review and potential inclusion in the Court Rules.

Finally, as stated above in the context of its recommendations for legal education regarding the effect of metadata issues on lawyer ethical obligations, the Working Group strongly recommends that all participants in the discovery process – judges, lawyers, legal assistance organizations and pro se litigants – be informed that metadata may play a role in discovery in litigation. The Group recommends that metadata be addressed in judicial education as well as lawyer continuing legal education, and that communications prepared to assist pro se litigants alert such litigants that metadata may be present in documents that they produce, and that they may request metadata in discovery.

III. E-FILING – METADATA IN ELECTRONICALLY FILED DOCUMENTS

The Working Group considered issues pertaining to metadata in electronic documents submitted to the Judiciary for filing and in posted judicial opinions. The Group recognizes that the Judiciary should not "alter" a filed document. As a threshold matter, however, the Group does not consider metadata in an electronic document filed with the court to be part of the official court record. The official record, with regard to a court-filed document under current technologies and practices, is the text of the document, the words on the page, and does not include the embedded information generated when documents are created or revised on a computer.

The Group is advised that documents filed in "pdf" format may contain metadata that can be revealed by the use of current technology. The Group recommends that when an e-filer submits a document for filing, the Judiciary activate a "pop-up" notice on the computer screen warning that electronic documents may contain metadata. The notice would not direct the e-filer to "scrub" the document prior to filing; it would simply warn the e-filer of the potential presence of metadata in the document. The Group further recommends that the Judiciary take steps, such as "flattening" e-filed documents on receipt from e-filers, that have the effect of rendering metadata more difficult to reveal. Lastly, the Group recommends that judges also take steps to "scrub" or "flatten" documents prior to posting them online or electronically sending them to litigants or lawyers.

The Group notes that the Court recently created the Working Group on Metadata in Judiciary Posted Documents that will consider metadata in documents posted on the Judiciary website or documents electronically distributed by the Judiciary. The Group hopes that the recommendations in this Report will assist that Group in its review of metadata issues.

CONCLUSION

This Report and Recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents is hereby presented to the Court for its consideration. The Group thanks the Court for this opportunity to serve.

Respectfully submitted,

WORKING GROUP ON ETHICAL ISSUES INVOLVING
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