

3.2.2 Metadata

Documents sent as e-mail attachments may include "metadata," which is generally defined as information about a document, including information about its author[s], revisions to the document, and even information about the computer system itself. Although some observers have described this information as "hidden" or "secret" data, such data is neither hidden nor secret, but simply a common feature of most versions of Word, WordPerfect, and Office, as well as Adobe Acrobat. The feature was designed to encourage collaboration among multiple authors of a document. Although sharing a document's drafting history with coworkers could be convenient, sharing the drafting history with opposing counsel could be risky.

A New York state bar ethics committee considered the metadata issue in New York State Bar Association Committee on Professional Ethics, Opinion 782 (December 2004). The panel held that lawyers must use reasonable care to prevent clients' confidences and secrets contained in electronic documents from being revealed to opposing counsel or other third parties. To act reasonably, a lawyer must assess the risks involved in using technology and determine if the mode of transmission is appropriate under the circumstances. This may require the lawyer to stay abreast of technological advances and learn about potential risks. In deciding the necessary degree of care, the lawyer should consider the subject matter of the document, whether the document was based on a template used in another matter for another client, whether there have been multiple drafts of the document with comments from multiple sources, whether the client has commented on the document, and the identity of the intended recipients.

The solution to the metadata problem depends in part on the firm's word processing software. It appears that many lawyers may need regular reminders of this issue. We are also aware of proprietary software programs that purport to "scrub" metadata from e-mail attachments. You should consult your firm's IT department about this issue.

There may be specific ways to minimize the risks of particular types of metadata. When you make changes to a document that has already been "saved," your computer does not necessarily eliminate the prior version[s] and save only the revised version. Rather, it might retain the original version, while "remembering" where to make changes. The original version might not be retrievable within the word processing program itself, but it may be seen in bits and pieces with a text editor, and a professional with the right tools could probably recreate the previous version(s) intact. Word processing programs are designed this way to allow more rapid "saving" of documents as you work. This feature can be disabled in most programs. Lawyers should check with their firm's IT specialists to be sure that this is not a problem.

Some word processing programs allow the user to "track changes" (or "red-line"). That feature is useful when several parties are working together to draft a document. However, your computer can "remember" all of the editing history even when it is not visible to you on the screen or on the printed copy. In such a case, the history also would be available to anyone who received the document by e-mail or on a diskette or other storage medium. We understand that there are ways to eliminate this superfluous information, including copying the finished document to another format and then recopying it back to your word processing program. If in doubt, consult your firm's IT department.