

The Mobile Lawyer and How NOT to Commit Malpractice With Your Portable Technology



 NEW YORK STATE BAR ASSOCIATION

Tightwad Tech & the Portable Practice

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New York, NY

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How NOT to Commit Malpractice With Your Computer

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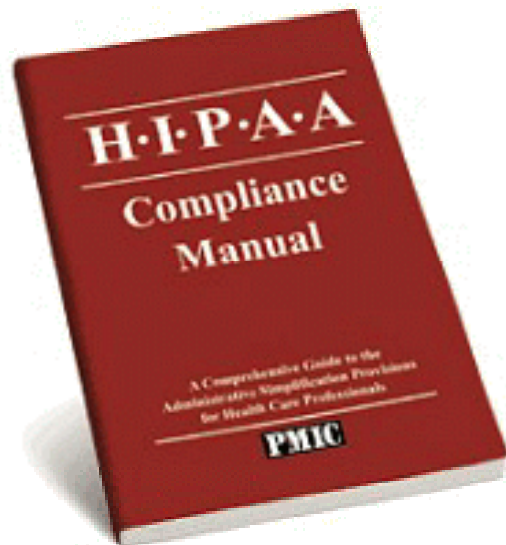
Twitter: @rkodner



- ◆ Marquette Univ. Law School, 1986 (Law Review)
- ◆ Founded MicroLaw, Inc. in 1985
- ◆ Legal Technologist, Educator, Author
- ◆ Technolawyer Legal Technology Consultant of the Year 1999, Contributor of the Year 2001, 2002, 2005, 2006
- ◆ Over 1400 law offices assisted across North America
- ◆ Frequent author and speaker nationwide on legal technology subjects
- ◆ Chair, Wisconsin Law & Technology Conference 2001-2005, Founder/1st Chair, Wisconsin Solo & Small Firm Conference 2006
- ◆ Founder/Chair, National Solo & Small Firm Conference 2006-2007
- ◆ ABA Blawg 100 – Technology Category
- ◆ Chair, Milwaukee Bar Association Technology Committee, 2002-2007
- ◆ Chair, ABA LPM Section Computer & Technology Division and Member, TECHSHOW 1997- 2001 Board, Co-Chair, LegalTech CLE Planning Board 1999-2005
- ◆ Co-Author, "How Good Lawyers Survive Bad Times" (ABA LPM Publishing – www.tinyurl.com/how-good-lawyers)



The Intersection of Technology and Substantive Law is Blurred Beyond Recognition – “Competence” Evolves



Lawyers everywhere need to understand that new laws and new techniques mean new knowledge is mandatory. This means understanding e-Discovery issues and the broad, sweeping (and chilling) impact and reach of HIPAA

Growing Movement to Include Technology Knowledge in Definition of “Competence”

“The duty to provide competent representation requires a lawyer to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata.”

Colorado Ethics Opinion No. 119
(5/08)

Ethics opinions in Colorado and Maine, as well as some Canadian guidance address a lawyer’s need to understand basic technology as relates to providing client service as part of the definition of ethical “competence.”

Growing Movement to Include Technology Knowledge in Definition of “Competence”

“...we also do not believe it reasonable for an attorney today to be ignorant of the standard features and capabilities of word processing and other software used by that attorney...”

Maine Ethics Opinion No. 196
(10/08)

Maine goes further than Colorado indicating it is unreasonable for attorneys to be ignorant of standard features of software used...

A Glimpse Into the Future U.S. Definitions of Being Ethically “Competent”

To meet the ethical obligation for competence ... lawyers must be able to recognize when the use of a technology may be necessary to perform a legal service on the client’s behalf, and must use the technology responsibly and ethically.

Lawyers may satisfy this duty by personally having a reasonable understanding of the technology and using it, or by seeking assistance from others who have the necessary proficiency. Lawyers also need to have a reasonable understanding of the technologies that their clients are using, when such knowledge is relevant to providing legal advice.

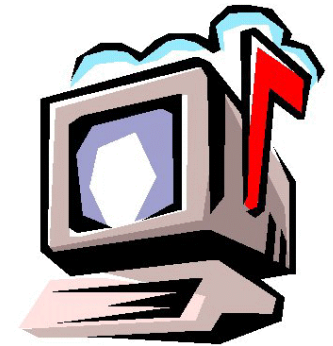
The Canadian Bar Association goes further, having issued “Guidelines for Practicing Ethically with New Information Technologies” in Sept. 2008

www.cba.org/CBA/activities/pdf/guidelines-eng.pdf

E-MAIL

The Ethical Pitfalls and Traps of Electronic Law Practice

- **I attached the final contract to the E-mail message. Just print it, sign it, and mail the original back to me.**
- ▶ **Client edits the “final” and produces her own version.**
- ▶ **Client has other party sign the “revised document.”**
- ▶ **How can I prevent the client from editing the final? Maybe PDF makes more sense**
- ▶ **Educate your clients about response time.**



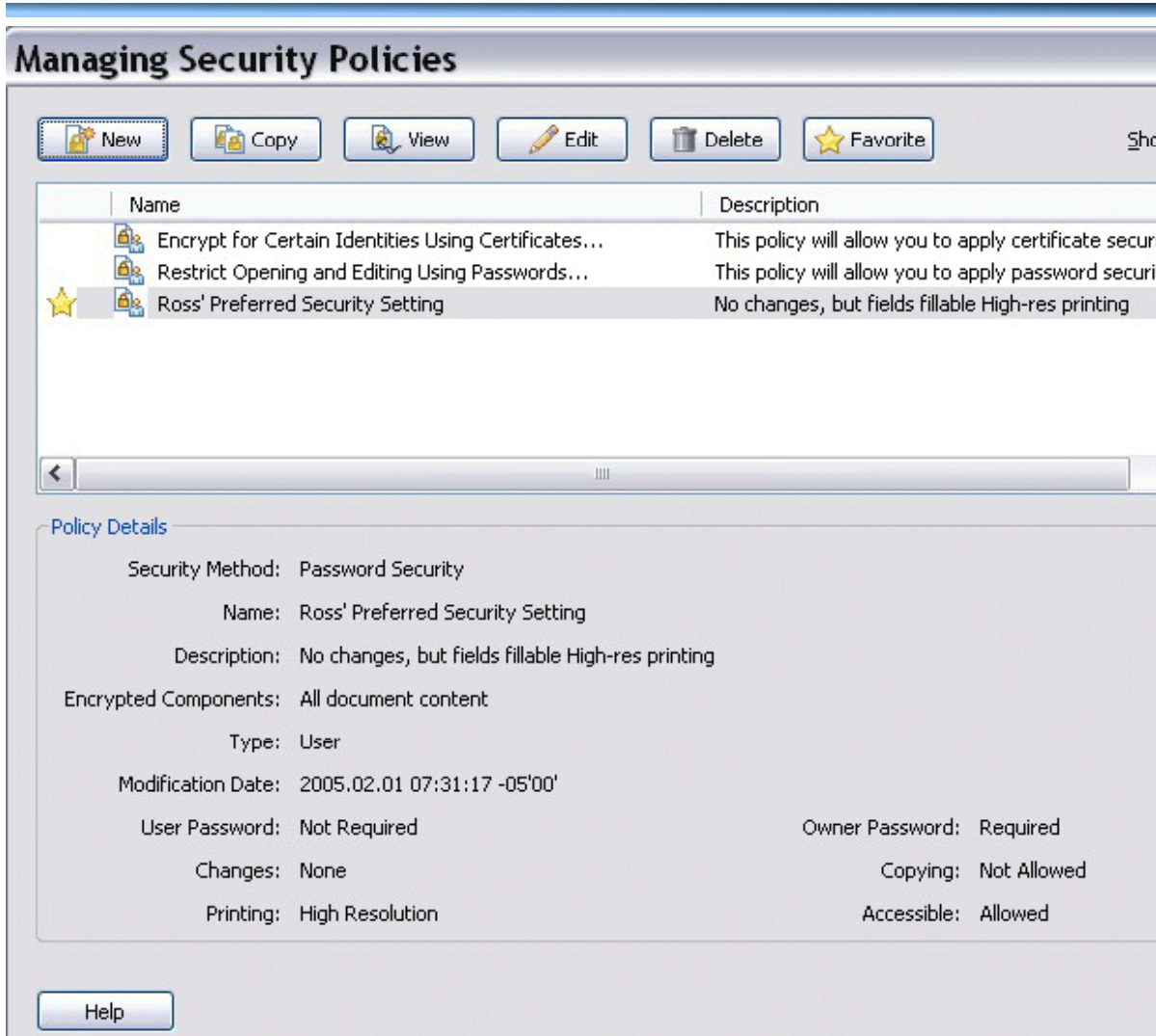
THE “PDF FIRST” APPROACH

Understand Security Issues Sending PDF Files

- ***Our firm has a “PDF First” approach for sending out electronic documents because the files can’t be edited, right?***
- ▶ **More and more firms go “PDF First”**
- ▶ **SECURITY! Without activating PDF security, PDF files are highly editable!**
- ▶ **Procedurally, you need to secure all outbound PDFs as standard practice**
- ▶ **Learn about PDF security and alert clients to the issue as well**



Security in Acrobat 9 in One-Click



Managing Security Policies

New Copy View Edit Delete Favorite Show

Name	Description
Encrypt for Certain Identities Using Certificates...	This policy will allow you to apply certificate security
Restrict Opening and Editing Using Passwords...	This policy will allow you to apply password security
★ Ross' Preferred Security Setting	No changes, but fields fillable High-res printing

Policy Details

Security Method: Password Security

Name: Ross' Preferred Security Setting

Description: No changes, but fields fillable High-res printing

Encrypted Components: All document content

Type: User

Modification Date: 2005.02.01 07:31:17 -05'00'

User Password: Not Required Owner Password: Required

Changes: None Copying: Not Allowed

Printing: High Resolution Accessible: Allowed

Help

- Acrobat 9 answers a critical need
- Build security policies that you can apply with a single click
- Acrobat 9 reminds you to turn on security with every new PDF created

E-MAIL SECURITY

The Ethical Pitfalls and Traps of Electronic Law Practice

- **Don't worry about security when I send you this attachment - after all, who would be interested in reading legal documents?**
- ▶ **Do you need to worry about Internet e-mail security?**
- ▶ **What approach do you take to alert recipients of the issues?**
- ▶ **What about the ABA's statement on e-mail, security and confidentiality?**
- ▶ **How can I protect my e-mail?**



E-MAIL ADDRESSING

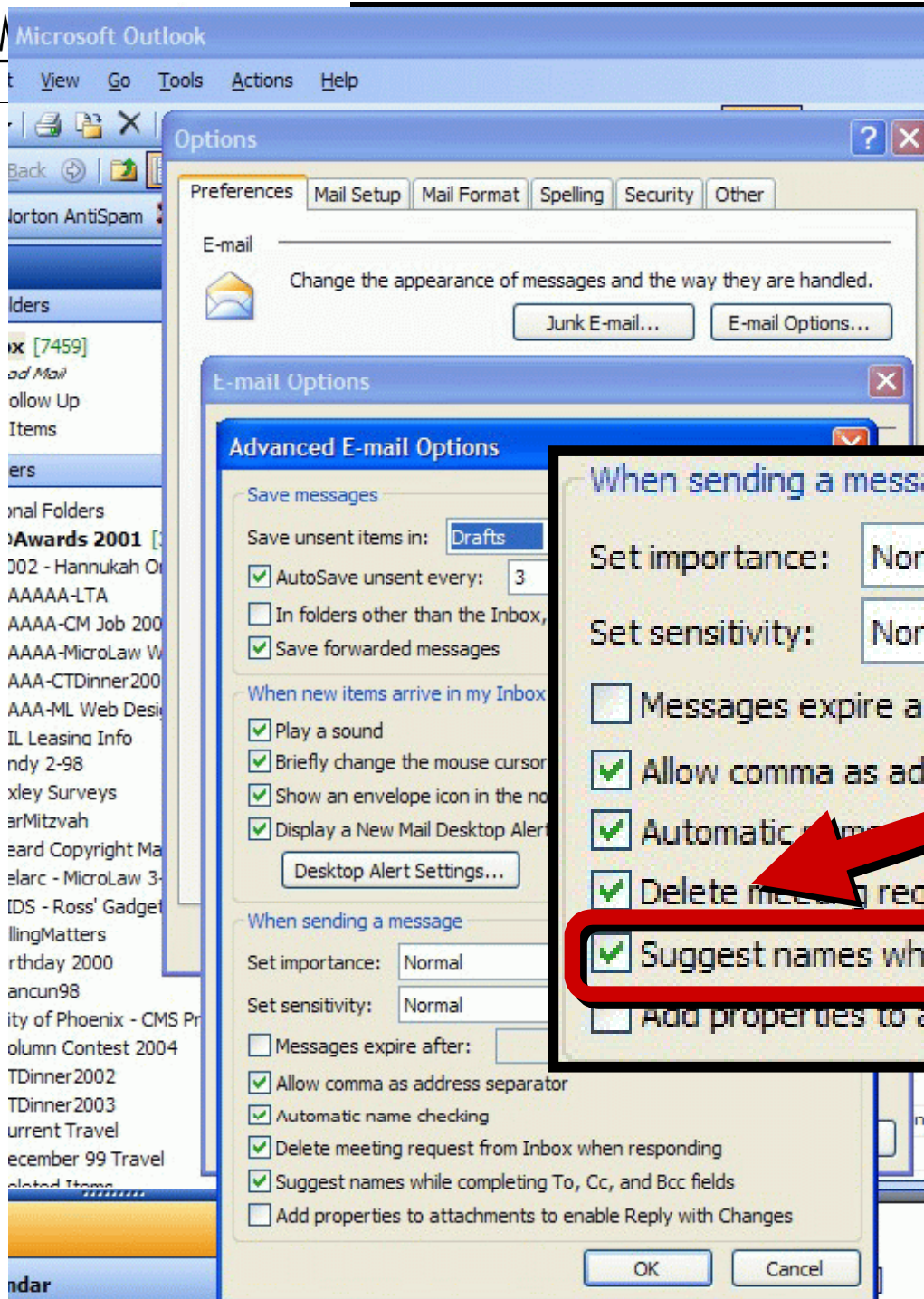
Beware of the Dreaded “Auto-Complete” Function in Your E-Mail Software!

- **Wow! I just accidentally sent an e-mail to opposing counsel that should have gone to my client! This is NOT good!**
- ▶ Beware of the “[Auto-complete](#)” functions in modern e-mail software!
- ▶ This means that you could intend to address an e-mail to your client “Robert Jones” by typing “Rob”
- ▶ But instead it pulls up opposing counsel “Robert Allen” . . . and you click “Send” before noticing!
OOPS!



TURN OFF OUTLOOK'S AUTO-COMPLETE FUNCTION!

1. On the **Tools** menu, click **Options**.
2. On the **Preferences** tab, click **E-mail Options**, and then click **Advanced E-mail Options**.
3. Clear the **Suggest names while completing To, Cc, and Bcc fields** check box.



Social Media & Networking Cautions!

Major potential for ethical and public relations troubles

- Presume that everything you do with Twitter, Facebook, LinkedIn, etc. is completely publicly accessible, permanently!
- The same is true for your employees, clients, experts and family members
- This information is all potentially discoverable!
- Ethics rules about client confidentiality apply! Be careful what you say - it's public info!
- Master the private posting techniques of all services
- **DISCLAIMERS!**
 - Atty/client relationship (my favorite: "I am not your lawyer unless we both sign something that says so and you pay me money")
 - Attys: Jurisdictions licensed to practice
 - Attys: Not dispensing legal advice
- And your reputation is online everyday - do "ego searches" of your own name on these services to make sure nothing is posted (by others) which can negatively reflect on you



Social Media & Networking Cautions!

Major potential for ethical and public relations troubles

Ruin a “Fatty Cisco Job” with 1 Tweet

Witness someone ruin a “Fatty Cisco Job” with a single post on Twitter, and become an overnight Internet sensation.

A potential Cisco applicant [tweeted](#) this earlier today:

Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.

Tim Levad at Cisco saw the Tweet, and tweeted back:

Who is the hiring manager. I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the web.



cisconfatty.com

Cisco Fatty

This went viral overnight and is becoming a very hot Trend.

HR Caution

How just a single tweet can wreak havoc for both employees and employers

Check out cisconfatty.com

Practice Management Systems

The Ultimate Malpractice “Safety Net”

- Practice management systems such as Time Matters serve as the ultimate “Malpractice Safety Net” – think of them as “anti-malpractice” tools
- These systems make it nearly impossible to miss key dates and deadlines
- Through a system of cross-checks and smart ticklers, systems such as PracticeMaster, Time Matters or Amicus Attorney can hound you relentlessly, ensuring key dates and deadlines are not missed



It is frankly irrational and irresponsible to practice law without a case/practice management system

Practicing “in the Cloud”

Ethical Issues with SaaS Legal Software?

- New legal software options include those that are outsourced to SaaS (Software as a Service) firms who offer billing and practice management systems to law practices
- All your firm and confidential client information is stored remotely on the SaaS companies systems and accessed over a secure internet connection
- Issues?
- Mostly about lack of “offline” abilities...what happens when you have a “bad internet day” and can’t access your docket and case information?



Oops! I Didn't Mean to Send Those "Track Changes!"

- **Set MS Word to warn you before you print a document, save to PDF or send if there are any tell-tale comments or tracked changes lurking within the document!**
- **MS Word 2003: *Tools – Options – Security and under privacy options check "warn before printing, saving or sending a file that contains tracked changes or comments"***
- **MS Word 2007: *Office Button – Word Options – Trust Center – Trust Center Settings – Privacy Options and check "warn before printing, saving or sending a file that contains tracked changes or comments"***
- **And then of course, PAY ATTENTION TO THE WARNINGS THAT APPEAR!!**



BACK-UP

The Ethical Pitfalls and Traps of Electronic Law Practice

- We back-up once each month. That should be sufficient, right?
 - ▶ If you lose it, will you cry?
 - ▶ Where did you put the back-up?
 - ▶ Does the backup really work?
 - ▶ Who knows how the backup works? Do you run “test restores” at all?
 - ▶ Do you run system disaster “fire drills?”
 - ▶ Where are the original disks with serial numbers?
 - ▶ Is your back-up protected from virus attacks?
 - ▶ Do you have a disaster plan?



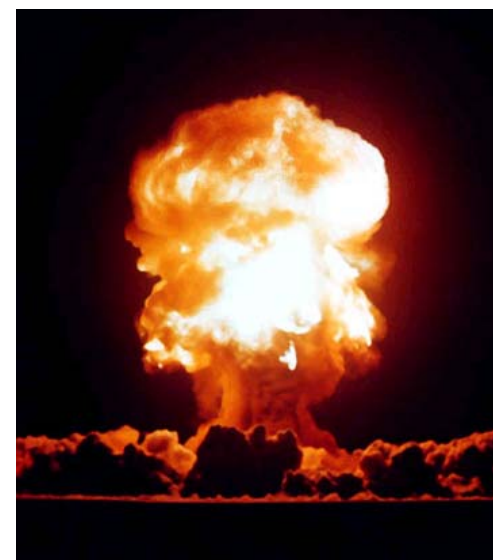
Um . . . Ms. Jones? Remember that “Backup Thing” we were talking about last week?

Read This Article on Backup! “Ross’ Great Truths About Data Backup”

- Your practice may depend on it: Read the article at this location and attached to these materials – **FOUR LAYERS OF PROTECTION!**

<http://tinyurl.com/kodner-on-backup>

- Primary Backup Software – Individual PC systems and Peer to Peer networks: NTI Backup Now, Acronis True Image 11 Home
- Primary Backup Software – Network Servers: Symantec Backup Exec (standard or “Small Business”) – ver. 11d or 12 with the right mix of “agents” and the “Disaster Recovery” module



Using an Online Backup Provider

As a secondary backup methodology, online backup services are becoming popular. There are issues to consider, as follows:

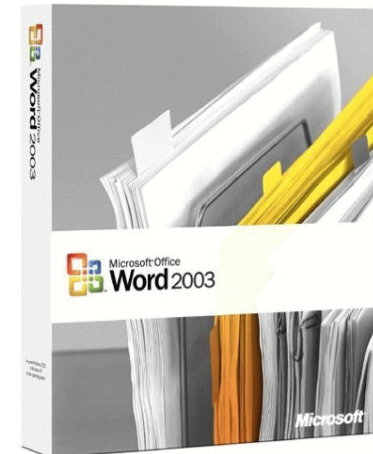
- *Encryption of info? Safe in transit too?*
- *Locally accessible in the event of the need to restore? Forget about total online restoration...*
- *Who has the security “keys?”*
- *Who has access to your data?*
- *Who owns the remotely stored data?*
- *Where is the data stored physically? Far enough away to be out of the region?*
- *On what kind of media?*
- *Contracts, privacy policies, EULA, SLA, business plan, dissolution plan for data return?*
- *How long in business?*
- *Company stability and reputation – any State/National Bar endorsements?*
- *Does this pass ethical muster with a third party controlling confidential client info?*



“METADATA”: INVISIBLY LURKING DISASTER!

This is NOT the Kind of Surprise You Want!

- ***What is “Metadata”?***
- ▶ **Metadata is hidden information contained within certain types of files**
- ▶ **Examples most notably include Microsoft Word, Microsoft Excel and Microsoft Powerpoint files**
- ▶ **Other programs have Metadata issues to a lesser extent**
- **Examples include Adobe Acrobat PDF files and Corel WordPerfect documents**

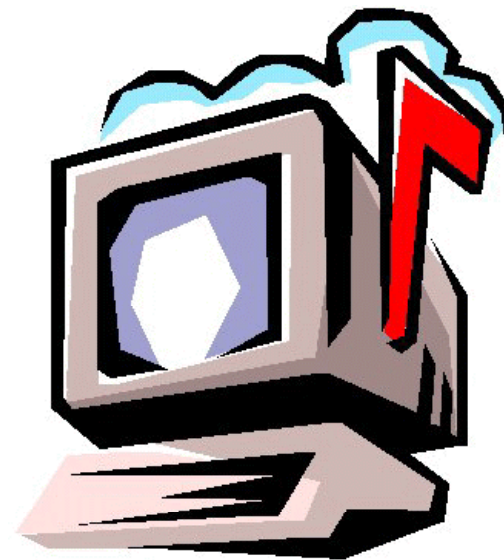


“METADATA”: WHAT CAN BE SEEN?

Many Types of Metadata Can Get You in Trouble

▀ Metadata examples lurking beneath the surface of Word files include:

- ▶ Built-in document properties
- ▶ Document statistics
- ▶ Last 10 author information
- ▶ Routing slip information
- ▶ Document versions and authors
- ▶ Tracked changes
- ▶ Hidden text
- ▶ Deleted document comments
- ▶ Font Size 1
- ▶ White Font



Four Fundamental Ethical Questions Regarding Metadata – Faced by Every Lawyer

■ *The First Question:*

- ▶ Is it ethical to look at the metadata hidden in documents received from other counsel or other parties, and to use it in some manner?

■ *The Second Question:*

- ▶ Is it ethical to look at the metadata hidden in documents received from other counsel or other parties, and to use it in some manner?



Four Fundamental Ethical Questions Regarding Metadata – Faced by Every Lawyer

- ***The Third Question:***
 - ▶ Does the recipient of documents containing metadata need to notify the sender?
- ***The Fourth Question:***
 - ▶ Are there exceptions to bars to viewing metadata in circumstances such as in the discovery of electronic information in litigation? Any other exceptions?





Is it ok to view information just because it's easy to do?

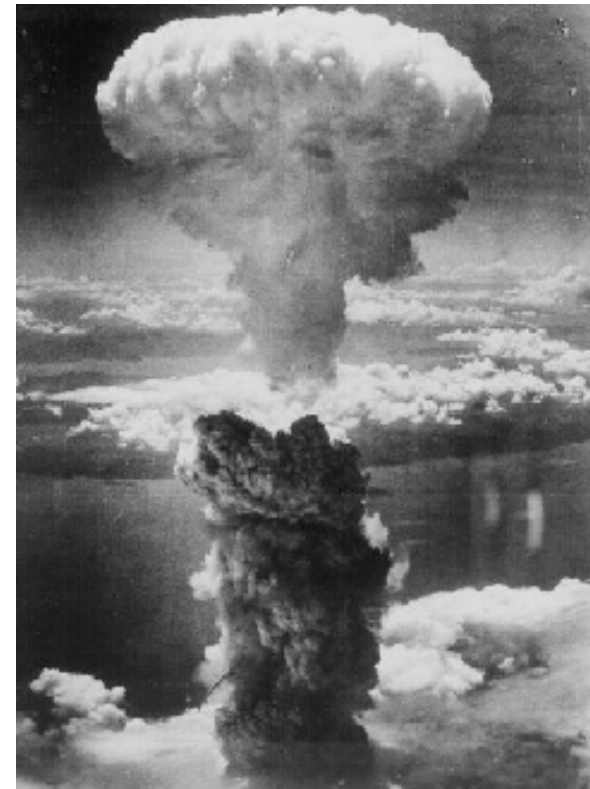
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THE “METADATA” BOMBHELL

New York Legal Ethics Opinion Opened the Legal Floodgates – What Your Counsel Should Know

- **New York Ethics Opinion 782: The Metadata Bombshell**
- **This 12/2004 ethics opinion states: “Lawyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets.”**
- **Expect this approach in other states over the next couple of years**
- **Ignorance is no longer an option!**
- **Read: www.hricik.com/eethics/3.2.html**



What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>ABA 11/06 Opinion No. 06-442</p>	<p>NONE</p> <p>There is no specific duty to remove metadata but the opinion indicates a number of metadata removal approaches, implying a "best practices" approach indicating removal is the right course to take</p>	<p>YES</p> <p>It's okay to look and to use metadata, but there is a requirement of notifying the sender of inadvertent sending</p>	<p>YES</p> <p>If a lawyer knows or reasonably should know the transmission was inadvertently sent with metadata in the document – a requirement to "promptly notify the sender."</p> <p>But . . . still ok to look!</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>ALABAMA Ethics Opinion No. 2007-02</p>	<p>REASONABLE CARE</p> <p>Ethical duty to exercise reasonable care when transmitting electronic docs to ensure that client secrets or confidences are not disclosed</p>	<p>NO</p> <p>Can't mine metadata if it is a knowing and deliberate attempt by the recipient to acquire confidential and/or privileged info to obtain an unfair advantage against the opposition</p>	<p>NOT ADDRESSED</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>ARIZONA Ethics Opinion No. 07-03</p>	<p>REASONABLE CARE</p> <p>Must exercise reasonable care to prevent confidential and/or privileged info from coming into the hands of unintended recipients – and not to violate the lawyers duty not to disclose such information</p>	<p>NO</p> <p>Bars unjustified intrusion into the client/lawyer relationship between opposing parties and their counsel with specific indication that a recipient lawyer may not examine electronic docs looking for metadata</p>	<p>YES</p> <p>Inadvertently or innocently discovered metadata is not an ethical concern. But if a recipient finds metadata and reasonably should know it was inadvertently send, the sender should be notified and allowed to take protective measures</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

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COLORADO Ethics Opinion No. 119	<p>REASONABLE CARE</p> <p>The sender must use reasonable care to ensure that metadata containing confidential info is not disclosed to a third party. <u>Technical ignorance or incompetent PC support is no excuse.</u></p>	<p>YES</p> <p>Unless the sender notifies recipient of inadvertent transmission before review. But it is ethical to search for metadata generally. BUT, if the sender notifies the recipient before the recipient looks, then it may not be examined.</p>	<p>YES</p> <p>When the recipient gets a document with metadata with ethically Confidential Info, it should be presumed by the recipient that it was transmitted inadvertently and must promptly notify the sender (whether a lawyer or not)</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

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<p>FLORIDA Ethics Opinion 06-02</p>	<p>REASONABLE CARE</p> <p>Sending lawyer must use reasonable care to safeguard confidential info including metadata contained in electronic communications</p>	<p>NO</p> <p>Recipient must not try to obtain from metadata info relating to the sender's <u>client</u> when the recipient knows or should reasonably know it wasn't intended for the recipient</p>	<p>YES</p> <p>If the recipient inadvertently obtains info from metadata the recipient knows or should know wasn't intended for the recipient, the lawyer must promptly notify the sender</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

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<p>MARYLAND Ethics Docket No. 2007-09</p>	<p>REASONABLE CARE</p> <p>Applied to a litigation context but open to future broader application.</p> <p>Absent agreement between parties, sending attorney is obligated to take reasonable measures to avoid disclosing confidences or work product in electronic documents</p>	<p>YES</p> <p>No ethical violation if the recipient attorney (or their staff) views and uses metadata without first ascertaining whether the sender intended to include such metadata</p>	<p>NO</p> <p>Recipient attorney is not required to notify sender there might have been an inadvertent inclusion of metadata, BUT the recipient CAN and SHOULD <u>communicate with its client</u> about whether to notify the sending attorney</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>NEW YORK Ethics Opinion No. 749, 782</p> <p>Bar of City of New York Opn No. 2003-04</p>	<p>REASONABLE CARE</p> <p>Must use reasonable care when using technology to communicate and assess the risks related to complying with other ethical obligations. Lawyers have a duty to remove metadata containing client confidences or secrets</p>	<p>NO</p> <p>Use of technology to surreptitiously obtain privileged information would violate the spirit of the ethical rules</p>	<p>YES</p> <p>The ABCNY who receives communication and is exposed to its contents before knowing it was misdirected is not barred from using the info, but the recipient must promptly notify the sender to give them a chance to take steps to prevent <i>further</i> disclosure</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>PENN. Formal Opinion No. 2007-500</p>	<p>NOT ADDRESSED</p>	<p>CASE by CASE</p> <p>Each attorney must make their own decision to use metadata based on the lawyer's judgment and the facts. Inadvertently included metadata should not constitute a waiver of privilege except where there is extreme carelessness or indifference</p>	<p>YES</p> <p>Attorneys receiving inadvertently disclosed documents are ethically bound to notify the sender so they can take protective measures. The same is true of inadvertent disclosure of metadata in documents intentionally transmitted</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>Wash. DC Bar Opinion No. 341</p>	<p>REASONABLE CARE</p> <p>Outside of a discovery content, senders have a duty to take reasonable steps to maintain document confidentiality including electronic docs which inadvertently contain confidences or secrets where there is a reasonably available technical means to remove metadata before sending</p>	<p>YES</p> <p>Unless the attorney has <u>actual knowledge</u> the sender inadvertently included metadata. Said the exchange of metadata is most often mutually helpful or otherwise harmless. But if there is prior recipient knowledge of inadvertent sending, you can't ethically look.</p>	<p>YES</p> <p>If the recipient has actual knowledge the metadata was sent inadvertently. Either way – must consult the sending lawyer to inquire whether it was inadvertently or intentionally sent.</p>

What Have American Jurisdictions Said About Metadata – Ethics Opinion Survey

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
<p>MAINE Opinion No. 196</p>	<p>REASONABLE CARE</p> <p>Sending attorney must use reasonable care to prevent disclosure of metadata containing confidential info. Requires attorneys to have a basic understanding of metadata and the software and measures used to purge sensitive metadata where appropriate to protect confidential info.</p>	<p>NO</p> <p>Not ethical for attorneys to examine metadata in docs sent by counsel or parties to try to find information legally confidential or should have been to have been sent unintentionally</p>	<p>NOT ADDRESSED</p> <p>No explicit guidance but favors Florida's approach to confidential metadata requiring recipient notify sender of inadvertently sent metadata</p>

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Bottom Line: No Technology Neanderthals Allowed Anymore . . .



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“METADATA”: HOW TO DEAL WITH IT

- **OPTION ONE:** Don't send out Word, Excel or PowerPoint files
- ▶ **PROBLEM:** Not very practical - sometimes you just have to send out editable Word, Excel and PowerPoint files



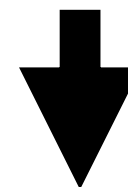
“METADATA”: HOW TO DEAL WITH IT

- **OPTION TWO**: Convert Word files to another format such as “RTF” (or even WordPerfect)
- ▶ **PROBLEM**: Layout and readability problems on the part of the e-mail attachment recipient



“METADATA”: HOW TO DEAL WITH IT

- **OPTION THREE:** Send Word, Excel and PowerPoint files as PDF files
- ▶ **PROBLEM:** Not editable (by most people), still security issues unless PDF/Acrobat Security enabled



Adobe PDF



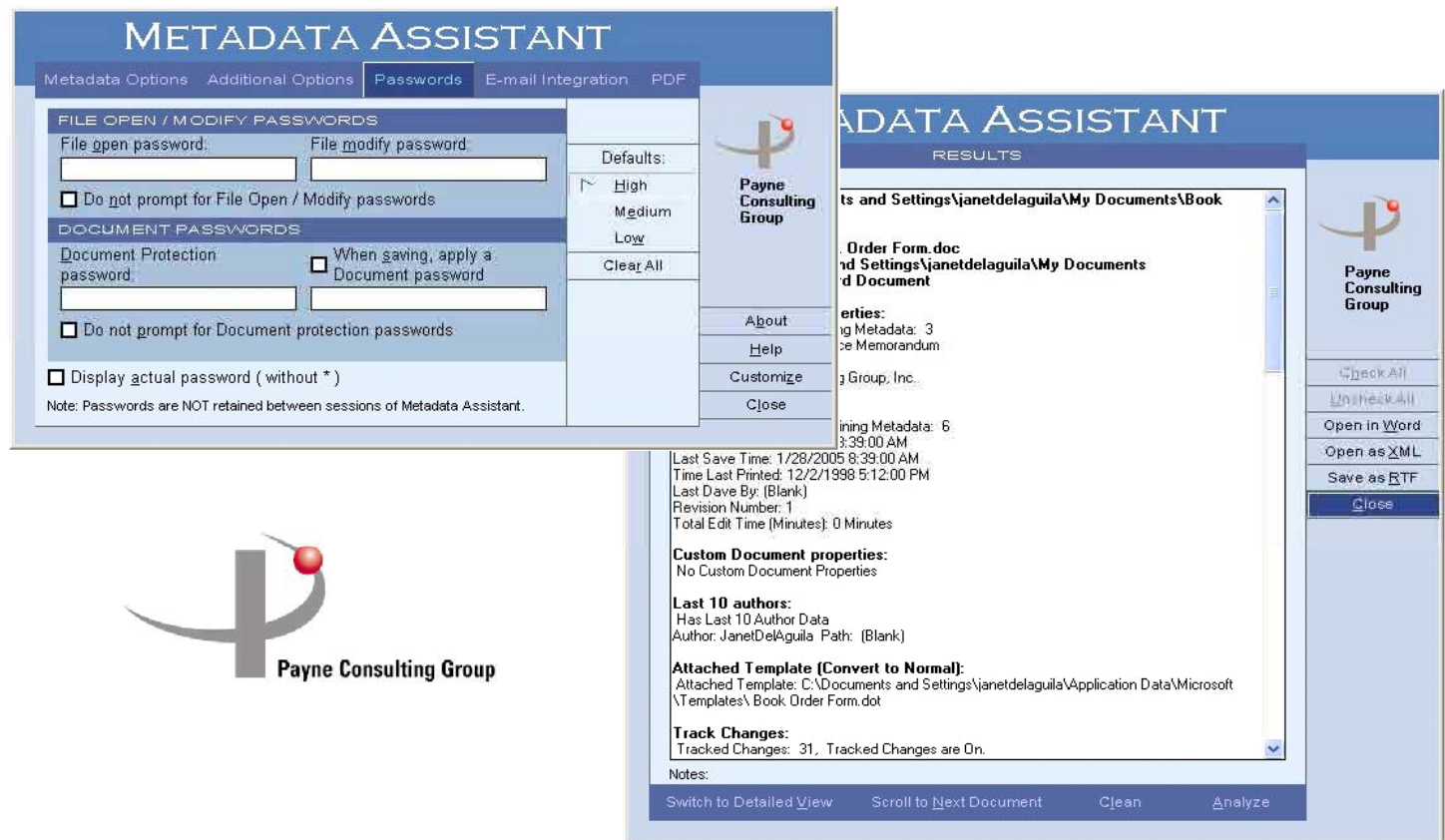
“METADATA”: HOW TO DEAL WITH IT

- **OPTION FOUR: Use Metadata removal tools**
- ▶ **PROBLEM: None**



WIPING OUT THE METADATA THREAT

- Payne Consulting's MetaData Assistant can safely strip out potentially damaging MetaData from Microsoft Word documents.
- Info is at www.payneconsulting.com
- \$79/license for smaller firms (see MicroLaw.com)
- Site Licenses available for larger firms



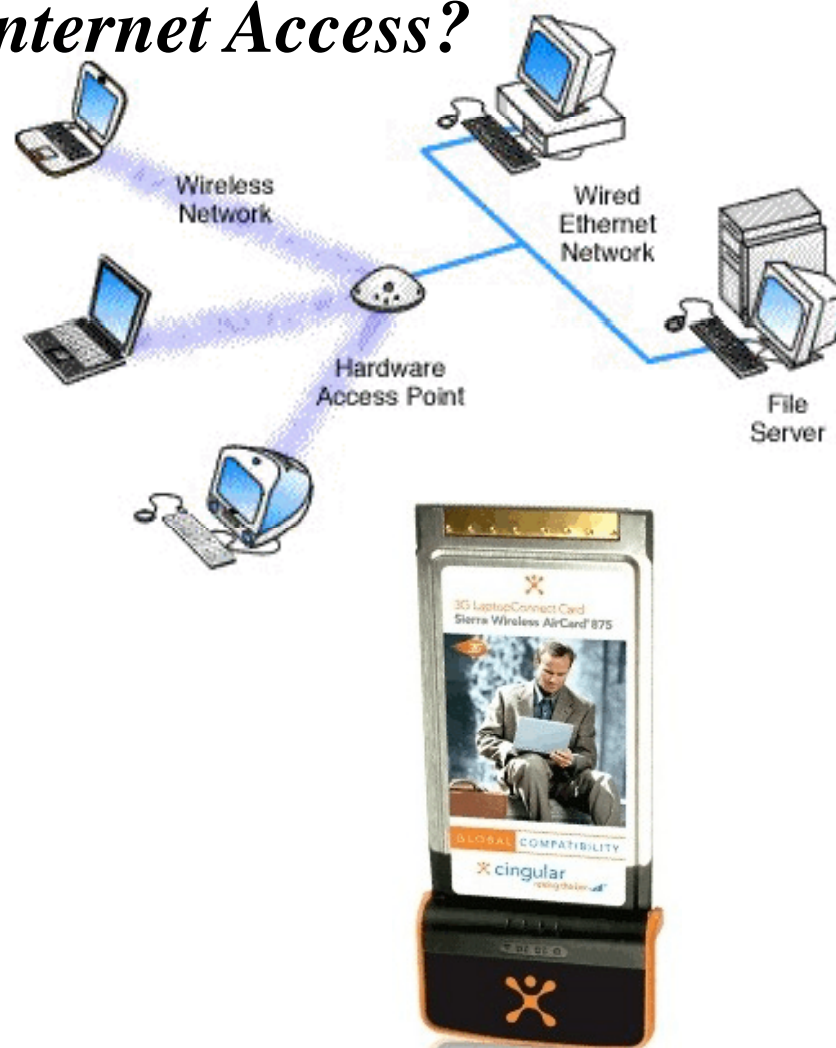
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WIRELESS INTERNET ACCESS

What About Wireless Internet Access?

- ▶ **What about Wireless security?**
- ▶ **Activate WPA2 or WEP security!**
- ▶ **WPA2 is best, WEP is not 100% secure but is far better than doing nothing**
- ▶ **Turn OFF “SSID Broadcasting”**
- ▶ **MAC Address limiting - only authorized accessors allowed!**
- ▶ **Don’t be discouraged by the wireless concept - it is worth the effort to secure the system given the geographical freedom it permits**
- ▶ **Never use Wi-Fi in a public hotspot – it’s completely unsecure! Use a wireless broadband card instead!**



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