

COMMENT TO LPRB PROPOSED OPINION NO. 22 MSBA COMPUTER & TECHNOLOGY LAW SECTION

These comments respond to LPRB Proposed Opinion 22, addressing metadata. The MSBA Computer & Technology Law Section provides these comments in an effort to seek clarification to the proposed opinion. As it is currently written, the Proposed Opinion may demonstrate ambiguities that can be remedied. It is our hope that this document will assist with that process.

I. LIMITED TO DOCUMENTS CREATED BY COUNSEL

At the onset, the Proposed Opinion should make it clearer that the opinion affects only those documents created by counsel, not documents disclosed in discovery (or any other exchange of client documents). The Proposed Opinion does suggest that the opinion relates to attorney-created documents, not evidentiary documents, by stating the following: “Furthermore, removing metadata from evidentiary documents in the context of litigation or in certain other circumstances may be impermissible or illegal.” Proposed Opinion at 3. This implies that the Opinion does not affect evidentiary documents. But that distinction should be made clearer, particularly since disclosure (and subsequent analysis) of metadata in discovery is increasingly common — and is increasingly required by courts granting motions to compel discovery. As such, the Proposed Opinion’s limitation to attorney-created documents should be clearly stated.

II. RECEIVING LAWYER’S OBLIGATIONS

In our view, the most problematic portion of the draft opinion is this sentence (and its support in the comment section):

If a lawyer receives a document which the lawyer knows or reasonably should know contains inadvertently sent metadata, the lawyer shall promptly notify the document’s sender as required by Rule 4.4, MRPC.

A. “Inadvertent” Disclosure Language Leads to Inevitable Notification of Opposing Counsel

The most pressing question raised by this Proposed Opinion is this: How can a receiving lawyer ever determine whether the other side’s disclosure of metadata is “inadvertent.” As the Proposed Opinion is currently drafted, the receiving lawyer would appear to have go through the following calculus:

- Opposing counsel just sent me this file (Word, PDF, Excel, etc.).
- It has metadata in it. I know this — not because I *looked* at the metadata, but because I know that *nearly every* document has metadata (even “cleaned” files).

- How technologically ignorant is my adversary?
- Are they technologically savvy enough to know about metadata?
- If they are savvy, do I think this disclosure was inadvertent?
 - Query whether anyone who knows about metadata would disclose metadata on purpose, without stripping it.
 - So arguably, the answer would invariably be “Yes, it was inadvertent.”
- If they are not savvy, do I still think that this disclosure was inadvertent?
 - If they don’t know (or even if I don’t think they know) about metadata, they won’t know that they disclosed it.
 - Again: arguably, the answer would invariably be “Yes, it was inadvertent.”

The only other way a receiving lawyer would definitively know that the disclosure is purposeful (i.e., not inadvertent) is if the adversary states something to this effect: “I know that this file has metadata in it, but I am giving it to you anyway.” Of course, this is incredibly unlikely.

B. “Reasonably Should Know”

Further, it is very questionable how a lawyer “reasonably should know” that the disclosure is “inadvertent.” Given the difficulty with the “inadvertent” calculus shown above, it is difficult to comprehend what such a calculus for “reasonably should know” would look like.

C. Every Digital File Contains Metadata

Significantly, it is essential to understand that nearly every digital file (Word, Excel, PDF, etc.) has at least *some* metadata. Even those files that are “cleaned” still contain some metadata. Anyone who knows this fact, therefore, does know (or at least “reasonably should know”) that every digital file received contains metadata — triggering an obligation, under the Proposed Opinion, to notify opposing counsel every time a digital file is received. For example, every time opposing counsel sends me a PDF or Word file, because I “reasonably should know” that each of those files contains metadata (even if I don’t *analyze* that metadata), I would be required to notify that lawyer that those files do, indeed, contain metadata. This is, of course, absurd.

D. Proposed Opinion and Comment Demonstrate that Lawyers Must Know About Metadata to be Competent

In Proposed Opinion 22 and its Comment, the LPRB writes that knowledge of metadata relates to competence:

Competency requires that lawyers who use electronic documents understand that metadata is created in the generation of electronic documents, that transmission of electronic documents will include transmission of metadata, and that actions can be taken to prevent or minimize the transmission of metadata.

In effect, then, the LPRB states that *every competent* lawyer must know about metadata. As such, it follows that every competent lawyer who receives an electronic document would know that *every such document* contains metadata — including *every* electronic document he/she receives from opposing counsel.

E. Effective Requirement: Receiving Lawyers Send a Responsive Disclaimer Every Time a Digital File Is Received

So in effect, under the draft opinion, every time an ethical, competent lawyer receives any file containing metadata in a file (Word, PDF, Excel, etc.), that lawyer would need to send this kind of letter to opposing counsel — regardless of his guess as to whether the adversary is tech-savvy enough to know about metadata:

- You sent me a file
- It has metadata in it
- I don't know if you know about metadata or not, but it's in there.

This is the result of the Proposed Opinion, though it does not appear to be the LPRB's intent.

F. The Only Way to See If a File Has Metadata Is to Analyze That Metadata

And if the LPRB changes the Proposed Opinion to state that the rule only applies to metadata that reveals privilege or work product, that brings about problems of its own. As described above, under the Proposed Opinion, a receiving lawyer who knows that every file contains metadata would automatically be required to send the notification to the adversary. If the Opinion states that the only metadata at issue is that containing privileged or work product, an attorney who knows that *every* file contains metadata — but would not otherwise go mining for that metadata — would be forced, under the rule, to analyze the metadata to see if it is innocuous or revelatory. As such, the rule would require the receiving lawyer to discover the revelatory metadata — where that lawyer would not have otherwise analyzed the metadata.

III. PROPOSED SOLUTIONS

A. Elimination of Burden on Receiving Lawyers

A better option would be to leave the opinion as is — placing the burden on lawyers not to reveal metadata — but remove the following sentence (and its support in the comments) entirely:

If a lawyer receives a document which the lawyer knows or reasonably should know contains inadvertently sent metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4, MRPC.

B. Knowledge That Document Contains Metadata Does Not Violate Rules; But Analysis of that Metadata May

Another alternative would be to affirmatively state that mere knowledge that a file contains metadata does not violate any ethical rule — unless that metadata is actually analyzed. Absent the receiving lawyer's *analysis* of the metadata, no obligation should fall upon the receiving lawyer to educate every adversary about metadata. Rather, as noted above, the burden (and focus of the Opinion) should be on working to prevent the sending lawyer from disclosing the metadata in the first place.

IV. PROBLEMATIC SCENARIOS UNDER CURRENT DRAFT

Following are real-world scenarios that demonstrate some problems that may stem from the Proposed Opinion, as it is currently drafted.

A. Scenario Number One

1. Factual Background

- Companies C1 and C2 are negotiating a contract with each other.
- Lawyer L1 represents C1, L2 represents C2.
- C1A and C1B are employees of C1, and C2A is an employee of C2.
- C2A mails a draft of the contract, in Word document format, to L1 for review.
- L1 redlines some changes and adds comments about strategy for the additions and deletions, all using the “Track Changes” feature of Word.

- L1 e-mails the marked-up draft to C1A, who accepts the changes and makes them invisible, at least on the face of the document. Then changes can still be viewed in the metadata.
- C1A e-mails the draft to his boss, C1B, who likes the draft.
- C1B e-mails the document to C2A for comment.
- C2A, in turn, forwards the document to L2.

2. Questions Raised Under Scenario Number One

1. Does L1 have any ethical responsibilities to C1 associated with metadata in documents that L1 provides to C1?
2. Does L2 have any ethical responsibilities to L1, C1, or C2 in this situation regarding the metadata in the document?

B. Scenario Number Two

1. Factual Background

- Company C1 is run by a CEO of questionable character and a former licensed attorney. Upon reading the new LPRB opinion, C1's CEO decides to use it to win a big contract with Company C2.
- C1 sends a redlined contract to C2 that contains purposefully incorrect metadata regarding falsified positions on contract pricing and duration.
- C2 provides the document to its counsel, L2.
- L2 notices the metadata.
- In compliance with LPRB Proposed Opinion 22, L2 discloses — to C1 — that L2 found the metadata.
- L2 also tells his client, C2, that the document contains metadata, though L2 does not disclose the contents of that metadata — just that it contains some metadata.
- C2 looks back into the document it received from C1, analyzing the metadata.
- C2, after learning the hidden terms that C1 purposefully placed in the metadata, demands the same terms — believing that they are real.
- C1 accepts, knowing that the “hidden” metadata terms were inflated.

2. Questions Raised Under Scenario Number Two

1. What are C1's ethical obligations?
2. What are C2's ethical obligations?
3. Are the results what is intended by the Proposed Opinion?