



NEW JERSEY STATE BAR ASSOCIATION

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VIA E-MAIL AND REGULAR MAIL

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments: Metadata Working Group
Richard J. Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey, 08625-0037

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) appreciates the opportunity to comment on the Report and Recommendations of the Supreme Court Working Group on Ethical Issues Involving Metadata in Electronic Documents (Working Group). The Working Group is to be commended for its tremendous effort in seeking to resolve the significant issues that sometimes result from the transmittal of electronic documents. The NJSBA supports many of the Working Group's recommendations, but has serious concerns about some of the changes recommended to the Rules of Professional Conduct.

The NJSBA's concerns focus on the proposed change to RPC 4.4(b), which requires the recipient of a document to determine if any of the metadata contained in the document was inadvertently sent and, if so, to take immediate steps to return the document and delete it from the recipient's system.

There is no distinction as to whether a document containing metadata was received as part of the discovery process, as part of a document being negotiated, or for some other reason. There is also no provision allowing for preservation of a document containing metadata for purposes of court review prior to the document's return and deletion. Thus, the decision about whether any metadata contained in a document was inadvertently sent rests solely on the shoulders of the recipient, and the action taken, or lack of action, can have serious consequences for all involved. Those consequences include ethics violations and potential disqualification of representation. This is too great a burden to place on the recipient, and the consequences for making a wrong determination are too significant.

The NJSBA previously submitted comments supporting the recommendation of the Supreme Court's Committee on Ethics and Admissions (Special Committee) to adopt a similar rule; however, that proposal included a provision permitting a recipient to bring a document containing metadata to a court's attention if there were any questions about the recipient's

obligations. That proposal also permitted the recipient to preserve the document pending review and disposition by the court.

If any rule changes are adopted by the Court, the NJSBA strongly recommends that they include a provision like the one suggested by the Special Committee allowing for the sequestration of any electronic document that includes metadata and/or a safe harbor for those who review the document in good faith pending a court resolution of whether the production was inadvertent and whether privilege has been waived. This will alleviate the burden on a recipient of a document from having to guess whether any metadata in the document was purposefully or inadvertently sent. It will also protect both senders and recipients who may not be technologically savvy enough to remove or detect metadata in a document. Finally, it will allow for judicial resolution after taking into account the unique facts and circumstances attendant to any particular situation. The NJSBA believes this is critical, as the discovery and reading of metadata can occur under so many different circumstances that one rule cannot possibly address every situation.

The NJSBA also notes that the directive contained in the Working Group's proposal to destroy inadvertently sent metadata appears to be inconsistent with a lawyer's obligations under RPC 3.4(a), which prohibits a lawyer from unlawfully altering, deleting, destroying, or concealing a document or other material that has potential evidentiary value. Allowing a recipient to sequester a document until a court determines the appropriate action to be taken will also alleviate this inconsistency.

If the Court, however, decides to adopt a rule that does not allow for sequestration and requires the destruction of a document containing questionable metadata, the proposed language requiring the recipient of metadata to "take reasonable measures to assure that the information is inaccessible" creates a standard that may be difficult, if not impossible, to achieve. The rule should require a lawyer to take reasonable steps to ensure the deleted material is not readily accessible, taking into account the scale and complexity of that lawyer's information technology system. Thus, the NJSBA suggests a slight modification to the proposed language to require the recipient to "take reasonable measures to assure that the information is *not readily accessible*."

With regard to the proposed official comment to RPC 4.4(b), the NJSBA supports the use of the examples provided, but requests that additional examples be included of instances where metadata would not be viewed to be inadvertently sent. The NJSBA further suggests that the comment specifically provide that the use of "mining" software is prohibited.

Finally, the NJSBA supports many of the other recommendations made by the Working Group, and urges the Court to adopt them, as follows:

- The NJSBA supports the Working Group's recommendation that "electronic information" be included in the definition of writing in RPC 1.0 and an official comment be added to provide a definition of metadata. The NJSBA strongly suggests that any rule change clarify that metadata is "part of" a document and not separate and apart from the document.
- The NJSBA supports the amendment to Civil Rule 4:10-2 and 4:18-1.

- The NJSBA believes that steps should be taken to minimize the disclosure of metadata in documents electronically filed with the Judiciary.
- The NJSBA agrees that metadata issues should be addressed as a component of judicial education programs, continuing legal education and law school curricula. The NJSBA also supports the Working Group's observation that 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. The NJSBA is committed to including technological issues like those presented by this report in its continuing legal education courses in an effort to increase lawyers' knowledge about these issues.

Again, the NJSBA appreciates the opportunity to review the Working Group's report and recommendations, and the Court's willingness to consider our comments. While the NJSBA advocates consideration of a different approach for some of the Working Group's recommendations, we acknowledge and commend the Working Group for its thoughtful analysis and debate of the difficult and complicated issues involved.

Please do not hesitate to contact me with any additional questions or comments on the above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Miles S. Winder, III", followed by three horizontal lines indicating a signature line.

Miles S. Winder, III
President

/sab

cc: Thomas Hoff Prol, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director