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**Metadata:  
The (Really) Fine Print**

**By Mark J. Fucile  
Fucile & Reising LLP**

“Metadata” is “data about data.” It is embedded in electronic documents and, depending on the format, can include information about when and who made changes and related comments about those changes. In many circumstances, metadata is of little interest. In others, however, metadata can reveal information otherwise protected by the attorney-client privilege or the work product rule such as “redline” comments between a lawyer and a client in a draft contract. Late last year, the Oregon State Bar issued an ethics opinion discussing our duties when handling metadata in the context of exchanging documents with opposing counsel. The opinion, 2011-187, is available on the OSB website at [www.osbar.org](http://www.osbar.org). It follows an earlier opinion by the ABA, 06-442, that is available on the ABA’s website at [www.americanbar.org](http://www.americanbar.org). Both examine lawyers’ duties from the perspective of the sender and the receiver. In this column, we’ll focus on the Oregon opinion, but the ABA opinion provides a still relatively current survey of how these issues are being handled nationally.

Before turning to 2011-187, a caveat is warranted. The new Oregon opinion largely discusses metadata outside the context of formal discovery. Both ORCP 43 and FRCP 26 now address “electronically stored information” in the

formal discovery setting. RPC 3.4, in turn, deals with both discovery requests and responses.

***The Sender***

2011-187 begins by discussing two related concepts central to handling client information: competence and confidentiality. The former is governed by RPC 1.1 and imposes a duty to act competently in representing clients. The latter is governed by RPC 1.6 and charges us with the responsibility for protecting clients' confidential information. In short, we need to act competently to protect confidentiality.

2011-187 (at 2) finds that “[c]ompetency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.” It then concludes (at 3) that “[a] lawyer must use reasonable care to avoid disclosure of confidential client information, particularly where the information could be detrimental to a client.” 2011-187 does not specify particular steps that meet the standard of care, noting (at 3) that “what constitutes reasonable care will change as technology evolves.” Software, however, can “scrub” documents and “old fashioned” transmission methods such as fax and paper are simple ways to avoid the risks.

***The Receiver***

2011-187 notes that under RPC 4.4(b) a lawyer must promptly notify the sender if the lawyer receives a confidential document the lawyer knows or reasonably should know was inadvertently sent. The opinion, however, doesn't draw a bright line—acknowledging that the simple receipt of a “redlined” document today doesn't necessarily imply that it was inadvertently sent. The opinion also observes that even if RPC 4.4(b) applies it only requires notification, with evidence law controlling whether privilege has been waived through inadvertent disclosure (and cross-referencing OSB Formal Ethics Opinion 2005-150, which addresses RPC 4.4(b) in greater detail). 2011-187 counsels that a lawyer on the receiving end of what appears to be inadvertently sent privileged information should consult with the client on the risks and benefits (beyond required notification) of simply returning the document or retaining it (and presumably being prepared to litigate privilege waiver).

2011-187 concludes with a brief yet sweeping indictment of using specialized (beyond normal word processing) software to search for metadata in documents received, or “data mining.” At least as applied to software-enhanced screening for metadata (presumably as opposed to simply opening a document that includes, for example, redlining), the opinion states: “Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously

entering the other lawyer's office to obtain client information and may constitute 'conduct involving dishonesty, fraud, deceit or misrepresentation' in violation of Oregon RPC 8.4(a)(3)."

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and [Mark@frllp.com](mailto:Mark@frllp.com).