

E-Mailing Documents: What You Can't See Can Hurt You

By Kathleen R. Baxter, Esq.

Scenario: You are representing a client in negotiating a major contract. The other party's attorney has just e-mailed you a proposed contract for your and your client's review. In bygone days, of course, the lawyer would have faxed (or, before the days of faxing, would have mailed) a hard copy of the contract to you. You, in turn, would have reviewed it with your client, penciled in your client's proposed changes, and then sent to back to the other attorney for preparation of a final version. With the wonders of modern technology, however, you can open the document on your own computer, review the draft with your client, make the appropriate changes in the contract, and e-mail it back to the other attorney. But wait – Is there more to this document than you can see? Should you look for that which your eye cannot see?

Documents created through the major word processing programs may contain “metadata” – data that may be hidden in a final document, such as deletions and overwritten files – along with revision logs, file properties, templates, and hidden text. A person familiar with the presence of this data may be able to access this information. Can a lawyer use this ability to access possibly confidential information that may be hidden in an e-mailed communication from another lawyer?

In Opinion 749 (2001), the NYSBA Committee on Professional Ethics responded to this question with an emphatic “No”! The Committee likened the practice to other conduct prohibited for attorneys, such as the prohibition against soliciting the disclosure of unauthorized communications, exploiting the willingness of another to disclose confidential information, and making use of inadvertent disclosure of confidential information. In reaching its conclusion, the Committee stated, “We believe that in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a “secret” of another lawyer's client would violate the letter and spirit of [DR 1-102 of the Code of Professional Responsibility].”

“But,” you may say, “the other attorney disclosed this information.” The Committee went on to state:

[T]o the extent that the other lawyer has “disclosed,” it is an unknowing and unwilling, rather than inadvertent or careless, disclosure. ... [Here,] it is a deliberate act by the receiving lawyer, not carelessness on the part of the sending lawyer, that would lead to the disclosure of client confidences and secrets.

Accordingly, the Committee concluded that the receiving lawyer may not deliberately seek access to “hidden” information in documents transmitted to him or her by e-mail.

Having reached that conclusion, however, the Committee also noted the sending lawyer's responsibility to exercise care in using e-mail. In an earlier opinion, Opinion 709 (1998), the Committee stated: "in circumstances in which a lawyer is on notice for a specific reason that ... the confidential information at issue is of such an extremely sensitive nature that it is reasonable to use only a means of communication that is completely within the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail." The Committee reiterated this finding in Opinion 749.

The ability to utilize e-mail to transmit documents for review and editing enables lawyers to complete transactions for their clients in a much more efficient manner than was possible before the advent of electronic communications. However, lawyers should take care not to exploit this ability to undermine attorney-client confidentiality, "the foundation of the attorney-client relationship."