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The Hidden Perils of Metadata

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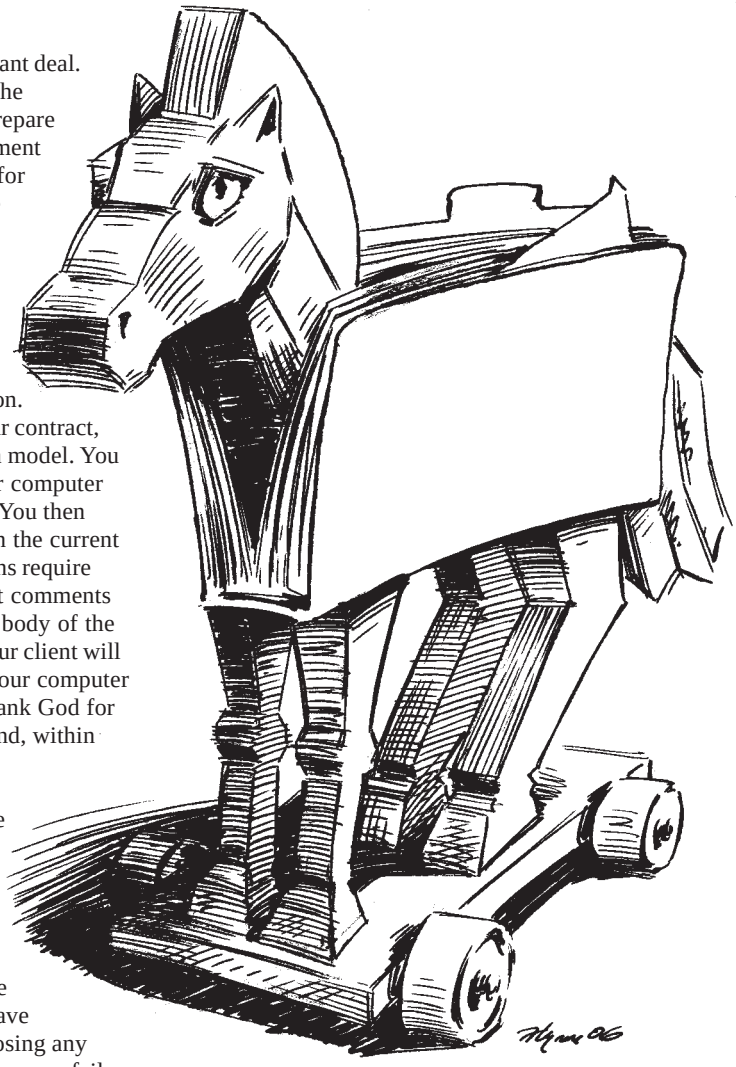

You are negotiating an important deal. You and your client identify the important deal points. You prepare a draft of the proposed agreement for transmittal to your client for comment; you want to ensure that when you send the draft to opposing counsel, it contains the language most favorable to your client on the key deal points, so that you can negotiate the final language from a strong position.

You decide to use a similar contract, drafted for another client, as a model. You open the old contract on your computer and save it with a new name. You then start to customize it for use in the current matter. Since certain provisions require your client's input, you insert comments or questions directly into the body of the draft, highlighting them so your client will notice them. You save it on your computer and send it to your client. Thank God for e-mail! You attach the draft and, within seconds, your client has it.

Your client has the same software and uses it to redline the document. Some comments are typed right into the draft, answering your questions and advising you of the "bottom line" on some terms. As you revise the document, you periodically save the edited versions to avoid losing any data in the event of a crash or power failure. After a few more rounds of revisions and comments from your client, the document has been completed. You compose an e-mail to opposing counsel, attach the final version of the agreement and send it on its way. How did you ever live without all this technology?

When you receive your opponent's response, including a redlined version of the document reflecting their proposed changes, you are astounded to realize that they have seized on each of the points raised by your client in the comments and e-mails. Each of the "bottom lines" identified by your client has been demanded by your opponent. It is as if your opponent has seen all of the redlined text and the comments you exchanged with your client. It's a nightmare!

You are not imagining things. Your opponent really did see the redlined text and the comments you thought were private. It was all contained in "metadata," which was attached to

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A newsletter from The ABA Standing Committee on Lawyers' Professional Liability

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Metadata

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the file that you e-mailed to your opponent.

What is metadata? Although the document on your computer screen looks like a two-dimensional piece of paper, it is really akin to a three-dimensional folder. The current version on the screen is the top document in the folder. But behind the screen is the rest of the folder, including all the draft versions, and it is stored on your computer. So, you did not just e-mail one document; you e-mailed an entire folder. You provided your opponent with a great deal of information: prior versions, edits, the identity of authors and editors, dates of alterations, the time expended on editing and the electronic notes that your client attached. *See, e.g.*, Hricik and Jueneman, "The Transmission and Receipt of Invisible Confidential Information, 15 No. 1 Prof. Law 18 (2004).

Metadata affects litigation attorneys, too. Some jurisdictions require that attorneys provide electronic versions of certain pleadings such as separate statements in support of motions for summary judgment (see, e.g., California Rule of Court 342(i)) while some courts require electronic brief filing. It is routine for the individual portions of joint statements to be transmitted by e-mail to the attorney responsible for filing the final document. All these transmittals can contain metadata.

What are the potential ramifications of such a transmittal, both for the lawyer transmitting metadata and for the lawyer receiving it?

The attorney transmitting the document may have an affirmative duty to take reasonable precautions to ensure that confidential information contained in metadata is removed prior to transmittal. ABA Model Rule of Professional Conduct 1.6 prohibits attorneys from revealing client information without the client's informed consent. A New York State Bar opinion held that an attorney has "a duty . . . to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets." NY Eth. Op. 782 (2004). While recognizing that what may constitute "reasonable care" will vary with the circumstances, the Opinion notes that a lawyer who uses technology has the obligation to become familiar with that technology to avoid harming the client: "[r]easonable care may . . . call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with respect to the mode of transmission." *Id.* This duty could conceivably require the attorney to warn the client about the risks of forwarding documents to others; just as an attorney may want to warn a client not to disclose the substance of privileged communications, so too may the lawyer want to warn the client about the risks of metadata transfer.

What about the lawyer on the receiving end? Can the receiving lawyer mine the incoming file for metadata with impunity? Some jurisdictions may impose an affirmative duty on lawyers to refrain from searching for metadata. *See, e.g.*, NY Eth. Op. 749 (2001) ("[a] lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents. . . .")

Note, however, that this Opinion assumes that the receiving attorneys were "sophisticated users" who took affirmative steps to find the metadata. As technology advances, even unsophisticated users will be able to stumble across metadata unintentionally; how long will it be before a court determines that the existence of metadata is so well-known, and the precautions available to erase it so common, that its transmission passes the realm of "inadvertent" to "careless?" And, in any event, the New York rule cannot preclude *clients* from mining for metadata when they receive documents from counsel.

As technology changes, so too may the standard of care. Attorneys should consider investing in metadata "scrubbing" software that automatically operates when an electronic document is transmitted and does not permit transmission until the sender makes an affirmative decision whether to scrub the document. Attorneys should also consider instituting formal policies regarding the handling of electronic transmissions, including educating employees and clients.

"'Documents create a paper reality we call proof.'" *Zubulake v. UBS Warbrug LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 214. In the computer age, that reality may be a virtual one.

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Levit Essay Contest Submissions Solicited

Submissions are now being solicited for the annual Levit Essay Contest on Lawyer's Professional Liability. The winner of the contest will receive a cash prize of $5,000 and an expense-paid trip to the Spring National Legal Malpractice in Washington, DC on April 25-27, 2007.

This contest encourages original and innovative research and writing in the areas of legal malpractice law, professional liability, and loss prevention. The Levit Essay Contest is open only to ABA members of the Law Student or Young Lawyer Division.

The deadline for submissions is February 23, 2007.

The competition is co-sponsored by the ABA Standing Committee on Lawyers' Professional Liability and the law firm of Long & Levit, LLP, of San Francisco. Contest rules and the entry application are available at www.abalegalservices.org/levit.html.

lpl Advisory is a bi-annual newsletter published by the American Bar Association Standing Committee on Lawyers' Professional Liability for the news and information exchange needs of the lawyers' professional liability community.

Closing Opinions in Business Transactions: Liability to Third Parties and to Clients

by Arthur Field, Field Consulting

A lawyer's opinions to a party on the other side of a transaction in which the lawyer represents its own client is an anomaly. Yet it is steeped in tradition. Lawyers have been issuing third party opinions for a hundred years or more. The opinions are seen as useful both by clients and the non-clients who receive them. The theoretical possibilities of conflicting responsibilities to the third party and the client seem to have been resolved in a practical way. ABA Rule 2.3 classes the opinion with an internal investigation made for dissemination outside the organization. Both are seen as an appropriate way for the client to provide fairly presented advice to third parties. The rule provides that the lawyer must reasonably believe that the work to be done is compatible to the client relationship. The ALI's Restatement of the Law Governing Lawyers recognizes third party opinions in Section 95 which uses the language of Rule 2.3.

Lawyers who gave closing opinions probably always assumed that there would be malpractice type liability. That is now well established. However, through the 1980's third party opinion liability claims were defended on the basis that there was no liability for a negligently given opinion even if such an opinion was addressed to and delivered to the third party because there was no privity between the lawyer and opinion recipient. The New York decision in Prudential Ins. Co. v. Dewey Ballantine, Bushby, Palmer & Wood, 605 NE2d 318 (NY 1992) and the Texas law decision in First National Bank v. Lane & Douglass, 961 F. Supp. 153 (N.D. Tax 1997) ended doubts about the availability of a malpractice type remedy. The courts appear now to see the remedy as one for negligent misrepresentation applying malpractice standards as to lawyer conduct.

The responsibility to the third party in an opinion situation is usually much narrower than the responsibility of the lawyer in the same transaction to its own client. There is no engagement letter between the opinion giver and the third party. The responsibility is to provide only the limited advice in the opinion letter rather than to advise on the transaction. The opinion is both the advice and the definition of the scope of responsibility to the third party. The opinion is delivered as a closing document the client (but not the third party opinion giver) is obligated to deliver. The client controls delivery of the opinion. Thus, any rights the third party has arise from what is actually delivered, and not from any promise to deliver an opinion in a particular form or with particular contents or meaning.

Transaction documents may cover hundreds of pages. The third party opinion letter is likely to be half a dozen pages long. It is written in a combination of plain English and a stylized jargon. The use of jargon permits relatively short opinions to be used. The recipient needs a lawyer to interpret the opinion letter received. The third party opinion giver provides only the opinion letter. The opinion letter is not accompanied by a written or oral explanation. The recipient gets advice from its own counsel about the opinion submitted at closing. Ordinarily opinion recipient's counsel will have negotiated the opinion letter to be received as a part of the transaction negotiations. The opinion recipient's counsel advises its client whether the opinion letter submitted is acceptable.

Although opinion recipient's counsel advises its client as to the acceptability of the opinion letter, ordinarily it has not done the diligence to know whether the opinion is correct or whether appropriate diligence has been done. Its only advice is as to the scope of the opinion, including the acceptability of limitations of one kind or another stated in it. Thus the opinion recipient continues to rely on the opinion giver as to the contents of the opinion letter. At closing the opinion letter is presented by or in behalf of the client. It is accepted by the 3d party on the advice of its own counsel.

If there is a claim that the opinion letter is wrong in some material aspect the usual malpractice rules apply. Experts for each side will testify as to the appropriateness of the conduct of the opinion giver. The testimony is likely to refer to bar reports and treatises. See the recent decision in Dean Foods Co. v. Pappathanasi 2004 WL 19442 (MASS. Super.).

Even if the opinion letter is right, there may still be liability, even criminal liability. The act of delivering an opinion that is correct (or incorrect) may facilitate a client violation of fiduciary duty or fraud. There may be criminal or civil liability for the delivery of the opinion if the opinion giver understood the fraud. And then there is the possibility that a correct opinion may nevertheless involve a fraud (not by the client but) by the opinion giver. That is the claim of the government in the pending KPMG prosecution in the Southern District of New York (U.S.A. v Stein et al). The government does not challenge the transaction as to which the opinion relates. The basis for the indictment is said to be the knowledge by the opinion giver that the transaction that was the subject of the opinion letter was not intended to take place as described in the opinion letter.

To complete the picture the opinion recipient's counsel may be liable to its client for negligently advising acceptance of an inappropriate opinion. And the opinion giver may be liable to its client for advice contained in the 3d party opinion letter. The opinion giver will probably be unable to establish that it did not give the advice to its client that it gave in the third party opinion letter in the same transaction.

While there are few reported cases, in the past few years claims have increased in size and frequency. With this as background it will not surprise readers to learn that the Business Law Sections of the ABA, California Bar, Texas Bar, Pennsylvania Bar, Florida Bar, the TriBar Opinion Committee and a number of law firms are sponsoring the first ever seminar in New York in October on managing legal opinion risk.

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