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Metadata: PROTECT AGAINST HIDDEN DANGERS

By Peter Mierzwa

What Is Metadata?

Whenever we create documents on our computers, the computer programs we use track what we are doing. They track who created the document, when it was created, how long they spent, how many words there are, when it was last edited, and much more. This information is called **metadata**. The common definition for metadata is data about data, which is not very helpful. One federal court defined metadata as describing "the history, tracking, or management of an electronic document" and including such useful information as file names, location, format, creation and access dates, and user permissions. (*Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005))

Find Metadata

Although metadata is contained within the documents you create, you cannot see it. You need to look for it. It is embedded in computer files about your document. These files are called OLE or "object linking and embedding" storage. The critical characteristic of OLE files is that they travel with the document wherever it may go. The following are examples of metadata that may be in your documents' OLE files:

- your name
- your initials
- your company or organization name
- the name of your computer
- the name of the network server or hard disk where you saved the information
- other file properties and summary information
- nonvisible portions of embedded OLE objects
- the names of previous authors
- document revisions
- document versions
- template information
- hidden text
- comments

Identify the Hidden Danger

In Microsoft Word documents, two popular features create major metadata risks: Versions and Track Changes. The Versions feature will save a new version of the document in the OLE, often automatically without giving you notice. The risk here is that using a form document that had the Versions feature activated would record all prior versions of your work, including any client confidences. This information would be accessible by the receiving attorney.

The other feature creating metadata risks is the Track Changes feature, which allows parties to work collaboratively on electronic documents. Track Changes allows us to send draft documents for comments to cocounsel, the client, and even opposing counsel, then review those changes and either accept or reject them. The risk with Track Changes is that it can be set to keep changes hidden. With the hidden text option turned on, the person editing the document can make changes without knowing that those changes and the original text have been stored.

Much of this metadata appears innocuous enough on its face. In the context of litigation, however, metadata has often provided "smoking gun" evidence. Metadata can provide an electronic paper trail of who touched the document and what the person did. Imagine testimony that a document was created and sent on a particular date or that only one person worked on that document. A quick look at the metadata could reveal the truth and provide powerful ammunition for cross-examination.

Metadata is hidden for a reason. This is not information that you intended as part of your final document. The ability to view metadata raises ethical questions for the sending attorney and the receiving attorney. Although this article will not address these ethical issues, attorneys should familiarize themselves with ABA Formal Opinion 06-442, as well as any opinions from their own states about viewing metadata.

Manage Metadata

If you are producing a document, you can certainly take steps to ensure that you do not disclose confidential information. The ethics opinions suggest that it is your responsibility to your clients not to transmit damaging metadata.

There are a number of methods to prevent metadata from leaving your computer:

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Pro Bono Through Public Education

By David Trevaskis

In 2004, Congress established September 17 (the day the United States Constitutional Convention signed the U.S. Constitution in 1787) as "Constitution Day," a federal holiday. On this day, the law mandates that all publicly funded educational institutions provide educational programming on the history of the Constitution. Constitution Day kicks off the school year each fall and provides a great opportunity for attorney involvement in public education about the law.

It is a great time for lawyers to call schools to which they are connected as alums, as parents, and as members of the community and ask if the schools would like help in setting up their mandated Constitution Day programming. Participation in law-related and civic education programs has been a growing means through which attorneys contribute to the public good.

A lawyer who renders public service to improve access to justice is simply doing what all lawyers are asked to do as part of their professional duty. The need for such public service is great; in Pennsylvania, for example, nearly 80 percent of the poor do not have access to attorneys and therefore have limited access to our justice system. ABA Model Rules of Professional Conduct Rule 6.1, Voluntary Pro Bono Publico Service, is not limited to direct legal representation of poor clients. A lawyer may perform this service "by participation in activities for improving the law, the legal system or the legal profession." Providing education about the law, in a nation guided by the rule of law, constitutes such public service.

There are many programs available through local and state bar associations for the larger community, including the ABA/YLD's Public Service Projects (visit www.abanet.org/yld/public_service.html), People's Law Schools, where lawyers provide easy-to-understand presentations on various legal disciplines, and Teen Courts, where lawyers teach young people how to conduct trials of peer offenders and work to oversee such youth courts. An attorney provides mentorship to young people learning about the justice system by coaching a mock trial team or moot court team that competes before local judges or lawyers. While providing valuable education to young people, the attorney coach will likely develop client contacts through the students, teachers, parents, other attorneys, and judges involved in the program.

The number of events to choose from can be overwhelming, but becoming involved in as few as one or two renders valuable service to the community, benefits the legal profession by dispelling any negative portrayal of our profession, and provides a network of potential business contacts.

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Got an Itch to Create a Niche?

By N. Andrew Rotenstreich

A niche practice is a legal practice focused on a distinct segment of the business market. You may not think of yourself as a specialist or intend to develop a niche practice, but your clients and referrals may pull you in a particular direction that can give you and/or your firm more recognition and make your business more profitable.

Some of the benefits of practicing law in a niche market are consistent work, high-level client contact, and the ability to focus on a particular area of the law (i.e., more in depth knowledge of the legal issues of that practice area). As an attorney, having a niche practice can provide good job security where there is little competition for the work.

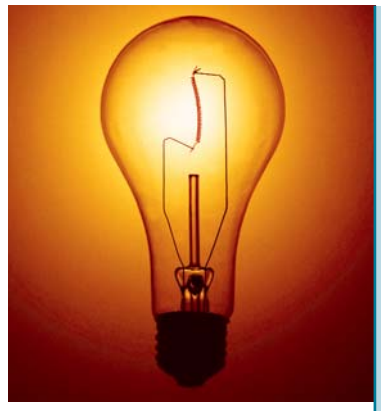
Realizing the potential for a niche practice is very important. When I first started working in my niche practice area, few people understood there was a legal need in this area (including me). I was fortunate to realize such a potential, and then spent time learning the issues in this area of the law before others realized the niche existed. The most rewarding aspect of creating a niche practice is the knowledge that you are the "go-to" person in that industry for legal issues in your particular geographic area (i.e., city, state, or region).

The first step in developing a niche practice is to claim a certain area of the law by positioning or "marketing" yourself therein. The area you stake out can be based on your personal background, previous work experience, general legal interest, or relevant training. Experience in your chosen field helps of course, but you can also develop a niche practice in an area in which you have no prior knowledge or experience. In fact, everything I learned about my niche industry has been from "on the job training." I had no previous experience in the field.

To educate and market yourself, you should seek to work with individuals in the industry (and not necessarily with attorneys), join and get active in trade associations, and research industry issues. The most challenging aspect of developing a niche practice is learning the industry "lingo" and issues that affect businesses in that industry. Study the legal issues involved with the particular industry (e.g., regulatory issues, legislative issues, contract issues, real estate). Once you become familiar with these issues, you can begin to research ways to address them and "offer" those services to businesses in the industry.

Marketing a niche practice requires the same marketing tools and techniques as any other business marketing strategy. Niche marketing is just more industry specific. Your involvement in industry trade associations will become an effective marketing tool. Writing articles for trade publications and volunteering to participate on industry panels are other good marketing tools. These publications and panels are always looking for authors and volunteers. You should market yourself at *all* times in *all* industries in which your niche practice is focused.

It goes without saying that the fewer number of attorneys practicing in a particular legal arena, the less competition for that work. So while you do not have to be the first attorney in your geographic area to develop a legal practice in a particular niche market, you must distinguish yourself as being competent in that industry. You can then find *and work* with an attorney who can provide such service; but stay involved with the client. In my experience, clients want to know that you care about them and their businesses, not just about making a quick buck on a billable hour.



obtain a great amount of trust from clients in any industry by learning and understanding the issues that face these businesses. This is a major selling point to potential clients, as those representatives want to know that you understand their issues.

Once you've established yourself in your niche market, you should continue to work hard to maintain those client relationships. At this point, you have a relationship with the client that you should nurture, and your goal is to be the "go-to" lawyer for that client on any issue. If an issue arises wherein you do not feel that you could provide the best service or value to the client,

Marketing a niche practice requires the same marketing tools and techniques as any other business marketing strategy.

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READY RESOURCES

- *The Lawyer's Guide to Marketing Your Practice,* Second Ed. 2004. PC # 5110500. Law Practice Management Section.
- *Marketing Success Stories: Conversations with Leading Lawyers,* Second Ed. 2004. PC # 5110511. Law Practice Management Section.

To order online, visit www.ababooks.org.

Does That Framed License Mean Anything?

CREATING POSSIBILITIES IN THE YOUNG LAWYER'S CAREER

By Jennifer L. Brinkley

If you are like me, you took the bar, obtained your license, and were filled with the excitement of becoming a practicing lawyer. But after a while, your framed license on the wall wasn't enough. The only real difference, you feel, is that you can now speak in court on those motions you prepared while waiting for your license. What have three years of law school, months of preparing for the bar exam, and a mountain of debt actually achieved? Many first-year associates become most experienced with the embarrassment of not knowing how the justice system actually works and the stinging frustration of their inexperience.

It can be very easy to feel downtrodden as a first-year associate, to wonder why you ever wanted to practice law or when you're going to fulfill the ideals you first sought. Your everyday reality seems limited to drowning under documents loaded with terms you do not understand. But as motivational author Terry Josephson says, "Stop thinking in terms of limitations and start thinking in terms of possibilities." Many avenues lead to success for the new attorney.

Jurisdictions may vary on actual requirements, but new attorneys often are encouraged to provide pro bono representation to clients, and this ethical "duty" can be the perfect place for new attorneys to cut their teeth on an actual case. Working through Legal Aid or other programs is a wonderful way to fulfill our ethical obligations as attorneys while picking up some much-needed, and much-desired, experience. It's also a refreshing supplement to billable hours.

Another way to obtain experience is to sign up with the court's guardian ad litem (GAL) program to be appointed as a children's attorney. Abused, dependent, and neglected children are in serious need of representation from attorneys, and a GAL can be a crucial player in the life of a child who desperately needs an advocate. GALs obtain invaluable courtroom experience—and a dose of reality as to the problems facing children in their communities. It's also a wonderful way to get to observe experienced attorneys work, as the parents are usually represented by counsel and the prosecution is involved in each case.

It is easy to despair during the early years of inexperience and lack of confidence that come with being a new attorney. You may feel light-years from where you thought you would be by now. But I found that success comes only through leaving the office and throwing yourself into the practice of law—despite innocence or inexperience. By volunteering you can obtain experience while making a difference in your community. Your confidence will grow with each case you take, and you will be able to use your hard-earned license to benefit yourself and others. When I see the difference I am making in the life of a child, or when I hear my pro bono client say, "Thank you for helping me when you did not have to," I realize that framed license on the wall does make a difference after all.

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READY RESOURCES

- Visit the Web site of the ABA Standing Committee on Pro Bono and Public Service at www.abanet.org/legalservices/probono/home.html or consult your local bar association for a list of pro bono opportunities in your state.

Ten Tips for Drafting Engagement Letters

By Brian S. Faughnan

Other than in a smattering of jurisdictions and certain specific engagements (like contingent-fee cases), by and large, an attorney agreeing to represent a client is not ethically obligated to draft and send that client an engagement letter setting forth the terms of representation. Thus, for most lawyers, whether to send an engagement letter is a question of prudence, not ethics. Nevertheless, sending an engagement letter can allow both you and your client to better understand the scope of your ethical obligations with respect to that engagement. Below are ten tips for drafting engagement letters.

10. Not everything is negotiable. Although you can use your engagement letter to memorialize an agreement and limit the scope of your engagement, any limitation still must be reasonable under the circumstances. If your client has agreed to pay you an unreasonable fee, memorializing that agreement in an engagement letter will not transform the unreasonable fee into a reasonable one.

9. The truth, the whole truth, and nothing but the truth. Make certain that what your engagement letter says about you and the services you intend to perform is true. Avoid making false or misleading communications about yourself or your services.

8. Know your audience. Well-crafted engagement letters serve to protect the lawyer from liability exposure that can result from actual or manufactured client misunderstandings. The best engagement letters are understandable both by the primary audience (the client to whom the letter is addressed) and the secondary audience (judges, juries, or bar counsel who will be reviewing it if the complaint is filed).

7. The devilish details. A form engagement letter can only take you so far. Often, the most crucial part of an engagement letter is the description of what you are being engaged to do. You will want to make sure both to define the scope of the matter for which you are being engaged and to identify any specific limitations that have been agreed upon regarding what the client expects you to do.

6. But I thought I was only representing one of the Musketeers. If no other reason provided here is enough to convince you that sending an engagement letter would be helpful, perhaps this one will: an engagement letter will likely serve as your best opportunity to avoid any confusion about exactly who is, as well as who is not, your client. Nothing can ruin your day like receiving a motion to disqualify claiming you have a conflict that prevents you from being adverse to someone you never thought was your client.

5. No, no. I mean a "true" retainer. Assuming you are ever lucky enough to find a client who will pay one, the terms of a "true" retainer agreement can be spelled out nicely in an engagement letter. Likewise, if what the client is really paying you is an advance to be held in trust and applied to pay fees earned in the future, your engagement letter is the perfect place to spell out the terms under which you are holding that money.

4. You Jane. Me not your lawyer. A nonengagement letter (i.e., an "I'm not your lawyer" letter) is a handy device for memorializing the fact that you have not undertaken to represent anyone in a particular matter. Be careful when sending such a letter not to end up having your nonengagement letter accidentally turn its recipient into your client. (Telling someone "A two-year statute of limitations applies to your potential claim" is, after all, the provision of legal advice.)

3. It's not me; it's you. A disengagement letter (i.e., an "I'm no longer your lawyer" letter) is another helpful tool. The act of sending a disengagement letter, while not likely to increase the chances of you getting paid any outstanding accounts receivable, will serve to transform its recipient from a client to a former client and to change your obligations to avoid conflicts of interest with the recipient.

2. Ch-ch-ch-ch-changes. Engagements change over the course of time. New parties get added to lawsuits, new potential lenders show up in deals, and lawyers get asked to take on additional legal responsibilities. When the nature of your engagement changes, send your client an updated engagement letter.

1. Paving the road with good intentions. If you actually say in the letter that the client needs to sign and send it back, you better follow up and get a signed copy back. When a lawyer gets in a dispute with a client about the lawyer's obligations to that client, the only thing worse than not having sent an engagement letter is having an unsigned engagement letter that says the client is supposed to sign it to show agreement with its terms.

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READY RESOURCES

- *The Essential Formbook, Volume I: Partnership and Organizational Agreements/Client Intake and Fee Agreements*. 2003. PC # 5110424V1. Law Practice Management Section.

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Metadata

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- Convert the data to Adobe Acrobat PDF format, which turns your multilayered document into a flat image with some basic metadata. If your recipient has the full version of Acrobat, they will be able to append comments via the extensive commenting features.
- If you have the new Acrobat 8 Professional, there is a built-in, user-friendly metadata removal and redaction tool that will search for and permanently remove selected data.
- Print the document and then scan it to PDF. The recipient will not be able to alter or access the original.
- Both Microsoft and Corel have metadata removal tools that work with their word processing and other programs. (See downloads at Microsoft.com; WordPerfect X3 includes a "save without metadata" function.)
- Third-party products such as Metadata Assistant, iScrub, or Change-Pro Metadata Suite allow you to remove metadata from individual files. Each integrates with Microsoft Outlook, allowing removal of metadata from emails before sending. (See www.payneconsulting.com; www.esqinc.com; and www.litera.com.)
- You can copy all the text and paste it into a new document, but you risk losing formatting. Also, be sure that you have reviewed any tracked changes and accepted or rejected those changes. If you fail to accept or reject the tracked changes, they will be copied into the new document.
- Where you don't have to provide an electronic version, faxing or mailing the document is the best option. However, this "hardcopy" option is disappearing.

Whichever method you choose, you should consider adopting a standard scrubbing procedure.

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READY RESOURCES

- *Ethics & Technology 2006: How Not to Commit Malpractice with Your Computer* (Audio CD Package). 2005. PC # CET05HNCC. Center for CLE and Law Practice Management Section.

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ABA/YLD Scholarship Program

The ABA/YLD Scholarship Program is designed to encourage the participation of minority, solo/small firm, government, private sector, and military service attorneys in the Young Lawyers Division. The program consists of mentoring and partial funding to attend three of the YLD's meetings. The selection will be based on the individual's achievement, commitment to the organized bar and the Young Lawyer Division's mission and goals, and financial need. Deadline for applications and letters of recommendation is June 15, 2007. Information is online at **www.abanet.org/yld/scholarships/home.html**.

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Things Judges Like to See from Young Attorneys

By Jocelyn Gabrynowicz Hill

As a law clerk, I have seen a judge rip a young attorney to shreds. I have also seen young attorneys fare exceedingly well before that same judge. I submit that the difference stems not from severe mood swings on the part of the judge but from the attitude of the attorneys. If you, like me, have nightmares about incurring your judge's ire, here are a few things you can do to ensure smooth sailing at your next court appearance.

When you argue a motion before a court, start from the beginning. Judges have very large caseloads. They do not know you or your case as well as you do. Introduce yourself; tell the judge which party you represent, including whether your client is the plaintiff or defendant. Describe the motion that you will argue. Tell the judge what relief you are requesting and list the pertinent reasons your relief should be granted. By outlining your argument at the outset, you give the judge a road map for your later development of the facts and the law applicable to your case. If you start in the middle, it will be a confusing affair for all involved.

When you question a witness on the stand, make sure you actually question the witness. While this may sound obvious, if you are questioning a witness, make sure you ask clearly formulated questions. Lawyers sometimes fall into the habit of directing statements at a witness rather than asking questions. Interrogation in court is not a conversation. Lawyers who converse with a witness are unable to control that witness and are thus unable to ascertain the truth. When you ask a clear question, it is obvious when a witness dodges the question by offering explanations or qualifications. If you ask the witness a clearly formulated question, a judge can insist that the witness answer the question.

Be a good listener. Listening is very important. If the judge asks you a question, do your best to answer. Even if the question seems to be coming out of left field, the question concerns a matter of importance to the person who is going to decide your case. Read the judge's signals. If things are going in your favor and the judge says, "Anything else?" resist the temptation to air your third and fourth argument on the subject. Unless you have yet to cover a crucial element, quit while you are ahead or you may cause the judge to reconsider.

Be punctual. Show up on time—even if you know your judge is always late. That one time you show up late the judge will surprise you and show up early.

Build a good reputation, not a bad one. If you appear before a judge more than once, the judge will get to know you and your reputation. If you are always punctual, prepared, and candid, you will earn favor with your judge. A good reputation for honesty and fair play will work to the benefit of you and your clients. If you are known to be trustworthy, the judge will give you the benefit of the doubt. Conversely, a bad reputation will work against you. If you act like you know more than the judge, you fervently argue frivolous positions, or you consistently try to hide the ball in discovery, you will earn yourself a bad reputation before the judge. If your judge does not like you, your nightmares could become reality.

Jocelyn Gabrynowicz Hill is currently clerking for the Honorable Mark I. Bernstein in the Philadelphia Court of Common Pleas Commerce Program. She can be reached at Jocelyn.gabrynowicz@courts.phila.gov.

READY RESOURCES

- *Questions from the Bench*. 2005. PC # 5310334. Section of Litigation.
- *McElhaney's Trial Notebook*, Fourth Ed. 2005. PC # 5310348. Section of Litigation.

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