

**SUPREME COURT OF ARIZONA**  
**ATTORNEY ETHICS ADVISORY COMMITTEE**

**Ethics Opinion File No. EO-20-0008**

*The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168.*

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A lawyer who authors and sends an electronic document to someone other than the client on whose behalf the document was drafted, or other privileged persons, is responsible, under ER 1.6, for first scrubbing the document of confidential metadata that may be contained within the electronic file. A lawyer who receives an electronic document or other type of electronic file from another lawyer is not ethically prohibited from retrieving and reviewing any embedded metadata. This opinion approves in part and disapproves in part State Bar of Arizona Opinion 07-03.

A lawyer may not, without the prior informed consent of the recipient, ethically embed in an email to potential, current, or future clients, or other lawyers, hidden email-tracking software, also known as a web beacon, pixel tag, clear GIF or invisible GIF. Use of such a device violates ER 4.4.

**ISSUES PRESENTED**

1. If a lawyer sends an electronic communication, what ethical duty does the lawyer have to prevent the disclosure, through metadata embedded therein, of confidential or privileged information?
2. May a lawyer who receives an electronic communication examine it for the purpose of discovering the contents of the metadata that may be embedded within it?
3. May a lawyer embed hidden software in an email to another lawyer that tracks information about the handling and viewing of the email?

**RELEVANT ETHICS OPINIONS**

State Bar of Arizona, Rules of Professional Conduct committee, Opinion No. 07-03

ABA Formal Op. 06-442

**APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT**

**ER 1.1. Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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## **Comment**

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### **Maintaining Competence**

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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### **ER 1.6. Confidentiality of Information**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

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## **Comment**

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### **Acting Competently to Preserve Confidentiality**

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. ...

### **ER 4.4. Respect for Rights of Others**

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document or electronically stored information and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures

## Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of others. It is impracticable to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from others and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

### ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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## OPINION

### *Metadata*

Electronic documents and other electronic files contain “metadata” – information about the file, such as when and by whom it was created, when it was modified, and even when and how and by whom it was subsequently edited and modified. SBA Opinion 07-03 concludes that a lawyer sending an electronic document to anyone—other than the client, other lawyers and staff within the lawyer’s firm, or other privileged persons—must take reasonable measures to “scrub” the document of such confidential information, except to the extent prohibited by a rule, order, or procedure of a court or other applicable provision of law. The Committee agrees with this conclusion.

The degree of electronic scrubbing that is required will depend on the circumstances. Some information may be so innocuous that a lawyer is, under the circumstances, justified in concluding that its disclosure is impliedly authorized by the client – information such as when and by whom the document was created and modified, when this is already generally known to the receiving lawyer. Other metadata, such as a history of substantive edits and embedded comments made or inserted by the lawyer or the client, must always be removed before the lawyer shares the file with a non-privileged person.

This of course does not in any way limit the professional obligation of the lawyer to provide a “redlined” document to the lawyers for other parties that show changes made to a draft joint document under negotiation (whether a motion, stipulation, contract, etc.) (see Ariz. R. Sup. Ct., Rule 41, *Creed of Professionalism* § B(12)), nor does it limit the obligation to provide files in their native format, with intact metadata, when required by discovery and disclosure rules.

The SBA Opinion, however, goes on to conclude that a lawyer who *receives* an electronic document or other file from that contains metadata may not deliberately access and review that metadata, but rather must treat the metadata as “inadvertently sent” within the meaning of ER 4.4(b)—even when the electronic document itself was not inadvertently sent—unless review is

otherwise allowed by a rule, order, or procedure of a court or other applicable provision of law. With this conclusion the Committee disagrees.

The SBA Opinion's conclusion rests in large part on its assumption that [t]he sender of the document may not be aware of the metadata embedded within the document or that it remains in the electronic document despite the sender's good faith belief that it was "deleted." It may have been reasonable, in 2007 when the SBA Opinion was issued, to view ignorance as a reasonable excuse for failing to scrub an electronic file before sharing it with non-privileged persons. But it no longer is.

"Scrubbing" software is commonly available. It is even included within the programs—Microsoft Word and Adobe Pro—that lawyers most often use to create most of the electronic files they create and share. Understanding how to run these simple processes—or relying on staff that are proficient in running them—is part of a lawyer's duty of competence under ER 1.1. Ariz. R. Sup. Ct., Rule 42, ER 1.1, cmt. ¶ 6 (duty to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"). The burden to ensure that the information is protected is on the sending lawyer. The receiving lawyer, whose first duty is to their client, does not act unethically by reviewing information that is readily removable by the sending lawyer, unless the lawyer knows or reasonably should know that the document itself was inadvertently sent.

This is in line with the majority of more recent opinions from other jurisdictions. [List other ethics opinions, including ABA 06-442.]

### *Web Bugs*

The Committee received an inquiry regarding whether it is ethical for a lawyer to embed a "web bug" in emails to other lawyers. As described in an opinion issued by the Illinois State Bar Association Professional Conduct Advisory Committee, a "web bug"—also called a web beacon, pixel tag, clear GIF or invisible GIF<sup>1</sup>—is a piece of software, hidden with an email message, that "permit[s] the sender of an email message to secretly monitor the receipt and subsequent handling of the message, including any attachments":

The specific technology, operation, and other features of such software appear to vary among vendors. Typically, however, tracking software inserts an invisible image or code into an email message that is automatically activated when the email is opened. Once activated, the software reports to the sender, without the knowledge of the recipient, detailed information regarding the recipient's use of the message. Depending on the vendor, the information reported back to the sender may include: when the email was opened; who opened the email; the type of device used to open the email; how long the email was open; whether and how long any attachments, or individual pages of an attachment, were opened; when

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<sup>1</sup> This opinion does not encompass services such as Constant Contact or MailChimp that track emails but do so prominently displayed links and images that the email recipient can choose not to click.

and how often the email or any attachments, or individual pages of an attachment, were reopened; whether and what attachments were downloaded; whether and when the email or any attachments were forwarded; the email address of any subsequent recipient; and the general geographic location of the device that received the forwarded message or attachment. At the sender's option, tracking software can be used with or without notice to the recipient.

ISBA Professional Conduct Advisory Opinion No. 18-01 (January 2018). It is easy to imagine the various ways in which such information might provide the sending lawyer with significant insights into the receiving lawyer's work project, the lawyer's communications to and from their client, and how the lawyer and client evaluate the information in the email (and any documents attached) and hence the matter within which the email has been generated. Importantly, unlike with metadata-scrubbing software, there do not appear to be any readily available and consistently reliable devices or programs capable of detecting or blocking web bugs. Therefore, if a lawyer chooses to use a web bug, there is no realistic way for the receiving lawyer to protect themselves.

The Illinois ethics opinion, as well opinions issued in Pennsylvania, Alaska, and New York, conclude that the use of such software is ethically prohibited. *See* Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee Formal Opinion No. 2017-300 (2017); Alaska Bar Association Ethics Opinion No. 2016-1 (October 2016); New York State Bar Association Opinion 749 (December 2001). The Committee agrees with the reasoning and conclusions of these opinions. The use of such software constitutes an "unwarranted intrusion[] into ... the client-lawyer relationship," which violates ER 4.4's prohibition on a lawyer's employment of "methods of obtaining evidence that violate the legal rights of such a person." Ariz. R. Sup. Ct., Rule 42, ER 4.4(a) and Comment ¶ 1. It also falls within ER 8.4's prohibition of "conduct involving dishonesty, fraud, deceit or misrepresentation. Ariz. R. Sup. Ct., Rule 42, ER 8.4(c).