

# The Ethical Obligations of an Attorney When Using Technology

A Cell Phone Does Not Create an Invisible Cone of Silence and Other Adventures on the New Frontier

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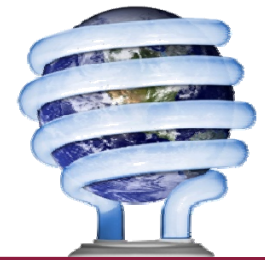
May 2009

# What Is the Relationship Between Legal Ethics and Technology?



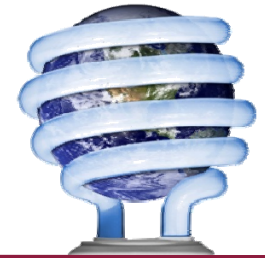
- Have you ever received a misaddressed e-mail?
- Have you ever been sent the wrong attachment?
- Have you ever found “useful” information via metadata? (Have you looked?)
- Have you ever received a Blackberry response to a message that was clearly “off”?
- Have you ever sent a work-related e-mail using your personal e-mail address?
- Have you ever discussed a confidential matter on a cell phone?
- Have you ever agreed to destroy or return all information?

# The Ethical Foundations – American Bar Association Model Rules Of Professional Responsibility



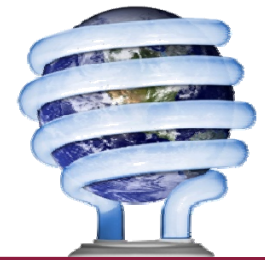
- Rule 1.1 – Competence in legal skills
- Rule 1.3 – Diligence in client representation
- Rule 1.4 – Communications with clients
- Rule 1.6 – Confidentiality of client information
- Rule 1.15 – Safekeeping client property
- Rule 1.18 – Duties to a prospective client
- Rule 4.4(b) – Misdirected communications
- Rules 5.1 & 5.2 – Obligation to supervise

# Legal Issues and Use of Technology



- Telephone communications
- E-mail communications
- Internet sites and privacy
- Remote access
- PDAs and pagers
- Document management and retention
- Applications software
- Third party data storage

# Some “Interesting” Rulings



- It is a crime under the wiretap act to intercept an e-mail in temporary storage on an internet server
- A lawyer who uses technology must do so competently
- Attorneys have an ethical obligation to ensure that e-discovery is complete
- Subject to important conditions, it is permissible to store electronic client data on a third-party server or computer device – Nevada State Bar Formal Opinion No. 33

# Top Technology Glitches That Become Ethical Blunders



1. Hard drive v. hard copy v. e-mail copy v. document management systems
2. E-mails from hell
3. E-mails instead of conversations – the “three strike rule”
4. E-mails and follow-up: spam filters, lost e-mails and other sidetracks to cyber-purgatory
5. Misused forms and documents
6. Spellcheck v. proofing
7. Word glitches – dropped edits, dropped text, wrong version, etc.
8. E-filing issues – litigation and commercial filings
9. Voicemail messages live on
10. Computerized research
11. On-screen editing and review
12. Blackberry errors
13. Wrong attachments – e-mail, e-filing, etc.
14. Blogs
15. E-discovery
16. Identifying “final” documents
17. Changing “final” documents
18. Relying on distributed “track changes” document rather than generating a blackline

# Telephone Communications – The Practical Issues



- Taping of phone calls
  - Disclosure
  - Federal and State law
  - Risk of being taped
- Use of cellular phones
- Handsfree phones
- Voice mail / answering machines
- Unified messaging systems – voicemails that live forever
- Waiver of privilege through public discussions
  - Public places
  - Private places with “outsiders”
  - Private places with ethical walls

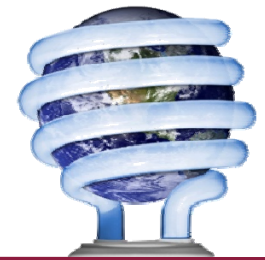
# E-Mail Communications – The Practical Issues



- To encrypt or not to encrypt – see the wiretap case
- Unintended recipients
- Reply to all
- Improper domain names / cybersquatters
- Web-based messaging systems (Yahoo / Hotmail / MSN)
- Permanent record
- E-mail retention policy
- Integration with other systems (e.g. iManage)
- Instant messaging

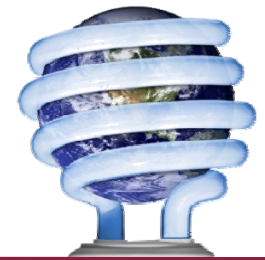


# E-Mail Communications – The Practical Issues (cont'd.)

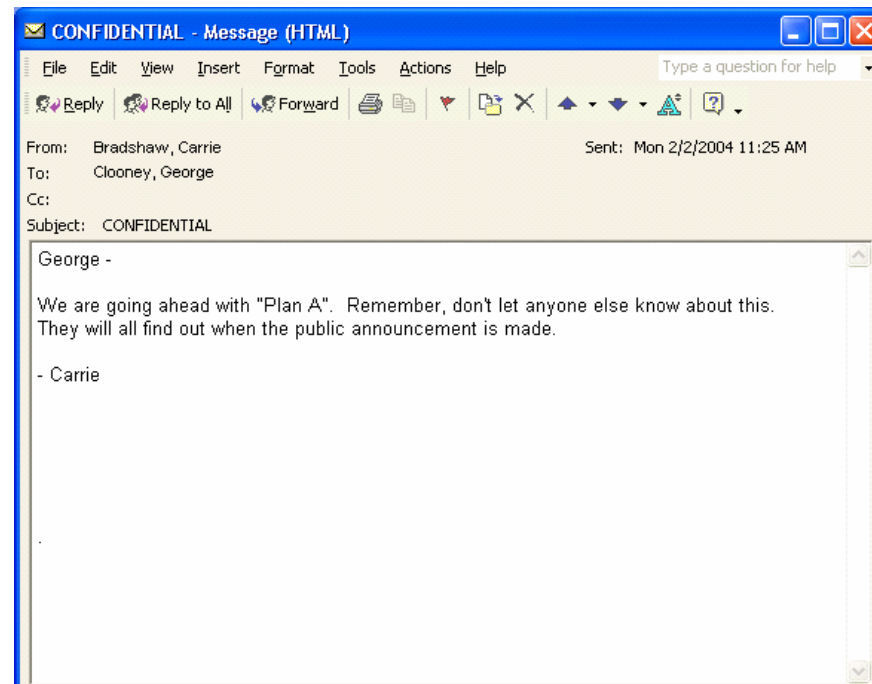


- Receipts for sent messages
- Attachments
- Out-of-office notification
- E-mail filters and spam
- Lost and blocked e-mails
- Inappropriate use of “bcc”
- Work e-mails from personal e-mail
  - The case of Karl Rove
- E-mails cannot replace conversations
- Shrinking cycle for response — the biggest risk issue of all!

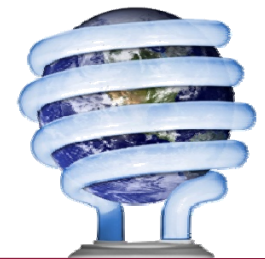
# BCC and Reply All



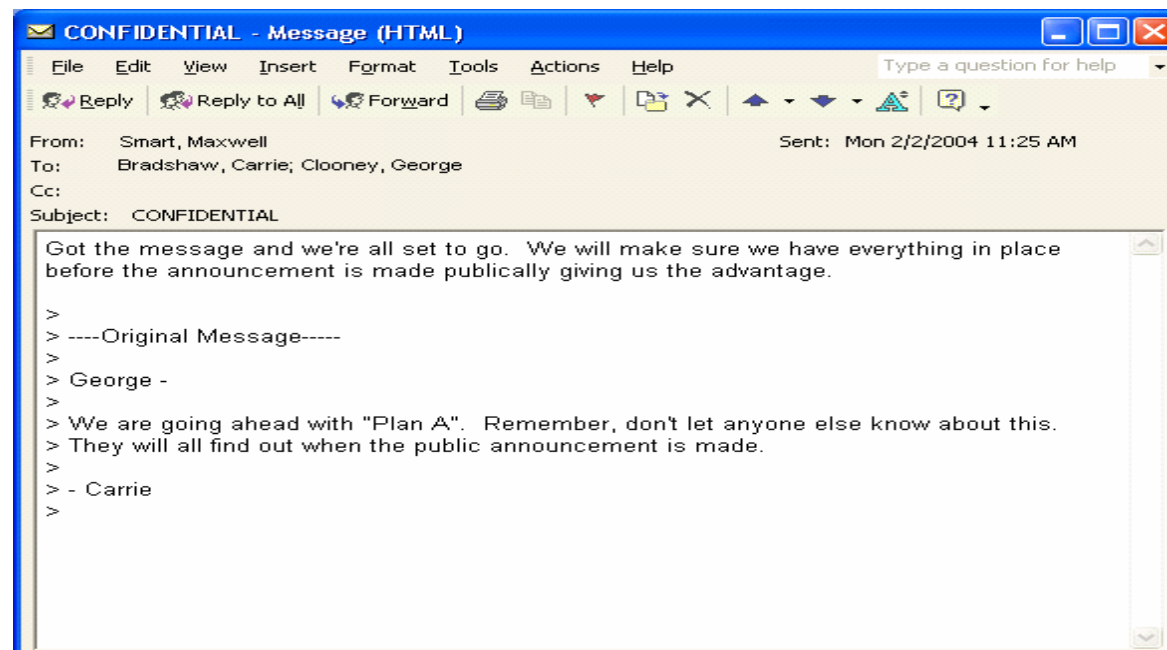
Email sent **TO: George Clooney** **FROM: Carrie Bradshaw**  
George is not aware that there is a **BCC** included in the message



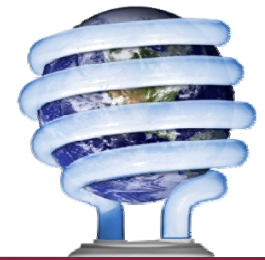
# BCC and Reply All



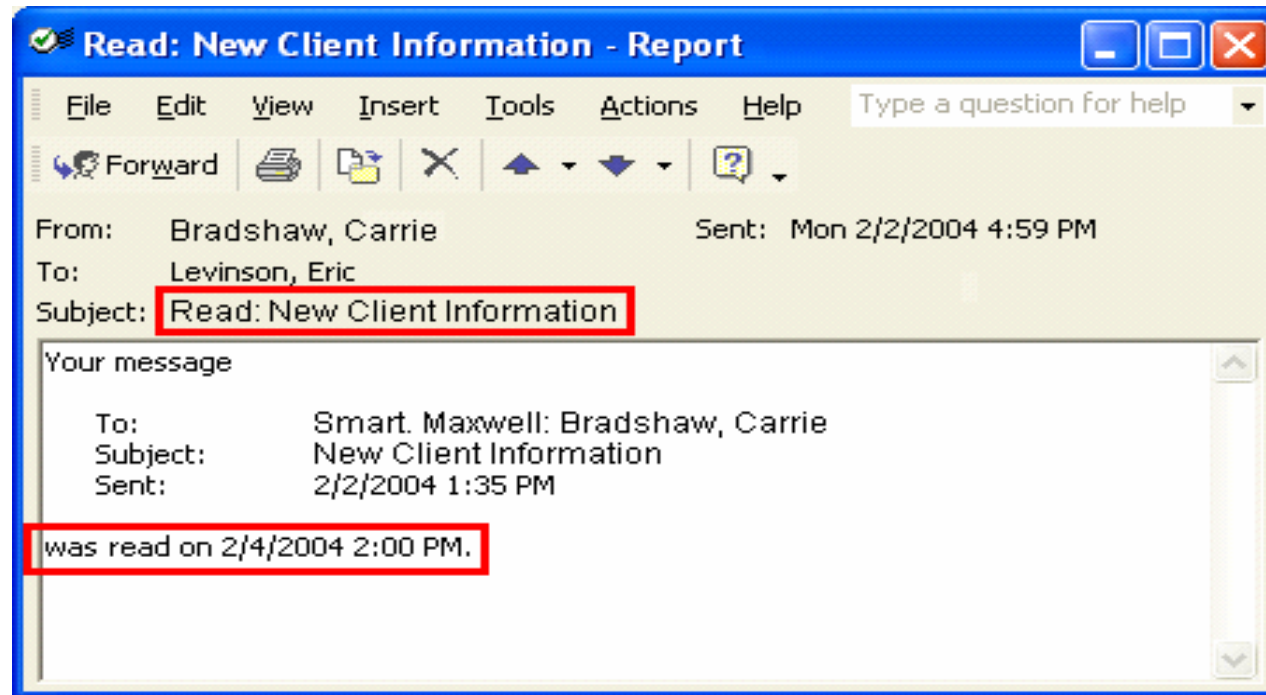
**BCC** recipient “Maxwell Smart” used **REPLY ALL** to respond to original sender.  
BCC recipient has now revealed their name.



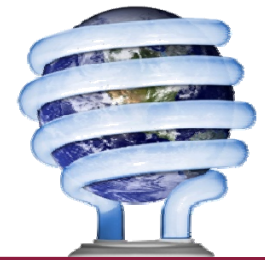
# Return Receipt



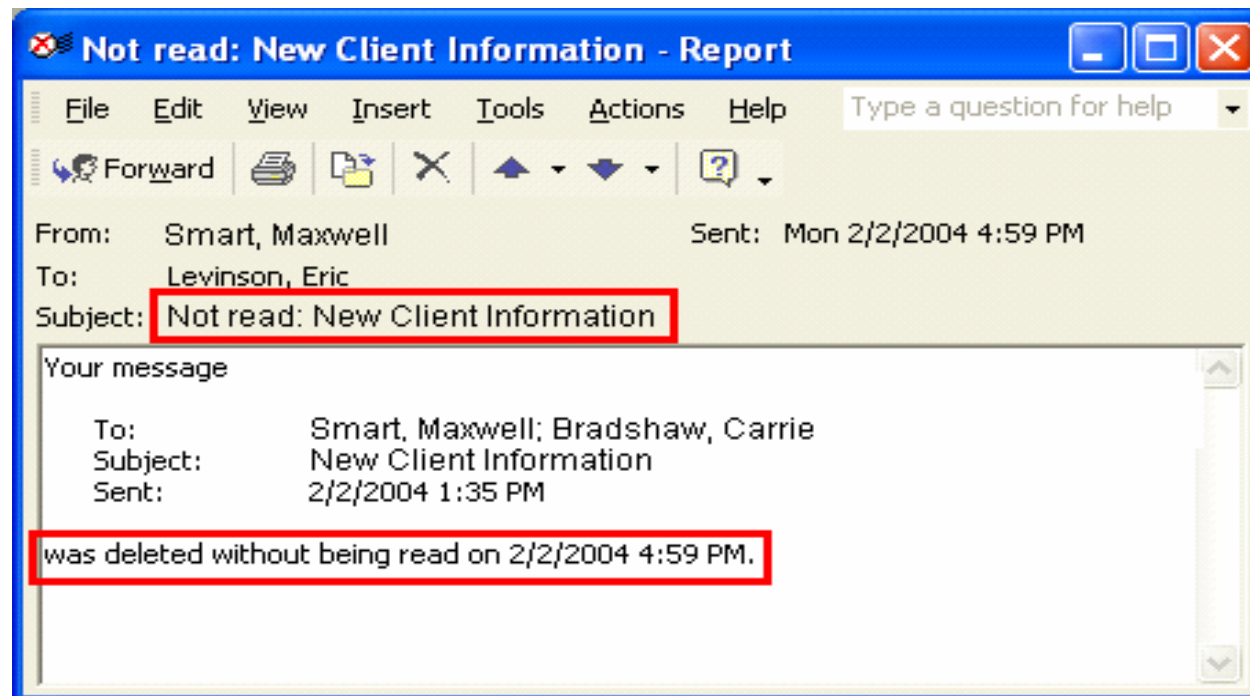
Informs senders when you have read their e-mails



# Return Receipt



Notifies senders when you have deleted their e-mails without reading it (even when you have previewed it)!



# Internet Sites and Ethical Issues – The Practical Issues



- Inadvertent attorney-client relations
  - E-mail communications
  - Bulletin board discussions
- Inadvertent receipt of confidential information
  - Obligation to protect may exist even if attorney-client relationship is not established
- Blogs
  - Issues conflicts

# Remote Access – The Practical Issues



- Personal data on business machines
- Business data on personal machines
  - Protect the firm
  - Protect yourself
- Business centers
  - Leaving the data on the local PC
  - Leaving the print-out in the business center
- Shared computers
  - Home use issues

# PDA's and Pagers – The Practical Issues



- Simple security model
- Risk of permanent data loss
- Emerging problems
  - Reply to all
  - Reading complicated problems one screen at a time
  - Not reading an entire e-mail on the Blackberry
- Lost devices

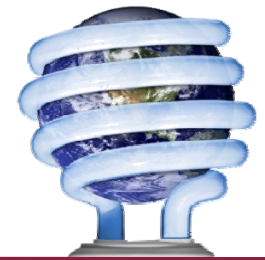


# Document Retention Policies – Technology Twists on an Old Theme



- Industry specific laws and regulations
- Consistent and written policy
- Paper vs. electronic records
- E-mail, voice mail, etc. are documents
- Electronic trail for e-mail, voice mail, instant messaging
- Privacy issues
- Engagement letters and confidentiality agreements and the return/destruction of documents and work product
  - The destruction of all electronic copies of a document cannot be ensured!

# Applications – Disclosure Issues




- Inadvertent disclosure of information
  - Track Changes – is it a tool or a mistake?
- Microsoft word
  - Metadata
  - Word macros and viruses
- Wordperfect – “undo” feature
- Desktop search tools
  - Keeping “deleted” documents
- Microsoft outlook
  - Tracking features for attachments

# Sample: Document Properties



**version test1.doc Properties** [?] [X]

General | Summary | Statistics | Contents | Custom

 version test1.doc

---

Type: Microsoft Word 97-2002 Document  
Location: C:\Documents and Settings\el007487\Local Settings\  
Size: 19.0KB (19,456 bytes)

---

MS-DOS name: VERSIO~2.DOC  
Created: Monday, February 02, 2004 10:53:20 AM  
Modified: Monday, February 02, 2004 12:12:22 PM  
Accessed: Monday, February 02, 2004 11:50:47 AM

---

Attributes:  Read only  Hidden  
 Archive  System

OK Cancel

**version test1.doc Properties** [?] [X]

General | Summary | Statistics | Contents | Custom

Title: BOA version 1

Subject:

Author: david bloom

Manager:

Company: mayer, brown, rowe & maw

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Category:

Keywords:

Comments:

Hyperlink base:

Template: Blank\_Gen.dot

Save preview picture

OK Cancel

# Sample: Multiple Versions Within Single Document



**version test1.doc Properties**

General | Summary | **Statistics** | Contents | Custom

Created: Monday, February 02, 2004 10:57:00 AM  
Modified: Monday, February 02, 2004 12:12:22 PM  
Accessed: Monday, February 02, 2004 11:50:47 AM  
Printed:

Last saved by: iadt user  
Revision number: 6  
Total editing time: 2 Minutes

Statistics:

Statistic name	Value
Pages:	1
Paragraphs:	6
Lines:	6
Words:	21
Characters:	93
Characters (with spaces):	108

OK Cancel

**Versions in version test.doc**

New versions

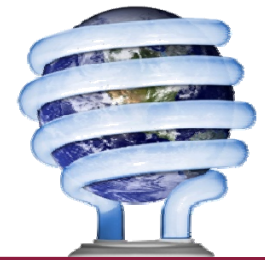
Save Now...  Automatically save a version on close

Existing versions

Date and time	Saved by	Comments
2/2/2004 12:12 PM	iadt user	another version's version
2/2/2004 12:11 PM	iadt user	Automatic version
2/2/2004 12:11 PM	iadt user	this is another version

Open Delete View Comments... Close

# Using “Recover Text from Any File” File Open Option



STATEMENT OF  
FORMER SPEAKER OF THE HOUSE NEWT GINGRICH  
BEFORE THE  
SUBCOMMITTEE ON RULES HOUSE SELECT COMMITTEE ON HOMELAND SECURITY  
TUESDAY, SEPTEMBER 9, 2003

Mr. Chairman and members of the Subcommittee:

I appreciate the opportunity to testify today on the gravest threat to our survival since the height of the Cold War. This challenge has already required the most significant transformation of our government since the National Security Act following World War II when President Truman established the modern unified military

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for the website...thanks!  
Susan.Sheybani@mail.house.gov  
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Microsoft Word 10.0  
Eric Levinson  
\$Testimony for the Rules Subcommittee on Homeland Security

# Track Changes



## Default View: Final (View Changes Off)

THE WANNABE COMPANIES

CREDIT AGREEMENT  
dated as of January 7, 2004

\$110,000,000

CANADIAN IMPERIAL BANK OF COMMERCE

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### CLOSING MEMORANDUM

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1. Summary of Closing

On January 5, 2004, a ~~preclosing~~ was held at 2:00 P.M., Chicago time, in the offices of Trent, Wise and Cooper, Chicago, Illinois

The closing was held on January 7, 2004 at 10:00 A.M., Chicago time, at the above-mentioned offices of Trent, Wise and Cooper. Unless otherwise indicated herein, all actions taken on the date of the initial Credit Event, and all papers delivered on the date of the initial Credit Event, were considered to have been taken or delivered simultaneously and no action taken or delivery made was considered to have been taken or made until all actions incident thereto had been completed. The following parties were present or delivered one or more documents at the closing:

2. Party  
Designation Herein

# Track Changes



## Enable "Show Changes" View

(

~~THE COMPETITOR COMPANY~~

CREDIT AGREEMENT  
dated as of **Eric Levinson, 1/7/2004 6:56 PM:**  
Inserted  
\$110,000,000

CANADIAN IMPERIAL BANK OF COMMERCE

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2. Party Designation Herein

**Comment:** January 1, 1987  
CLOSING CIBC MEMO RE  
WANNABE COMPANY

**Comment:** [WORDPERFECT]  
ATTENTION: Please note that this document was converted from WordPerfect. Information regarding the headers and footers as well as any text or graphics boxes found in the original WordPerfect file can be found at the end of this document. Contact the Help Desk should you have any further questions. \*Upon completion of your review, please delete this comment. Thank you.\*

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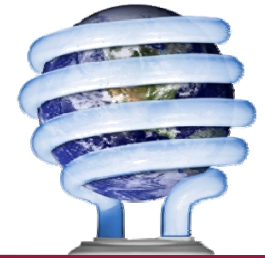
# Metadata in the News



- California AG forwards anti-P2P letter drafted or reviewed by MPAA
- Bush Iraq war speech traced to NSC staff special advisor
- Blair Iraq dossier attributed to U.S. researcher
- Pentagon discloses military secrets
- “How do we get Bloom off this point”

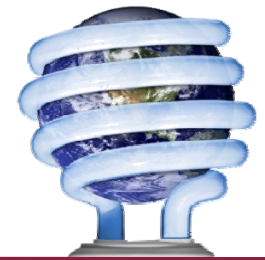


# Metadata Before the Bar



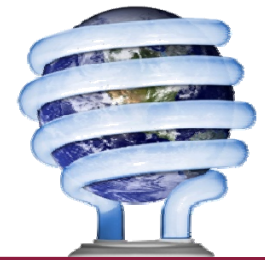
- ABA Ethics Opinion 06-442 – A lawyer may review and use embedded information contained in e-mail and other electronic documents. Must a lawyer remove such data to act ethically?
- Florida Bar Opinion 06-2 – A lawyer must take care to ensure confidentiality by removing metadata. A lawyer who inadvertently receives metadata should notify the sender.
- Maryland Bar Opinion – Lawyers must take reasonable steps not to disclose information. Lawyers are under no obligation to notify the sending party.

# Metadata Before the Bar



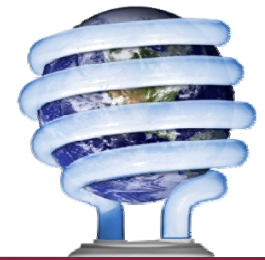
- New York State Ethics Opinion No. 749 – A lawyer may not make “use of computer software applications to surreptitiously ‘get behind’ visible documents or trace e-mail.” A lawyer may not examine such materials; should notify the sender; and should abide by the sender’s instructions.
- Maryland State Bar, Op. 2007-09 – A lawyer has an ethical obligation to avoid disclosure of confidential information embedded in electronic materials.

# Metadata Before the Bar



- New York State Ethics Op. 782 – Attorneys must use due care to avoid disclosure of secrets hidden in “metadata”.
- Penn. Bar Ass’n Final Opinion 2007-500 – A lawyer must exercise sensitive and moral judgment to decide whether to utilize the metadata based upon the lawyer’s judgment and the particular factual situation.

# Metadata Before the Bar



- Colorado Bar Ass'n. Opinion No. 109 – A lawyer who sends electronic documents must use reasonable care to guard against disclosure of metadata. A receiving lawyer may search for and review metadata. However, the receiving lawyer must assume that confidential information was transmitted inadvertently and act accordingly.

# Four Metadata Questions



- 1. Can the lawyer search for or view the metadata?
- 2. Can the lawyer use information learned from the metadata?
- 3. Must the lawyer notify the sender?
- 4. Must the lawyer return the document?

# Redacting Documents



- Physical v. electronic redaction
- Masking v. deleting information
- Unmasking electronically shielded material

# Practicing Safe Computing In Your Personal Life – Avoiding CTD (Cybernet Transmitted Disasters)



- Use strong passwords for your personal e-mail accounts and financial accounts
  - E-tailers will send you new passwords for your accounts
  - Many e-tail accounts store your credit card information
  - E-delivery of financial statements
  - Free and commercial programs to help with this

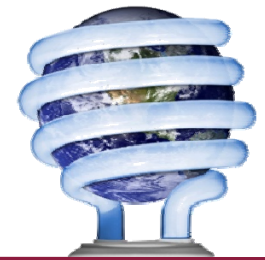
# Practicing Safe Computing In Your Personal Life – Avoiding CTD (Cybernet Transmitted Disasters)



- Always use protection
  - Updated antivirus and spyware software
  - Firewalls
  - Change default passwords on routers, etc.
  - Update your programs and applications
- Always avoid public exposure
  - Password protection for wi-fi
  - Don't use cybercafés for financial transactions
  - Erase, erase, erase – cookies, history, document copies

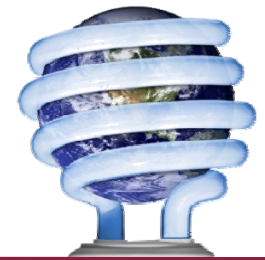


# Practicing Safe Computing In Your Personal Life – Avoiding CTD (Cybernet Transmitted Disasters)



- Always know your partners
  - File-sharing — illegality and risk
  - Community sites
  - Downloading from an Internet search
  - E-mail or web offers
- Always watch your back(up)
  - Computers die and data corrupts
  - Back up your data, on-line or via media

# Practicing Safe Computing In Your Personal Life — Avoiding CTD (Cybernet Transmitted Disasters)



- Zen technology riddle — If you back-up your data and spill a cup of coffee on both your computer and your back-up media, what is the sound of one hand clapping?