IN THE SUPREME COURT OF THE STATE OF MONTANA



No. AF 09-0688



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| IN RE THE RULES OF PROFESSIONAL CONDUCT PROPOSED ETHICS COMMITTEE RULE 4.4(c) | ) ) ) ) | State Bar of Montana Technology Committee COMMENT |

## I. Introduction

The Technology Committee has discussed at great length in a series of meetings, as well as participation in calls with the Ethics Committee and Board of Trustees, the Montana Supreme Court's directive to confer as to the Ethics Committee's proposed addition of a subsection (c) to the Rule of Professional Conduct 4.4.

Prior to the meeting of the Technology Committee, the Ethics Committee met and unanimously voted to "stand firm" and not agree to any changes with regard to their proposed rule change. The Ethics Committee's determination to not consider any changes to their proposal left the Technology Committee with no one with whom to confer.

## II. The Technology Committee Unanimously Agrees The Ethics Committee's Proposed Rule 4.4(c) Should Not Be Adopted As A Montana Rule Of Professional Conduct

The Technology Committee's objections include, but are not limited to:

a. The proposed rule contains undefined terms which create difficulties, if not impossibilities, in both prosecuting and defending any claim of improper conduct.

b. The proposed rule stems from a fear of technology and a fundamental misunderstanding of what is and is not possible. Further, it is based on concepts dealing with specific scenarios which are limited to a finite set of circumstances and uses of some current technologies and, thus, is constrained to current situations as opposed to being flexible enough to address future changes in technology.

c. The proposed rule creates an unneeded distinction between documents existing in an electronic format as opposed to a document in a physical/hardcopy format.

d. On a deeper philosophical level, attorneys who use computers need to understand the implications of that use. Attorneys need to know, understand, and control the electronic communications they choose to utilize. The Montana Supreme Court should not adopt special rules, like the proposed Rule 4.4(c), which act to relieve an attorney from what should be an obligation to know the tools they are using. Instead the rules, as a whole, should encourage attorneys to maintain some minimum competency as to the software and hardware they operate.

e. The proposed rule and any sanction imposed as a result of this rule does not prevent or correct the harm which will occur to the clients/public based on the sending attorney's disclosure. The only means to prevent harm is to focus the responsibility on the sending attorney to competently understand the technology being used. Absent requiring such a level of competence on the part of a sending attorney, the confidence of a client, and the public as a whole, as to the protection of client confidentiality will be dangerously eroded.

f. The proposed rule only applies between attorneys. The rule does not apply to self-represented, non-lawyer litigants.

g. There exists a level of unfounded overconfidence to believe one can regulate/control the use of technology and that one can create regulations which keep ahead of changes in technology. The focus of any such rule cannot be on a specific act because that act is transitory and will change or become outmoded.

h. The ABA and its Commission 20/20 did not deem an addition to the current Rule 4.4 necessary despite the Commission's focus on the changes in the practice of law based on technology. Likewise, states such as Oregon and Washington have not deemed a change in Rule 4.4 necessary, but rather have chosen to address the same issues which concern our Ethics Committee by drafting ethics opinions which utilize existing rules.

## III. In The Event The Court Determines An Alternative To The Current Rule 4.4 Is Required, The Technology Committee Submits Two Alternate Proposals

While it is the opinion of the Technology Committee there should be no change to the current Rule 4.4, if the Montana Supreme Court deems a change appropriate, the change should be more specific. The expressed underlying fear and reason for the proposed addition to Rule 4.4 is a concern related to the aggressive use of new and potentially expensive invasive software not in common use and only available to those with superior knowledge and/or financial means whereby one party has an unfair advantage.

### A. Proposed Alternative Language

While other states have addressed these concerns through the application of current rules (see ethics opinions of Oregon and Washington Ethics Committees), if the Montana Supreme Court determines it needs to add language to Rule 4.4, the Technology Committee recommends the following language:

> (c) A lawyer, who receives a writing*, document or electronically stored information that the lawyer knows or reasonably should know was inadvertently disclosed, shall not examine or use the information and shall abide by the sender's instructions as to the disposition of the document or communication.
>
> (d) A lawyer shall not use software designed to recover or reconstitute, in part or whole, electronically stored information that was eliminated or fragmented as a result of the sender's efforts to protect privileged or confidential information. This rule excludes writings* produced in discovery and information that is the subject of criminal investigation.
>
> *Writing is a defined term Rule 1.0 Terminology (p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications.

### B. The Ethics Committee's Concerns Are More Appropriately Addressed By Adoption Of An Ethics Opinion

It is the opinion of the Technology Committee that the concerns of the Ethics Committee are better addressed in an opinion similar to those opinions issued by the Ethics Committees of the states of Oregon and Washington as opposed to

attempting to address concerns by the creation of changes to the language of existing rules. Those opinions are attached to this Comment.

## IV. Conclusion

The Technology Committee firmly believes the original language proposed by the Ethics Committee as an addition to Rule 4.4 should be rejected. However, if the Court believes the matters raised regarding the current Rule 4.4 merit attention, it should contemplate adoption of the language proposed by the Technology Committee, or direct the Ethics Committee to draft an Ethics Opinion similar in outcome to those written by the Washington and Oregon State Bar Ethics Committees.

Respectfully submitted this 23rd day of November, 2016

STATE BAR OF MONTANA

By: _____
Joseph Sullivan
Technology Committee Chair
On behalf of the members of the Technology Committee:

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# Oregon State Bar

## Legal Ethics Committee

## Formal Opinion No. 2011-187

Approved by Board of Governors, April 2015

# FORMAL OPINION NO 2011-187

[REVISED 2015]

## Competency: Disclosure of Metadata

**Facts:**

Lawyer *A* e-mails to Lawyer *B* a draft of an Agreement they are negotiating on behalf of their respective clients. Lawyer *B* is able to use a standard word processing feature to reveal the changes made to an earlier draft ("metadata"). The changes reveal that Lawyer *A* had made multiple revisions to the draft, and then subsequently deleted some of them.

Same facts as above except that shortly after opening the document and displaying the changes, Lawyer *B* receives an urgent request from Lawyer *A* asking that the document be deleted without reading it because Lawyer *A* had mistakenly not removed the metadata.

Same facts as the first scenario except that Lawyer *B* has software designed to thwart the metadata removal tools of common word processing software and wishes to use it to see if there is any helpful metadata in the Agreement.

**Questions:**

1. Does Lawyer *A* have a duty to remove or protect metadata when transmitting documents electronically?

2. May Lawyer *B* use the metadata information that is readily accessible with standard word processing software?

3. Must Lawyer *B* inform Lawyer *A* that the document contains readily accessible metadata?

4. Must Lawyer *B* acquiesce to Lawyer *A*'s request to delete the document without reading it?

5. May Lawyer *B* use special software to reveal the metadata in the document?

## Conclusions:

1. See discussion.
2. Yes, qualified.
3. No.
4. No, qualified.
5. No.

## Discussion:

Metadata generally means "data about data." As used here, metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.[1]

*Lawyer's Duty in Transmitting Metadata.*

Oregon RPC 1.1 requires a lawyer to provide competent representation to a client, which includes possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Oregon RPC 1.6(a) requires a lawyer to "not reveal information relating to the representation of a client" except when the client has expressly or impliedly authorized the disclosure.[2] Information relating to the representation of a client may include metadata in a document. Taken together, the two rules indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and

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[1] Joshua J. Poje, *Metadata Ethics Opinions Around the U.S.*, American Bar Association (May 3, 2010), *available at* <www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html>.

[2] There are several exceptions to the duty of confidentiality in Oregon RPC 1.6, none of which are relevant here.

the risks of revealing metadata or to obtain and utilize adequate technology support.[3]

Oregon RPC 1.6(c) requires that a lawyer must use reasonable care to avoid the disclosure of confidential client information, particularly when the information could be detrimental to a client.[4] With respect to metadata in documents, reasonable care includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent.[5] What constitutes reasonable care will change as technology evolves.

The duty to use reasonable care so as not to reveal confidential information through metadata may be best illustrated by way of analogy to paper documents. For instance, a lawyer may send a draft of a document to opposing counsel through regular mail and inadvertently include a sheet of notes torn from a yellow legal pad identifying the revisions to the document. Another lawyer may print out a draft of the document marked up with the same changes as described on the yellow notepad instead of a "clean" copy and mail it to opposing counsel. In both situations, the lawyer has a duty to exercise reasonable care not to include

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[3] The duty of competence with regard to metadata also requires a lawyer to understand the implications of metadata in regard to documentary evidence. A discussion of whether removal of metadata constitutes illegal tampering is beyond the scope of this opinion, but Oregon RPC 3.4(a) prohibits a lawyer from assisting a client to "alter, destroy or conceal a document or other material having potential evidentiary value."

[4] Jurisdictions that have addressed this issue are unanimous in holding lawyers to a duty of "reasonable care." *See, e.g.*, Arizona Ethics Op No 07-03. By contrast, ABA Formal Ethics Op No 06-442 does not address whether the sending lawyer has any duty, but suggests various methods for eliminating metadata before sending a document. But see ABA Model RPC 1.6 cmt [19], which provides that "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

[5] Such steps may include utilizing available methods of transforming the document into a nonmalleable form, such as converting it to a PDF or "scrubbing" the metadata from the document prior to electronic transmittal.

notes about the revisions (the metadata) if it could prejudice the lawyer's client in the matter.

*Lawyer's Use of Received Metadata.*

If a lawyer who receives a document knows or should have known it was inadvertently sent, the lawyer must notify the sender promptly. Oregon RPC 4.4(b). Using the examples above, in the first instance the receiving lawyer may reasonably conclude that the yellow pad notes were inadvertently sent, as it is not common practice to include such notes with document drafts. In the second instance, however, it is not so clear that the "redline" draft was inadvertently sent, as it is not uncommon for lawyers to share marked-up drafts. Given the sending lawyer's duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in.[6] In that situation, there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata.

If, however, the receiving lawyer knows or reasonably should know that metadata was inadvertently included in the document, Oregon RPC 4.4(b) requires only notice to the sender; it does not require the receiving lawyer to return the document unread or to comply with a request by the sender to return the document.[7] OSB Formal Ethics Op No 2005-150 (rev 2015). Comment [3] to ABA Model RPC 4.4(b) notes that a lawyer may voluntarily choose to return a document unread and that such a decision is a matter of professional judgment reserved to the

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[6] *See Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992) (in the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer's authority from the client and with the client's consent).

[7] Comment [2] to ABA Model RPC 4.4(b) explains that the rule "requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." It further notes that "[w]hether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived."

lawyer. At the same time, the Comment directs the lawyer to ABA Model RPC 1.2 and ABA Model RPC 1.4. ABA Model RPC 1.2(a) is identical to Oregon RPC 1.2(a) and requires the lawyer to "abide by a client's decisions concerning the objectives of the representation" and to "consult with the client as to the means by which they are to be pursued."[8] Oregon RPC 1.2(a), like its counterpart Model Rule, requires a lawyer to "consult with the client as to the means by which they are to be pursued." Thus, before deciding what to do with an inadvertently sent document, the receiving lawyer should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Regardless of the reasonable efforts undertaken by the sending lawyer to remove or screen metadata from the receiving lawyer, it may be possible for the receiving lawyer to thwart the sender's efforts through software designed for that purpose. It is not clear whether uncovering metadata in that manner would trigger an obligation under Oregon RPC 4.4(b) to notify the sender that metadata had been inadvertently sent. Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Oregon RPC 8.4(a)(3).

**Approved by Board of Governors, April 2015.**

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[8] Although not required by the Oregon Rules of Professional Conduct, parties could agree, at the beginning of a transaction, not to review metadata as a condition of conducting negotiations.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 (confidentiality), § 6.3-2 (waiver by production), § 8.6-6 (inadvertently sent documents), § 16.4-5(b) (disclosure of metadata), § 7.2-1 to § 7.2-2 (competence) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 16, 59–60 (2000) (supplemented periodically).

# Washington State Bar Association

## Ethics Committee

## Advisory Opinion: 2216

WSBA

**Advisory Opinion:** 2216
**Year Issued:** 2012
**RPC(s):** RPC 1.4(a)(2), 1.6(a), 3.4(a), 4.4(a), 4.4(b), 8.4(d), RCW 5.50.060(2)(a)
**Subject:** Metadata

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This opinion addresses certain ethical obligations related to the transmission and receipt, in the course of a legal representation, of electronic documents containing "metadata." Metadata is the "data about data" that is commonly embedded in electronic documents and may include the date on which a document was created, its author(s), date(s) of revision, any review comments inserted into the document, and any redlined changes made in the document [note 1]. Specifically, this opinion addresses: 1) an attorney's ethical obligation to protect metadata when disclosing documents; 2) an attorney's ethical obligation when receiving another party's documents in which metadata is readily accessible and has therefore been disclosed; and, 3) the ethical propriety of an attorney using special forensic software to recover – from another party's documents – metadata that is not otherwise readily accessible through standard word processing software.

Illustrative Facts:

1. Lawyer A is preparing a written agreement to settle a lawsuit. The electronic document containing the agreement is circulated amongst attorneys in Lawyer A's law firm for review and comment. In reviewing the agreement, the firm attorneys insert comments into the document about the terms of the agreement, as well as the factual and legal strengths and weaknesses of the client's position. A preliminary draft of the agreement is finalized internally, and Lawyer A sends the agreement electronically, for review and approval, to Lawyer B, who represents the opposing party. Lawyer A does not "scrub" the metadata from the document containing the agreement before sending it to Lawyer B. Using standard word processing features, Lawyer B is therefore able to view the changes that were made to, and comments that were inserted into, the document by attorneys at Lawyer A's firm (i.e., Lawyer B can readily access the metadata contained in the document).

2. Same facts as #1, except that shortly after opening the document and discovering the readily accessible metadata, Lawyer B receives an urgent email from Lawyer A stating that the metadata had been inadvertently disclosed and asking Lawyer B to immediately delete the document without reading it.

3. Same facts as #1, except that Lawyer A makes reasonable efforts to "scrub" the document and thereby eliminates any readily accessible metadata before sending the document to Lawyer B. Lawyer B possesses special forensic software designed to circumvent metadata removal tools and recover metadata Lawyer A believes has been "scrubbed" from the document. Lawyer B wants to use this software on Lawyer A's document to determine if it contains any metadata that may be useful in representing his own client.

Analysis:

1. Lawyer A's ethical obligations: Lawyer A has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically to Lawyer B. Rule of Professional Conduct ("RPC") 1.6 (a) requires Lawyer A to "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 [explicitly] permitted by paragraph (b)" of RPC 1.6 (emphasis added). This rule of confidentiality applies to "all information relating to the representation, whatever its source" and extends to disclosures that, although they may not "themselves reveal protected information ...[,] could reasonably lead to the discovery of [confidential] information by a third person." Comments 3 & 4 to RPC 1.6. Metadata embedded in electronic documents that reflects attorney-client communications, attorney work product and/or other confidential information related to a representation falls squarely within the protections of RPC 1.6 [note 2]. As such, a lawyer must "act competently" to safeguard such metadata "against inadvertent or unauthorized disclosure[.]" [note 3]. Comment 16 to RPC 1.6. Lawyer A, therefore, must make reasonable efforts to ensure that electronic metadata reflecting protected information is not disclosed in conjunction with the exchange of documents related to a representation – i.e., that it is not readily accessible to the receiving party. Lawyer A can do this by disclosing documents in formats that do not include metadata – e.g., in hard copy, via fax, or in Portable Document Format ("PDF") created by mechanically scanning hard copies – or by "scrubbing" the metadata from electronic documents using software

utilities designed for that purpose [note 4]. Note, however, that in the context of discovery production, where certain metadata may have evidentiary value, RPC 3.4(a) specifically prohibits a lawyer from "alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value[,]" or assisting another person in doing so [note 5].

Lawyer B's ethical obligations: Upon discovery, Lawyer B has an ethical duty to "promptly notify" Lawyer A that the disclosed document contains readily accessible metadata. RPC 4.4(b) requires a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent ... [to] promptly notify the sender." For the purposes of the rule, "'document' includes e-mail or other electronic modes of transmission subject to being read or put in readable form." Comment 2 to RPC 4.4. As metadata is embedded electronic documents – i.e., "electronic modes of transmission" – it falls within the protections RPC 4.4(b). Here, where the metadata disclosed by Lawyer A includes attorney work product otherwise protected in litigation, Lawyer B knows or reasonably should know the metadata was inadvertently disclosed. As such, Lawyer B's duty to notify Lawyer A is triggered here.

2. Lawyer B's ethical obligations: Under the ethical rules, Lawyer B is not required to refrain from reading the document, nor is Lawyer B required to return the document to Lawyer A. See Comments 2 & 3 to RPC 4.4. Lawyer B may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect the document [note 6]. See id. If Lawyer B is not under such a separate legal duty, the "decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer[,]" in consultation with the client. Comment 3 to RPC 4.4; see also RPC 1.4(a)(2) (requiring an attorney to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

3. Lawyer B's ethical obligations: The ethical rules do not expressly prohibit Lawyer B from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been "scrubbed" from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against "us[ing] methods of obtaining evidence that violate the legal rights of [third persons]" and would constitute "conduct that is prejudicial to the administration of justice" in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. See RCW 5.60.060(2)(a), Dietz v. Doe, 131 Wn.2d 835, 842 (1997), and Comments 2 & 3 to RPC 1.6. As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Endnotes

1. See Joshua J. Poje, Metadata Ethics Opinions Around the U.S., American Bar Association, available at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html, last visited February 20, 2012. Note that Mr. Poje's chart does not reflect the opinion recently issued by the Oregon State Bar Association, Formal Opinion No. 2011-187 ("Competency: Disclosure of Metadata").

2. If the metadata reflects confidential information pertaining to a former client – as may occur when attorneys reuse template documents over time – it is protected by RPC 1.9(c)(2).

3. RPC 1.1, moreover, requires Lawyer A to provide competent representation to a client, which includes possessing "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The duty to competently represent a client includes the duty to possess, obtain or recruit sufficient skill to ensure that confidential information reflected in metadata is not inadvertently disclosed.

4. For a discussion of mechanical alternatives for protecting metadata in the disclosure process, see David Hricik and Chase Edward Scott, Metadata: The Ghosts Haunting e-Documents, Georgia Bar Journal, February 2008, available at: http://gabar.org/public/pdf/gbj/feb08.pdf, last visited February 22, 2012, and Jembaa Cole, When Invisible Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata, 1 Shidler J. L. Com. & Tech. 8 (Feb. 2, 2005), available at: http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/360/vol1_no2_art8.pdf?sequence=1, last visited February 20, 2012. As technology evolves, of course, what constitutes "competent" representation in this context necessarily evolves.

5. See also O'Neill v. City of Shoreline, 170 Wn.2d 138 (2010) (holding metadata is subject to disclosure pursuant to the Public Records Act).

6. See e.g., Fed. R. Civ. P. 26(b)(5)(B) and Washington State Superior Court Civil Rule ("CR")

26(b)(6) (governing claims of privilege or protection for information produced in discovery), Fed. R. Civ. P. 45(d)(2)(B) and CR 45(d)(2)(B) (governing claims of privilege or protection for information produced pursuant to subpoena), and Fed. R. Evid. 502(b) and Washington State Rule of Evidence 502(e) (governing claims of privilege or protection and waiver of same). Where the parties have entered into an agreement, such as a protective order, that addresses inadvertent disclosures, that agreement may also place additional obligations on the attorney in these circumstances.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.