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Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

Comment

NOV 23 2016

TO: Chief Justice Michael McGrath, Montana Supreme Court
FROM: Sam Alpert, Concerned Non-Lawyer
DATE: October 21, 2016
RE: Comment on Proposed Rule 4.4(c), Mont. R. Prof. Cond.
        Case No.: AF 09-0688

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

I would like to begin by disclaiming that while I currently serve as the IT Program Manager at the State Bar of Montana. However, this comment is submitted in my personal capacity, and not as an employee of the State Bar. My comments and opinions are my own.

The proposed 4.4(c) is a solution in search of a problem. I had the privilege of being able to attend the Court's September 20, 2016 public meeting on the proposed rule changes. As such, I was able to hear the Ethics Committee's argument in favor this rule. The purpose of this letter is to point out is that the argument made by the representatives of the Ethics Committee is flawed. The Ethics Committee failed to consider the sending attorney's ethical responsibilities with regard to maintaining the confidences of their client when they declared that a rule must be made to prevent an attorney in receipt of a document from using software to reveal confidential or privileged information. I fear the broad language of the proposed Rule would end up protecting negligent attorneys who failed to take reasonable precautions in protecting sensitive or confidential information. Opening a file where the sending attorney failed to remove confidential information should not be viewed as opening the attorney's briefcase. It should be viewed as the sending attorney handing the receiving attorney a letter containing their case strategy.

For years now, the ABA and other legal industry organizations have been warning attorneys about the potential threats to confidentiality posed by metadata, a term that has largely become associated with software features that allow for document markup but is far broader in scope. The message has been fairly straightforward: removing harmful metadata is not a sophisticated task. In

fact, according to the newly adopted 1.6(c), it a matter of professional competence.

There are many tools available to attorneys that allow for the removal of harmful metadata. In addition to third party programs specifically designed to remove metadata, programs commonly used by attorneys such as Microsoft Word[1], WordPerfect[2], Adobe Pro[3], Nuance PowerPDF[4] contain features that allow a user to discover and remove harmful metadata (i.e. scrub or sanitize the document) with the click of a button. Once properly scrubbed, the electronic document should be free of all but the most basic metadata (i.e. the date and time the electronic file was last handled). If an attorney is uncomfortable with learning how to use these features, removing metadata is as simple as printing, scanning, then sending the scanned copy of a document in order to ensure no harmful information is conveyed. Or, even more rudimentary, printing the document, sticking it in an envelope, and mailing it.

Attorneys who are not taking the time to discover and remove harmful metadata are being negligent with their clients' information. Attorneys who do not know or are not attempting to learn about the risks of using the tools of their trade are flirting with incompetence. Why would the court want to flip the burden of client confidentiality on to the receiving attorney when, if the document were a paper one, the receiving attorney's only obligation under the current Rules of Professional Conduct would be to notify the sender. Why does Montana need a different standard for electronic documents?

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[1] Microsoft. *Remove hidden data and personal information by inspecting documents*. Retrieved from Microsoft Support: https://support.office.com/en-us/article/Remove-hidden-data-and-personal-information-by-inspecting-documents-356b7b5d-77af-44fe-a07f-9aa4d085966f

[2] Corel. *Saving WordPerfect Files Without Metadata*. Retrieved from WordPerfect: http://www.wordperfect.com/en/pages/items/1500674.html

[3] Adobe. *Removing sensitive content from PDFs*. Retrieved from Adobe Support: https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html#removing_sensitive_content_from_pdfs

[4] Nuance. *Remove Document Elements*. Retrieved from Nuance: http://www.nuance.com/products/help/NuancePDF/en_US/Inspect_Document.htm

I urge the Court to review the rules it approved in the Order for which comments were sought on Rule 4.4(c) and ponder whether this rule raises the standards of practice for Montana attorneys and achieves the more important function of protecting clients. I firmly believe it does not.