



STATE BAR OF MONTANA

FILED

05/18/2017

Ed Smith

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STATE OF MONTANA

Case Number: AF 09-0688

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P.O. Box 726
Helena, MT 59624-0726

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200 W. Broadway
Missoula, MT 59802

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Missoula, MT 59802

Kate McGrath Ellis
314 N. Last Chance Gulch, Suite 300
Helena, MT 59601

Christopher B. Gray
P.O. Box 1065
Bozeman, MT 59711-1065

Paul R. Haffeman
P.O. Box 2103
Great Falls, MT 59403-2103

Channing J. Harrelius
P.O. Box 1629
Great Falls, MT 59403-1629

Ross W. McLinden
175 N. 27th Street, Suite 800
Billings, MT 59101

Kaylan A. Minor
P.O. Box 1047
Dillon, MT 59725

Eric E. Nord
2708 1st Avenue N. Suite 300
Billings, MT 59101

Jessica A. Polan
1205 S. Main Street
Kalispell, MT 59901-5639

J. Stuart Segrast
P.O. Box 201401
Helena, MT 59620-1401

Kent M. Sipe
801 W. Broadway
Lewistown, MT 59457

Brian C. Smith
P.O. Box 8121
Missoula, MT 59807

David J. Steele
619 SW Higgins, Suite K
Missoula, MT 59803-1467

Michael P. Talia
434 Chert Pl
Helena, MT 59602

Lynda S. White
One West Main Street
Bozeman, MT 59715

ABA DELEGATES

Damon L. Gannett
P.O. Box 1375
Billings, MT 59103

Shane A. Vannatta
P.O. Box 4747
Missoula, MT 59806

EXECUTIVE DIRECTOR

Christopher L. Manos

April 26, 2017

Chief Justice Mike McGrath
215 North Sanders
P.O. Box 203001,
Helena, MT 59620-3001

Re: Rule of Professional Conduct 4.4, No. AF 09-0688

Dear Chief Justice McGrath,

As you will recall, the State Bar's Ethics and Technology Committees had different views of how Rule 4.4 of the Rules of Professional Conduct should be amended. The Court at their December 2016 public meeting suggested the two groups work further to reach consensus on Rule language.

The Court adopted the following changes to Rule 4.4, effective January 1, 2017, which corresponds identically to the ABA's Model Rule:

Rule 4.4 Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third 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 relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

After multiple calls and e-mails, the interlineated language below was agreed upon between the two Committees, to address concerns about mining data raised at the public meeting. Subsection (a) is the same as above.

- (b) A lawyer who receives a writing, document, or electronically stored information relating that relates to the representation of the lawyer's client and that the lawyer knows or reasonably should know that the document or electronically stored information was inadvertently sent or disclosed, shall promptly notify the sender, and shall not examine or use the information, and shall abide by the sender's instructions as to the disposition of the document or communication, unless otherwise directed by a court.
- (c) A lawyer shall not use software designed to recover or reconstitute, in part or whole or in part, electronically stored information that was eliminated or fragmented as a result of the sender's lawful efforts to protect privileged or confidential information. This rule excludes writings produced in discovery and information that is the subject of criminal investigation.

The Board of Trustees then also was given the opportunity to review the language at their April 2017 meeting, and by a vote of 16 to 1, rejected the Committees' proposed language. The Board prefers the language effective January 1, 2017, and prefers that Montana's Rule remain identical to the ABA's Model Rule.

My understanding from earlier conversations is that the Supreme Court does not intend to re-open the comment period on this matter. As a result, please accept this letter as a final submission of the issues.

Sincerely,

Bruce Spencer
President Counsel
State Bar of Montana

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