

### **ABA Model Rule and Current Montana 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.

### **Ethics Committee's Proposed 4.4 (c)**

(c) A lawyer shall not knowingly access or use electronically stored information in a communication or document received from another lawyer, for the purpose of discovering protected work product, privileged or other confidential information, unless the receiving lawyer has obtained permission to do so from the author of the communication or document. "Communication" and "document" as used in this rule exclude documents produced in discovery and information that is the subject of criminal investigation.

### **Technology Committee's Proposals**

- (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 in 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.

### **Ethics Committee's Recommendation Following January 10 Bozeman Meeting**

Slightly revised (b), combining Montana's Current Rule and Technology Committee suggestions and include Technology Committee's (d) as an entirely new section (c):

(b) A lawyer who receives a writing\*, document or electronically stored information relating 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.

(c) 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.

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