

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.4

Lead Drafter: Martinez
Co-Drafters: Croker, Rothschild
Meeting Date: June 2nd & 3rd, 2016

I. CURRENT CALIFORNIA RULE

There is no California counterpart to ABA Model Rule 4.4.¹

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was a consensus among the drafting team members to recommend the proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 4.4 (CLEAN)

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

A lawyer who receives a writing relating to the representation of the lawyer's client that obviously appears to be privileged or confidential or subject to the work product doctrine, where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender.

Comment:

Rule 4.4 recognizes that lawyers sometimes receive writings that are privileged or confidential and were inadvertently sent or produced by opposing parties or their lawyers. A lawyer should refrain from examining such writings any more than is essential to ascertain if they are privileged, confidential or subject to the work product doctrine. The lawyer should either return the writings to the sender, seek to reach agreement with the sender regarding the disposition of the writings, or seek guidance from a tribunal. See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].

IV. PROPOSED RULE (REDLINE TO MODEL RULE 4.4)

Rule 4.4 ~~Respect For Rights Of Third Persons~~Duties Concerning Inadvertently Transmitted Writings

- (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~~

¹ ABA Model Rule 4.4(b) addresses an attorney's obligation when receiving inadvertently sent documents, or electronically stored information, relating to the representation. In California, case law has addressed an attorney's obligation when the attorney receives materials that obviously appear to be confidential or privileged which were provided inadvertently or by mistake. See, *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644.

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~~evidence that violate the legal rights of such a person.~~

~~(b) A lawyer who receives a document or electronically stored information~~ writing relating to the representation of the lawyer's client ~~and knows or reasonably should know that the document or electronically stored information that obviously appears to be privileged or confidential or subject to the work product doctrine, where it is reasonably apparent that the writing~~ was inadvertently sent or produced, shall promptly notify the sender.

Comment:

~~[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.~~

~~[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether 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. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.~~

Rule 4.4 recognizes that lawyers sometimes receive writings that are privileged or confidential and were inadvertently sent or produced by opposing parties or their lawyers. A lawyer should refrain from examining such writings any more than is essential to ascertain if they are privileged, confidential or subject to the work product doctrine. The lawyer should either return the writings to the sender, seek to reach agreement with the sender regarding the disposition of the writings, or seek guidance from a tribunal. See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].

~~[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such~~

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~~a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.~~

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **GREG DRESSER, OCTC, Date:**

[Insert OCTC Comments]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's subparagraph (a), which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted that they are concerned regarding the vagueness and over breadth of such terms as embarrass, delay, or burden a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and when balanced against the need to prevent litigation abuse, OCTC believes the ABA has it correct.

Further, the State Bar Act already prohibits counseling or maintaining actions, proceedings, or defenses only as appear to him or her legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct already prohibit an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.)

In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive personality." While some of this misconduct can be handled under other rules, not all of it can or should be and this would give better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that ABA's paragraph (a) should be adopted.

OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and are consistent with the California Supreme Court's decision in

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Rico v. Mitsubishi Motors Corp (2007) 42 Cal.4th 807, 818. We find either acceptable.

Comments 1 and 3 seems more appropriate for a treatise, law review article, or ethics opinion. Comment 2 is too long and covers at least two distinct concepts. It could be two comments.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC did not comment on ABA Model Rule 4.4 in 2001.

- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Other than California, all jurisdictions have adopted some version of ABA Model Rule 4.4; however, three jurisdictions do not have a version of Model Rule 4.4(b).²

The ABA State Adoption Chart for ABA Model Rule 4.4 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf
- Fourteen jurisdictions have adopted Model Rule 4.4 verbatim.³ Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4.⁴ Two jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 4.4.⁵

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

² The three jurisdictions are: Georgia, Michigan, and Texas.

³ The fourteen jurisdictions are: Arkansas, Connecticut, Delaware, Iowa, Kansas (with a different title), Massachusetts, Minnesota, Nevada, New Mexico (with a different title), North Dakota (Model Rule 4.4(b) is found in North Dakota Rule 4.5(a)), Ohio (4.4(b) is verbatim), Oregon (4.4(b) is verbatim), West Virginia, and Wyoming.

⁴ The thirty-one jurisdictions are: Alabama, Alaska, Arizona, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

⁵ The two jurisdictions are: Maryland and New Jersey.

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1. Change the title of the rule to “Duties Concerning Inadvertently Transmitted Writings”
 - Pros: The title more accurately describes the content and purpose of the rule.
 - Cons: None identified.
2. Recommend that California adopt of version of ABA Model Rule 4.4(b)
 - Pros: California case law states it is an ethical obligation of an attorney who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or otherwise clearly appear to be confidential and privileged that the attorney shall immediately notify the sender. In California, this duty is currently only found in case law and capturing the obligation in a rule of professional conduct will help protect the public and the administration of justice, as well as inform attorneys of their ethical obligation.
 - Cons: The first Commission declined to recommend adoption of this rule because they believed a lawyer’s duties concerning inadvertently transmitted writings often are fact-bound inquiries and therefore are difficult to specify in a rule that will have disciplinary consequences.
3. Recommend the rule use an “obviously appear” standard regarding the documents status as privileged or confidential or subject to the attorney work product doctrine, instead of a “knows or reasonably should know” standard.
 - Pros: California case law uses the phrase “materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . .” (*Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 807, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644, 656-657).⁶ It is best to use the standard stated by court decision which is a more rigorous standard than an objective standard.
 - Cons: An objective standard (knows or reasonably should know) accomplishes the same result articulated in the case law by using a known disciplinary standard being used in several proposed rules, and in our current rules (see, Rule 5-110). An objective standard may be more protective of privileged or confidential information because the standard would be that of a reasonably competent attorney. Such a standard would prevent an attorney from raising as a defense the document did not obviously appear privileged, or confidential, or subject the attorney work product doctrine “to me.”
4. Recommend adoption of only one Comment.

⁶ But see, *Rico*, 42 Cal.4th at 818: “The *State Fund* rule is an objective standard. In applying the rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel’s examination should have ended.”

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- Pros: The proposed Comment states the purpose of the rule and provides guidance as to how the rule should be applied. The Comment also cites to the California Supreme Court case stating the ethical obligations of an attorney who receives inadvertently sent or produced materials.
- Cons: None identified.

5. Recommend the Comment include an explanation of what steps lawyers may take following receipt of inadvertently produced materials.

- Pros: The steps described in the Comment preceding the citation to *Rico* accurately reflect what California case law says a lawyer may do following the receipt of inadvertently produced material. The steps articulated are what the California Supreme Court believes lawyers should do, at minimum, to resolve a dispute following the inadvertent production of privileged or confidential material.
- Cons: As written, the language implies that the lawyer can choose to do any of the three options. Rather, the court is stating a preferred order of conduct. Importantly, courts want parties to work out their differences first before bringing their disputes to court, which should only occur if the parties are unable to resolve it themselves.

6. Concepts Rejected (Pros and Cons):

1. Recommend adoption ABA Model Rule 4.4(a) which seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third party. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person.

- Pros: MR 4.4(a) provides important protection regarding the rights of third persons. The 2010 comment from OCTC supported adoption of MR 4.4(a) (see above summary of comment in section VI).
- Cons: Similar to the first Commission, the drafting team believes the rule is vague and overbroad with use of the terms “embarrass, delay, or burden a third party.” The rule could be used as a “club” in discovery disputes if one were to assert a discovery motion was being used in violation of the rule.

2. Include in the blackletter of the rule the specific steps that the receiving lawyer should do, in addition to promptly notifying the sender. California case law states the receiving lawyer “should refrain from examining the materials any more than is essential to ascertain if the materials are privileged [t]he parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders or other judicial intervention as may be justified.”

- Pros: What the Supreme Court has stated is what a lawyer, at minimum, should do in this situation: return the materials, reach an agreement with the sender, or seek guidance from a court. Although the language used in the case law is both “should” and “shall,” given the context of the Court’s

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description of an “ethical obligation,” these steps should be regarded as mandatory imperatives rather than permissive guidance.

- Cons: The steps described in case law are practice guidance and depend upon the specific facts and circumstances. As practice guidance, these steps do not belong in the blackletter of the rule. California court decisions state the receiving lawyer “should refrain” from reading the materials any more than is necessary to determine if the materials are privileged, and the lawyer “shall immediately” notify the sender that the lawyer possesses material that appears to be privileged. The additional guidance these court decisions provide use the permissive term “may” to describe what lawyers can do to resolve the dispute. Such language is not appropriate in the blackletter of a rule of discipline.
3. Include the following sentence in the Comment: “This rule does not address the duties of a lawyer who receives a document that may have been wrongfully obtained by the sending person.”
- Pros: Including this comment would provide useful guidance that promotes the receiving lawyer’s exercise of professional independent judgment to examine all of the relevant facts and circumstances and to determine a course of conduct consistent with the best interests of the lawyer’s client.
 - Cons: Although *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 impliedly held that *Rico* applies to documents that have been received from a client that is wrongfully in possession of them, it is not necessary to call out this distinction in the Comment. It is misleading to suggest that a lawyer could use wrongfully obtained documents, when that is not the case.
4. Include the phrase “or electronically stored information” after “writing” in the blackletter of the rule.
- Pros: As part of Ethics 20/20, the ABA revised MR 4.4(b) in 2012 to address the issues surrounding electronic documents and ESI discovery. The risk of inadvertently produced material grows when dealing with huge amounts of electronically stored data.
 - Cons: The ethical obligations imposed upon an attorney who receives inadvertently produced privileged or confidential material are no different whether the writing or document is “electronically stored,” or hand written. Further, the drafting team is under the belief that the term “writing” will be defined as described by Evidence Code section 250, which would include electronically stored information.

5. **Changes in Duties/Substantive Changes to the Current Rule:**

This would be new rule of professional conduct in California; however, the proposed rule would

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not be a substantive change in duties as articulated in California case law.

6. Alternatives Considered:

None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Martinez

- [Date]: Email Comment
- [Date]: Email Comment

Croker

- [Date]: Email Comment
- [Date]: Email Comment

Rothschild

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

Adopt proposed rule 4.4.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed rule 4.4 in the form attached to this Report and Recommendation.

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XII. DISSENTING POSITION(S)
[Insert any Dissenting Positions or write "None."]
XIII. FINAL COMMISSION VOTE/ACTION
[Date of Vote] [Action: Proposed amended rule adopted or not adopted] [Record of Roll Call Vote]