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May 23, 2016 Marlaud Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:

Please see attached OCTC memo with comments concerning ABA MR 4.4. Please consider these comments in preparation for the June meeting.

Attached:

RRC2 - [4-100][3-400][3-410][3-700][[1.8.5A][6.1][1.10][1.18][2.3][3.9][4.1][4.4][5.7][8.3] - 05-19-16 OCTC Memo to RRC2.pdf

May 19, 2016 OCTC Memo [Dresser] to RRC2:

* * *

L. ABA Model Rule 4.4 [Respect for the Rights of Third Persons]

Model Rule 4.4(a) is consistent with California law. (See Business and Professions Code sections 6068(g) and 6068(f), rule 3-200 of the Rules of Professional Conduct, and rule 128.7 of the Code of Civil Procedure. Also see *Sorenson v. State Bar* (1991) 52 Cal.3d 1036 [encouraging the commencement or continuance of an action from spite and vindictiveness]; In the Matter of Scott (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 454-457 [attorney acted in bad faith, out of spite, with a retaliatory motive, and with the purpose to harm others and cause delay]; and In the Matter of Varakin (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 187 [attorney acted in bad faith, out of spite and for the purpose of harassment].)

Model Rule 4.4(b) is also consistent with California law. (See *Ricco v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807.)

May 25, 2016 Ham Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I have some reservations about this rule.

First, discipline is not justified where a lawyer acts in good faith, or where a professional judgment call turns out to be wrong. This rule does not acknowledge good faith or error in professional judgment as defenses. This is a problem. In my view, there is no legitimate basis for imposing discipline where the lawyer acted in good faith or made an error in judgment.

Second, but related, the proposed rule, as written, is a strict liability rule. Discipline is generally not proper, however, for unknowing and inadvertent mistakes. Further, the court has remedies for breach – exclusion of evidence or disqualification of counsel. I am not aware of evidence indicating that a *discipline rule* is needed in this area because of abuse. I *have* seen many disputes about whether something was inadvertently produced. Most of the time, there are arguments on each side. This is not the stuff of discipline actions.

Third, what does “promptly” mean? Disciplinary rules must pass constitutional muster as specific and not vague and ambiguous. “Promptly” is too vague and is not a proper standard. The rule should instead provide that the lawyer notifies the sender at the earliest reasonable opportunity.

Finally, from whose perspective is “reasonably apparent” judged. It should not be viewed from the sender’s side, nor should it be second guessing after the fact. If this is the standard to be used, then it must be reasonably apparent to a reasonable lawyer that an issue exists.

May 25, 2016 Kehr Email to Difuntorum & Mohr:

I agree with this proposal in principle, and as far as it goes, as an expression of the standard that: "An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." Kirsch v. Duryea, 21 Cal. 3d 303, 309 (1978). However, the exact phrasing of the Rule should be considered carefully.

The proposed language ("...obviously appears to be privileged or confidential") is taken out of context from the State Fund opinion. That opinion goes on to use "appears" without "obviously". And the opinion also describes the standard as one of mere possibility: "We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." State Compensation Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 657 (1999) (emphasis added).

These and other varying expressions in the State Compensation line of cases permit honest disagreement as to what standard applies in the civil setting. I'm concerned that using the State Compensation language would lead to uncertainty about the disciplinary standard by moving the reader back to the appellate opinions. That could be avoided by using a different approach. Subject to an additional thought I will get to later in this message, I have this (partial) suggestion:

A lawyer promptly shall notify the sender upon receiving a writing relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is privileged, confidential, or subject to the work product doctrine and was sent or produced inadvertently.

While my principal concern is that we avoid mixing the disciplinary standard with the arguably indefinite civil standard, I also agree with the Con argument at ¶ 3 on p. 5 of 9 (pdf p. 239).

I would not include the proposed Comment (but later I will have a suggestion for a different Comment). B/c the proposed Rule does not include any requirement beyond notice, the proposed Comment is practice guidance rather than an explanation of the Rule. However, the Commission should consider whether to include in the Rule the requirement on further handling that Rico took from State Compensation ("... the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged" Rico v. Mitsubishi Motors Corp., 42 Cal. 4th 807, 817 (2007)).

Here is an example of what I have in mind: Lawyer receives a writing that he reasonably should have known might be privileged and inadvertently produced. In addition to not notifying opposing counsel, the lawyer studied and used the writing, including by providing a copy of it to a key witness. My view is that Lawyer would not have fulfilled essential duties as an officer of the court by notifying opposing counsel b/c the balance of Lawyer's conduct amounted to dishonesty. I believe that Lawyer should be subject to professional discipline. I would add this aspect to my earlier (partial) suggestion:

A lawyer promptly shall notify the sender upon receiving a writing relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is privileged, confidential, or subject to the work product doctrine and was sent or produced inadvertently and, without consent from the sender or a court, the lawyer shall not examine the materials any more than is

needed to ascertain the application of this Rule or use the materials for any purpose. (additional language in italics)

My final recommendation is that we add this Comment:

A lawyer's notice to a sender shall comply with Rule 4.2 or 4.3, as applicable.

May 26, 2016 Eaton Email to Difuntorum, Mohr & McCurdy:

Good job on the report. I agree with you on the omission of 4.4(a).

I believe, however, that we should adopt the "knows or reasonably should know" standard for receipt of inadvertent documents from the ABA model rule. The "obviously appears" language is too slippery for inclusion in a model rule.

I recognize that the phrase appears in Rico. But the language quoted in note 6 of your report from Rico makes it clear that California is in line with the more plainly objective language of the ABA Model Rule. In line with the mandate of our charter to eliminate unnecessary differences between California rules and those used in the preponderance of the states, I prefer the language in use in 40-plus jurisdictions.