

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

Where it is reasonably apparent to a lawyer who receives a writing relating to the representation of the lawyer's client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall:

- (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
- (b) promptly notify the sender.

Comment

If a lawyer determines this Rule applies to a transmitted writing, the lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal. See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

Where it is reasonably apparent to a lawyer who receives a writing relating to the representation of the lawyer's client that the writing was inadvertently sent or produced, and A-the lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing is privileged or subject to the work product doctrine, ~~where it is reasonably apparent that the writing was inadvertently sent or produced,~~ the lawyer shall:¹

(a)² refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

Comment

If a lawyer determines this Rule applies to a transmitted writing, the lawyer should ~~refrain from further examination of the writing and either~~ return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal. See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758]. ~~If the sender is known to be represented by counsel, the lawyer must communicate with the sender's counsel.~~ In providing notice required by this Rule, the lawyer shall comply with Rule 4.2.³

¹ Change in syntax is clarifying change; no change in substance is intended.

² Paragraph (a) added at request of SDCBA to conform the rule to the requirements of *Rico v. Mitsubishi*.

³ Change made per COPRAC suggestion.

Proposed Rule 4.4 Duties Concerning Inadvertently Transmitted Writings
Synopsis of Public Comments

TOTAL = 4 **A = 1**
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bi	Committee on Professional Responsibility and Conduct (COPRAC)	Y	M		<p>1. The Committee supports the Commission's decision not to adopt section (a) of ABA Model Rule 4.4.</p> <p>2. The Committee supports the text of proposed Rule 4.4 as written. While the proposed rule is narrower than ABA Rule 4.4(b), which applies to all inadvertent disclosures, whether or not privileged, we believe that this narrowed focus is consistent with existing California law and policy.</p> <p>3. COPRAC's concern is with the proposed comment to the rule. The first sentence of the proposed Comment is inconsistent with the Supreme Court's direction that Comments should not set forth additional rules of conduct but instead provide guidance for lawyers in interpreting the text of the rule. As written, the sentence has the potential to become the basis of discipline, and also to freeze the development of case law that is outside the scope of the rule. COPRAC proposes that the Comment be rewritten to make clear that the rule does not</p>	<p>1. No response required.</p> <p>2. No response required.</p> <p>3. The Commission disagrees with the commenter and has not made the change. The Commission believes that the first sentence accurately reflects the law and provides important guidance to lawyers in complying with that law.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>address what steps the lawyer should take after complying with the rule and that the case law answers to those questions are being provided as a convenience and not as an independent source of law.</p> <p>4. The second sentence of the comment is correct, but COPRAC believes it would promote clarity and uniformity simply to cross-reference Rule 4.2. Moreover, because the second sentence is in fact an effort to provide guidance in complying with the rule itself, COPRAC believes it should come first in the comment.</p>	<p>4. The Commission agrees with the commenter as to the language used and has made the suggested change. However, it has retained the sentence as the second sentence in the comment rather than make it the first sentence.</p>
X-2016-68v	San Diego County Bar Association (Riley)	Y	M		<p>We recognize that proposed Rule 4.4 is almost <i>verbatim</i> ABA Model Rule 4.4(b). In California, however, our Supreme Court, in <i>Rico v. Mitsubishi</i> (2007) 42 Cal.4th 807, 817, adopted as the ethical standard for all California lawyers the rule first articulated in <i>State Compensation Insurance fund v. WPS, Inc.</i> (1999) 70 Cal.App.4th 644, 656 (<i>State Fund</i>), and more recently reinforced in <i>Ardon v. City of Los Angeles</i> (2016) 62 Cal.4th 1176, 1185-1188.</p> <p>This <i>Rico/State Fund</i> ethical</p>	<p>The Commission agrees with the commenter and has revised proposed Rule 4.4 to include the requirement not to examine the writing any more than is necessary to determine whether it is privileged or subject to work product protection.</p>

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					<p>obligation not only requires that the lawyer who receives inadvertently produced privileged writings “shall immediately notify the sender,” but also mandates that the lawyer “refrain from examining the materials any more than is essential to ascertain if the materials are privileged.” Proposed Rule 4.4 eliminates this second requirement; we respectfully recommend that the Commission include it.</p> <p>Otherwise, proposed Rule 4.4 creates a grey area of confusion. Does the ethical lawyer stop reading as soon as it is clear that the document is privileged, the text of the rule notwithstanding? Or do Rules 1.1, competence, and 1.3, diligence, require the lawyer to read on; is it a decision in which the client itself has a right to participate, since a consequence could be disqualification, the text of the proposed rule notwithstanding?</p>	
X-2016-76m	Los Angeles County Bar Association Professional Responsibility Ethics Committee (PREC)	Y	M		<p>1. Proposed Rule 4.4 provides as follows (emphasis added):</p> <p>“A lawyer who receives a writing <i>relating to the representation of the lawyer’s client</i> and knows or</p>	<p>1. The Commission agrees with the commenter that the syntax of the rule as circulated for public comment created an ambiguity. The syntax has been changed to remove that ambiguity.</p>

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					<p>reasonably should know that the writing is privileged 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.”</p> <p>While the language of Proposed Rule 4.4 tracks with the language of the corresponding ABA Model Rule, the pronoun references contained therein are confusing. The emphasized language above could be read to suggest that the lawyer is receiving a writing that is subject to privilege with his or her own client.</p> <p>2. Further, PREC believes that the substance of the rule should apply to a lawyer receiving an inadvertently transmitted writing whether or not the lawyer is engaged in a representation that relates to the writing. As a result, the emphasized language above not only is confusing, it is also inaccurate and too limited.</p> <p>We propose that the emphasized language be deleted and the rule be revised to read as follows:</p>	<p>2. The Commission declines to make the requested change. A lawyer who receives privileged writings sent inadvertently should not be under a <i>duty</i> to notify the sender unless the privileged material relates to a matter in which the lawyer represents a client. The concern that outcome of the matter might be adversely affected by a lawyer’s possession and use of such writings does not exist when the lawyer is not involved in the matter.</p>

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					<p>“A lawyer who receives a writing and knows or reasonably should know that the writing is privileged 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.”</p> <p>3. In addition, in order to further clarify the application of this rule, we suggest adding a comment to clarify that Rule 4.4 only applies to inadvertent transmissions and does not apply to transmissions from the lawyer’s own client.</p> <p>Please consider adding something to the following effect to the Comment:</p> <p>“This Rule only applies to writings that are transmitted inadvertently, and does not apply where the sender is the lawyer’s client.”</p>	<p>Moreover, a lawyer should not be required to investigate electronic messages marked “Privileged” or “Work Product” from a stranger, given the sophisticated techniques that can be used to access law firm computer and email databases, e.g., phishing. Requiring a lawyer to do so could compromise privileged and other highly-confidential information that law firms have in such databases.</p> <p>3. The Commission declines to make the requested change. To do so would contradict case law. See <i>Clark v. Superior Court</i> (2011) 196 Cal.App.4th 37.</p>
X-2016-104av	Office of Chief Trial Counsel (OCTC)	Y	A	4.4	OCTC supports adoption of the rule.	No response required.

