

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Commission's Proposed Rule Adopted on October 21-22, 2016 –
Clean Version)

Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a 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

[1] 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.

[2] This Rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person. *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

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

TOTAL = 2 A = 1
D = 0
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21aa	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	A		OCTC supports this rule and Comments [1] and [2].	No response required.
Y-2016-7k	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-09-17)	Yes	M		COPRAC supports the adoption of proposed Rule 4.4 as revised but we respectfully suggest that Comment [2] be deleted. The Comment is confusing, both because the term “inappropriately disclosed” is vague and because it is not clear why the comment is limited only to “sending persons.” If the rule is intended to be limited to inadvertent disclosures, it would be more clear simply to state that.	<p>NOTE: The drafting team did not reach a consensus on a response to COPRAC’s concerns with Cmt. [2] and will present this as an open issue. Possible responses are provided below.</p> <p>[ALT#1: The Commission clarified Cmt. [2] with the following revision:</p> <p>[2] <u>This Rule recognizes that lawyers sometimes receive a writing that was mistakenly sent or produced by opposing parties or their lawyers.</u> This Rule does not address the legal duties of a lawyer who receives a <u>privileged or other</u> writing* that the lawyer knows* or reasonably should know* may have been <u>knowingly but</u> inappropriately disclosed by the sending person to the lawyer.</p> <p>Clark v. Superior Court (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].]</p> <p>[ALT#1: The Commission did not make the requested change. The Commission</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = 2	A = 1
	D = 0
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
						believes that Comment [2] is not confusing because the concise statement provided therein should be construed in light of the case citation that follows the statement. The Commission is charged with using comments sparingly and the approach of including a brief statement together with a case cite that provides more extensive information is intended to be consistent with that charge.]