

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 4.4**

### **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE**

**[There is no California Rule that corresponds to Model Rule 4.4,  
from which proposed Rule 4.4 is derived.]**

### **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.

### **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.

[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 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.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 4.4

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 4.4

Vote: X (yes) – X (no) – X (abstain)

## **III. COMMISSION’S PROPOSED RULE 4.4 (CLEAN)**

### **Rule 4.4 Duties Concerning Inadvertently Transmitted Writings\***

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. See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].

#### IV. COMMISSION'S PROPOSED RULE 4.4 (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 evidence that violate the legal rights of such a person.~~

~~(b) A~~Where it is reasonably\* apparent to a lawyer who receives a ~~document or electronically stored information~~writing\* relating to ~~the~~a lawyer's representation of ~~the lawyer's client and a client that the writing\* was inadvertently sent or produced, and the lawyer knows\* or reasonably should know\* that the document or electronically stored information was inadvertently sent~~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.

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~~[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.~~

~~[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 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. RULE HISTORY**

Although the origin and history of Model Rule 4.4 was not the primary factor in the Commission’s consideration of proposed Rule 4.4, that information is published in “A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013,” Art Garwin, Editor, 2013 American Bar Association, at pages 577 – 584, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. 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].)

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

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
**(In response to 45-day public comment circulation):**

OCTC supports this rule and Comments [1] and [2].

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Two comments, including the above comment from OCTC, were received. One agreed with the proposed rule. One agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

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).<sup>1</sup>

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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf)
- Fourteen states have adopted Model Rule 4.4 verbatim.<sup>2</sup> Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4.<sup>3</sup> Two states have adopted a version of the rule that substantially diverges from Model Rule 4.4.<sup>4</sup>

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<sup>1</sup> The three jurisdictions are: Georgia, Michigan, and Texas.

<sup>2</sup> The fourteen states 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.

<sup>3</sup> 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.

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

**A. Concepts Accepted (Pros and Cons):**

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 a 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 **one-size-fits-all** rule that will have disciplinary consequences.
3. Recommend the rule use an “reasonably apparent” 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.4<sup>th</sup> 807, 807, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4<sup>th</sup> 644, 656-657).<sup>5</sup> **The “reasonably apparent” standard approximates the case law standard and offers the advantage of using the term “reasonably” which is defined in the proposed terminology rule (rule 1.0.1(h)).**
  - Cons: An objective standard (knows or reasonably should know)

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<sup>4</sup> The two states are: Maryland and New Jersey.

<sup>5</sup> But see, *Rico*, 42 Cal.4<sup>th</sup> 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.”

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 Comment [1] that provides a citation to the key California case on this subject (*Rico v. Mitsubishi*).

- Pros: The proposed Comment clarifies the scope of the rule which is important in this situation because this rule would be a new rule in California. 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: Including case law as guidance assumes a risk that the case could change or be superseded.

5. Recommend adoption of Comment [2] which explains that the rule does not address the legal duties of a lawyer who receives information that may have been inappropriately disclosed by the sending person.

- Pros: The proposed Comment alerts lawyers to a problem area that is not addressed by the proposed rule. It provides citation to relevant case law (*Clark v. Superior Court*). This comment is important to avoid erroneous application of the new rule.
- Cons: The case cited is from the Court of Appeal and this could easily lead to confusion if subsequent cases provide different guidance.

**B. 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.
- 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 **after** 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 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 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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables



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

This would be new rule of professional conduct in California; however, the proposed rule would not be a substantive change in duties as articulated in California case law.

**D. Alternatives Considered:**

None.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Commission recommends adoption of proposed Rule 4.4 in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 4.4 in the form attached to this Report and Recommendation.