Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*
(Rule Approved by the Supreme Court, Effective November 1, 2018)

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].)

NEW RULE OF PROFESSIONAL CONDUCT 4.4
(No Former Rule)
Duties Concerning Inadvertently Transmitted Writings

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") reviewed and evaluated ABA Model Rule 4.4 (Respect For Rights Of Third Persons) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 4.4 (Duties Concerning Inadvertently Transmitted Writings).

Rule As Issued For 90-day Public Comment

Proposed rule 4.4 is derived from ABA Model Rule 4.4(b). ABA Model Rule 4.4(a) 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. The Commission did not recommend adoption of ABA Model Rule 4.4(a) because, similar to the First Commission, this Commission believes the rule is vague and overbroad with use of the terms "embarrass, delay, or burden a third party." In addition, there is a concern that such a rule could be used for mischief in discovery disputes if one were to assert a discovery motion was being used in violation of the rule.

Proposed rule 4.4 requires a lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing is either privileged or subject to the work product doctrine, when it is reasonably apparent to the receiving lawyer that the writing was inadvertently sent or produced, to promptly notify the sender. The Commission is recommending that California adopt this duty as a rule of professional conduct because California case law[1] affirmatively 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 the Commission believes 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.

The main issue debated when evaluating this rule was whether to recommend an "obviously appear" standard regarding a writing's status as privileged or subject to the attorney work product doctrine, instead of a "knows or reasonably should know" standard. The argument in favor of an "obviously appear" standard was that 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, 817, quoting favorably *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644, 656-657).[2] The Commission ultimately determined to recommend the objective standard of "knows or reasonably should know" because this standard accomplishes the same result articulated in the case by using a known disciplinary standard that is used in several proposed rules and in our

[1] See, *Rico v. Mitsubishi* (2007) 42 Cal.4th 807; *State Comp. Ins. Fund v. WPS* (1999) 70 Cal.App.4th 644.

[2] 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."

current rules. Further, an objective standard should be more protective of privileged information because the standard will be that of a reasonably competent attorney. Such a standard will prevent an attorney from raising as a defense that the document did not obviously appear privileged or subject to the attorney work product doctrine "to me."

There is one comment to the rule. As initially circulated for public comment, the rule comment provided guidance as to what steps the receiving lawyer should take in addition to promptly notifying the sender: Those steps were to refrain from reading the document and then (i) return the writing to the sender, (ii) seek to reach agreement with the sender regarding the disposition of the writing, or (iii) seek guidance from a tribunal. These steps are consistent with what the California Supreme Court has stated a lawyer should do in this situation.

Although the concept contained in proposed rule 4.4 is currently addressed in case law, the proposed rule is a substantive change to the current rules because the duty is now being included as a rule of discipline.

National Background – Adoption of Model Rule 4.4

As California does not presently have a direct counterpart to Model Rule 4.4, this section reports on the adoption of the Model Rule in United States' jurisdictions. 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).

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 states have adopted Model Rule 4.4 verbatim. Thirty-one jurisdictions have adopted a slightly modified version of Model Rule 4.4. Two states have adopted a version of the rule that substantially diverges from Model Rule 4.4.

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to the text and comment of proposed rule 4.4.

Text. The Commission modified the syntax of the black letter text to clarify the rule's application. This change is non-substantive. The Commission also moved from the comment in the 90-day public comment version and added as a requirement, the lawyer's duty to "refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine." This latter change conforms the rule to the holding in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].

Comment. The Commission made a non-substantive change to the second sentence of Comment [1] (formerly the only comment to the rule] to include a cross-reference to rule 4.2, which comprehensively regulates communications with a represented person. The public comment draft had provided: "If the sender is known to be represented by counsel, the lawyer must communicate with the sender's counsel."

The Commission also added proposed Comment [2], derived in part from Model Rule 4.4, Comment [4], to clarify that the rule does not apply to writings that may have been

inappropriately been disclosed by the sending person to the lawyer. A citation to California case law that governs such disclosures has also been added.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made a minor citation format change. In Comment [4], the Commission added the word "See" before the citation *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361]. This was the only change to the rule.

With this change, the Commission voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 4.4 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. An omitted asterisk for a defined term was added.

Rule 4.4 ~~Respect For Rights Of Third Persons~~Duties Concerning Inadvertently Transmitted Writings*
(Redline Comparison to the ABA Model Rule)

~~(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.

[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].)

~~[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.