

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Raul L. Martinez](#); [Mark Tuft](#); [Harry Sondheim](#); [Kevin Mohr G](#)
Subject: RRC - 4.4 - III.H. - Agenda Materials
Date: Thursday, March 18, 2010 12:30:29 PM
Attachments: [RRC - \[4-4\] - Public Comment Chart - By Commenter - DFT2.1 \(03-18-10\).doc](#)

Greetings Lauren:

I've attached the following:

Public Comment Chart, Draft 2.1 (3/18/10).

Here is Mark's transmittal message to Raul from yesterday:

Here is a draft of the public comment chart for your review. I did not modify the rule, although, as you will see, agree with the comments of OCTC that we are sending the wrong message by not adopting a version of paragraph (a) of the rule. I also added San Diego's somewhat nebulous comment. Finally, I would delete the entry by Santa Clara since that bar association make no comment.

I disagree with deleting the Santa Clara comment. A number of public commenters have approved the rule w/o providing a comment. It is important information we should transmit to BOG and the S.Ct. in the chart.

Please note that I've added COPRAC's comment that came in late and to which neither Mark nor Raul have had an opportunity to respond. I have shaded the COPRAC comment in rainy gray in the attached chart. Perhaps they will have a chance to draft a response to each before next week's meeting.

Please let me know if you have any questions. Thanks,

Kevin

--
Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147

714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
6	Committee on Professional Responsibility and Conduct ("COPRAC")			4.4(a)	<p>1. COPRAC generally supports the adoption of the rule. However, while COPRAC shares the Commission's concern about certain aspects of the paragraph 4.4(a) of the Model Rule, COPRAC recommends that the proposed rule include a revised paragraph (a). COPRAC agrees that the first phrase of MR paragraph (a) is vague, particularly the term "burden." COPRAC recommends that the proposed rule instead incorporate the language of Business and Professions Code section 6068(f) into the rule, to avoid uncertainty and improve consistency.</p> <p>2. COPRAC also recommends that the second phrase of paragraph (a) of the Model Rule should be included in the proposed rule. Proposed paragraph (a) would read as follows:</p> <p>(a) In representing a client, an attorney shall not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position 1	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				4.4(b)	<p>with which he or she is charged, and shall not use methods of obtaining evidence that violate the legal rights of a party or witness.</p> <p>3. COPRAC also supports the inclusion of paragraph (b) in the rule, which will provide lawyers with guidance, although some members are reluctant to raise this issue to a disciplinary level.</p> <p>4. We do have a concern with the proposed draft. The California Supreme Court in <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807, determined that “the State Fund standard applies to documents that are plainly privileged and confidential, regardless whether they are privileged under the attorney client privilege, the work product doctrine, or any other similar doctrine that would preclude discovery based on the confidential nature of the document.” <i>Id.</i> at n. 9.</p> <p>Paragraph (b) as proposed omits reference to the work product doctrine, which correctly should be referred to as such rather than as a “privilege.” To truly track the holding of <i>Rico</i>, the work product doctrine should be referred to in the rule. Although work product is referenced in Comment [2], for consistency, the text of paragraph (b) itself should also reference the work product doctrine.</p> <p>5. We note a further inconsistency between</p>	

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position 1	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>the text of the language of paragraph (b) and the text of the comment, in that, while the rule governs documents that are “obviously privileged or confidential” and “inadvertently sent,” the first sentence of Comment [2] is arguably narrower, in that only such documents “sent or produced by opposing parties or their lawyers” are covered.</p> <p>To rectify this inconsistency, we suggest that the first sentence of Comment [2] be revised so that the last phrase reads “and were inadvertently sent to the lawyer.”</p> <p>6. Finally, we are unclear what the Commission means by its use of the term “confidential” in paragraph (b) of this rule and Comment [2]. Paragraph (b) uses the term confidential without defining it. Comment [2] defines “privileged or confidential” to refer to “a writing that is subject to a statutory or common law privilege or the work product rule.” Does the Commission intend to refer to confidential information, as referenced in Business and Professions Code section 6068(e) and Rule 1.6? If so, that should be made clear. The language of the Comment is misleading, since the confidentiality rule is neither a statute nor a common law “privilege.” If this is not clarified, we are concerned that the use of the term</p>	

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position 1	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					"confidential" will be misunderstood.	
4	Office of the Chief Trial Counsel	M			<p>OCTC is concerned that the proposed rule deviates substantially from the ABA Rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct.</p> <p>The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(c)); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (Rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (<i>United States v. Hearst</i> (9th Cir. 1981) 638 F.2d 1190, 1197.)</p>	<p>Mark agree with OCTC's concern that the decision to eliminate Rule 4.4(a) deviates substantially from the rules in other jurisdiction and sends a message that lawyers in California may disregard the rights of third parties in representing a client. While some states have modified or not adopted paragraph (b), most states have adopted rule 4.4(a) verbatim or with minor chance.</p> <p>Raul continues to take the position that MR 4.4(a) should not be recommended for adoption.</p>

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position 1	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>OCTC believes the ABA's paragraph (a) should be adopted.</p> <p>OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in <i>Rico v. Mitsubishi Motors Corp.</i> We fine either acceptable.</p> <p>Comments [1] and [3] seem unnecessary as the Rule is clear and unambiguous.</p>	<p>The Commission disagrees that Comments [1] and [3] are not necessary. The Comments provide useful guidance on the purpose and application of the rule.</p>
3	Orange County Bar Association	A			<p>We agree with the adoption of the Commission's proposed version of Model Rule 4.4(b). We concur that a Rule should be adopted to reflect the recent Supreme Court decision in <i>Rico v. Mitsubishi Motors Corp.</i> We further agree with the use of the word "writing" instead of "document" for consistency with other Rules, and that paragraph (b) of the Model Rules as written is overly broad in that it applies to all types of documents, not just those that are privileged or confidential. However, we respectfully raise for consideration whether this provision belongs as part of Rule 4.4 or may be better positioned somewhere else, given that it applies equally to parties and to third persons and does not address merely the rights of third parties.</p>	<p>The Commission believes that the proposed version of Model Rule 4.4(b) belongs in this rule where it appears in jurisdictions that have adopted the rule. This will better enable lawyers to search for the rule and compare the provisions of this rule with the Model Rule and the rule of other jurisdiction.</p>

**Rule 4.4 Respect for Rights of 3rd Persons
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position 1	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	San Diego Co. Bar Association	M			The legal ethics committee drafter recommended that the ABA Model Rule 4.4(a) be adopted verbatim. The LEC voted 7-6 in support of modified approval, but since the Commission's vote was 5-5, the LEC recommends no position be taken given the close split in hopes that further revisions will develop consensus.	No response required.
2	Santa Clara County Bar Association	A			No comment.	No response required.



**SAN DIEGO COUNTY
BAR ASSOCIATION**

February 12, 2010

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Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)**

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: **David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee**
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: n/a

Proposed New Rule No./ Title: 4.4 Respect for Rights of Third Persons

(5) The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against “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 “would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim. Draft rule 4.4(b) restricts itself to in, documents that “obviously appears to be privileged or confidential” consistent with Rico v. Mitsubishi. It should be adopted as drafted by the Commission.

CONCLUSION: Although modified approval was recommended, the LEC vote was 7-6 in support of modified approval. Since the Rules Revision vote was 5-5, the LEC is recommending NO position be taken given the close split in hopes that further revisions will develop consensus.

LEC Rule Volunteer Name(s): Robert S. Gerber

Old Rule No./Title: No prior Cal. R. Prof. Conduct; but see Cal. Bus. & Prof. Code Section 6073.

Proposed New Rule No./ Title: Proposed Rule 6.1, Voluntary Pro Bono Publico Service

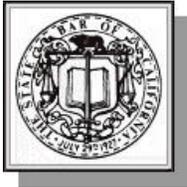
~~(5) The primary issue concerning this rule is whether pro bono publico services ought to be placed in the disciplinary rules or not. In the past, the “aspirational” goals of such service have been set out in Bus. & Prof. Code Section 6073 and have not been part of the Cal. R. Prof. Conduct. This differs from the ABA Model Code provisions adopted by the vast majority of the states. This rule change would bring California in line with the majority of the states. However, to make it clear, this rule change would NOT impose any disciplinary authority on the State Bar for a lawyer’s failure to provide pro bono publico services. The goal remains aspirational, as clarified specifically in Comment 12 to the Rule, which states that “The responsibility set forth in this Rule is not enforceable through disciplinary process.”~~

~~Other than this “controversial” aspect of the rule, nothing about the rule change is significant from a policy perspective. I fully support the rule as proposed.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

~~LEC Rule Volunteer Name(s): Erin Gibson~~

~~Old Rule No./Title: n/a~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | | |
|------------------------------------|-----------------------------------|--------------------------------|--|
| Rule 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [n/a] | Discussion Draft [all rules] |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

OFFICE USE ONLY.

* Date

03/01/2010 

Period

PC

File :

F-2010-382j SCCBA [4.4]

Commented On:

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**ORANGE COUNTY
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OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

MEMORANDUM

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 4.4 – Respect for Rights of Third Persons**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA agrees with the Commission's proposal to delete the language in Model Rule 4.4(a). The OCBA believes that including such language invites litigants to bring discovery disputes from the courtroom to the State Bar, where they will be decided by jurists with less knowledge of the underlying dispute and issues than the judge presiding over the underlying case has.

The OCBA agrees with the adoption of the Commission's proposed version of Model Rule 4.4(b). The OCBA concurs that a Rule should be adopted to reflect the recent Supreme Court decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807. The OCBA further agrees with the use of the word "writing" instead of "document" for consistency with other Rules, and that paragraph (b) of the Model Rule as written is overly broad in that it applies to all types of documents, not just those that are privileged or confidential. However, the OCBA respectfully raises for consideration whether this provision belongs as part of Rule 4.4 or may be better positioned somewhere else, given that it applies equally to parties and to third persons and does not address merely the rights of third persons.



THE STATE BAR OF
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT

Russell G. Weiner, Interim Chief Trial Counsel

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

March 12, 2010

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

~~**Rule 1.0.1 Terminology/Definitions.**~~

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

Rule 4.1 Truthfulness in Statements to Others.

- ~~1. OCTC's concern is one it has stated before: that this proposed rule requires knowing conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].~~
- ~~2. The Comments to this rule are too general and should be eliminated.~~

Rule 4.4 Respect for the Rights of Third Persons.

- OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(c); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.
- OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.
- Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.

Rule 6.1 Voluntary Pro bono Publico Service.

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

Rule 6.2 Accepting Appointments.

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)

- ~~1. OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 4.4

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 4.4 and offers the following comments.

COPRAC generally supports the adoption of the rule. However, while COPRAC shares the Commission's concern about certain aspects of the paragraph 4.4(a) of the Model Rule, COPRAC recommends that the proposed rule include a revised paragraph (a). COPRAC agrees that the first phrase of MR paragraph (a) is vague, particularly the term "burden." COPRAC recommends that the proposed rule instead incorporate the language of Business and Professions Code section 6068(f) into the rule, to avoid uncertainty and improve consistency.

COPRAC also recommends that the second phrase of paragraph (a) of the Model Rule should be included in the proposed rule. Proposed paragraph (a) would read as follows:

(a) In representing a client, an attorney shall not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged, and shall not use methods of obtaining evidence that violate the legal rights of a party or witness.

COPRAC also supports the inclusion of paragraph (b) in the rule, which will provide lawyers with guidance, although some members are reluctant to raise this issue to a disciplinary level.

We do have a concern with the proposed draft. The California Supreme Court in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, determined that "the *State Fund* standard applies to documents that are plainly privileged and confidential, regardless whether they are privileged

under the attorney client privilege, the work product doctrine, or any other similar doctrine that would preclude discovery based on the confidential nature of the document.” *Id.* at n. 9.

Paragraph (b) as proposed omits reference to the work product doctrine, which correctly should be referred to as such rather than as a “privilege.” To truly track the holding of *Rico*, the work product doctrine should be referred to in the rule. Although work product is referenced in Comment [2], for consistency, the text of paragraph (b) itself should also reference the work product doctrine.

We note a further inconsistency between the text of the language of paragraph (b) and the text of the comment, in that, while the rule governs documents that are “obviously privileged or confidential” and “inadvertently sent,” the first sentence of Comment [2] is arguably narrower, in that only such documents “sent or produced by opposing parties or their lawyers” are covered. To rectify this inconsistency, we suggest that the first sentence of Comment [2] be revised so that the last phrase reads “and were inadvertently sent to the lawyer.”

Finally, we are unclear what the Commission means by its use of the term “confidential” in paragraph (b) of this rule and Comment [2]. Paragraph (b) uses the term confidential without defining it. Comment [2] defines “privileged or confidential” to refer to “a writing that is subject to a statutory or common law privilege or the work product rule.” Does the Commission intend to refer to confidential information, as referenced in Business and Professions Code section 6068(e) and Rule 1.6? If so, that should be made clear. The language of the Comment is misleading, since the confidentiality rule is neither a statute nor a common law “privilege.” If this is not clarified, we are concerned that the use of the term “confidential” will be misunderstood.

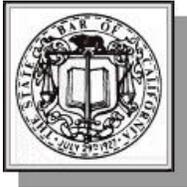
Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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F-2010-378 Esther [multiple].pdf

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Proposed Rule 4.4 [n/a]

“Respect for Rights of Third Persons”

(Draft #2, 11/22/09)

Summary: The Commission recommends against adoption of paragraph (a) of ABA Rule 4.4 because of concerns regarding the vagueness and overbreadth of the terms “embarrass, delay, or burden a third party,” and the resulting chilling effect this part of the Rule would have on legitimate litigation activities. The Commission agrees with the principles that underlie paragraph (b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential consistent with the Supreme Court’s decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

Statute

Bus. & Prof. Code § 6128(b)

Case law

Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Rather than following the Model Rule standard, the proposed rule codifies a Supreme Court opinion (*Rico*) concerning the issue of receipt of inadvertent documents. In addition, some lawyers believe that this is a complex area of law that is better left to case law development and is not amenable to a generalized rule.

Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.4* Respect for Rights of Third Persons

December 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third person. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person. The Commission recommends against adoption of paragraph (a) of ABA Rule 4.4 because of concerns regarding the vagueness and overbreadth of the terms “embarrass, delay, or burden a third party,” and the resulting chilling effect this part of the Rule would have on legitimate litigation activities.

Model Rule 4.4(b) provides that a lawyer who receives a document relating to the lawyer’s representation of a client and “knows or reasonably should know” that the document was inadvertently sent shall promptly notify the sender. The Commission agrees with the principles that underlie paragraph (b), but recommends that the Rule be limited to documents that obviously appear to be privileged or confidential and where it is reasonably apparent the document was inadvertently sent, consistent with the Supreme Court’s decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807.

Minority. The greatest danger to the practice of law in Model Rule 4.4 - paragraph (a) which forbids conduct which would “embarrass, delay or burden a third person,” - has been removed. That leaves only the paragraph which deals with the receipt of inadvertently produced documents. Inadvertently produced documents received little attention until a recent spate of court decisions which addressed that matter. Although the leading California case, *Rico*, clearly involved impermissible conduct (the lawyer snatched confidential documents from his opponent’s seat during a deposition recess), the subject of this proposed Rule is basically a new problem of document management in litigation, and the majority of cases have arisen from mistakes that occurred in the course of production of tens or hundreds of thousands of documents. The courts are dealing adequately with this problem, which is almost universally a by-product of the explosion of electronically stored communications. There is simply no need for a disciplinary rule for this subject.

* Proposed Rule 4.4, Draft 2 (11/21/09).

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 4.4 Respect for Rights of Third Persons</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 4.4 Respect for Rights of Third Persons</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(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.</p>	<p>The Commission recommends against adopting paragraph (a) because of a concern over the chilling effect it would have on legitimate advocacy since many proper litigation tactics may result in embarrassing opposing parties or delaying litigation. Where the lawyer engages in extreme delay of the client's case for personal gain, see Bus. & Prof. Code § 6128(b).</p>
<p>(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.</p>	<p>(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. <u>A lawyer who receives a writing that obviously appears to be privileged or confidential and where it is reasonably apparent that the writing was inadvertently sent shall promptly notify the sender.</u></p>	<p>The ABA's notification obligations under this paragraph are too broad in that they apply to all types of documents, not merely those that are privileged or confidential. The Rule should be limited to documents that obviously appear to be privileged or confidential, consistent with the Supreme Court's decision in <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807, 818 [addressing duties where document obviously appears to be confidential and privileged and was produced inadvertently]. The Commission's version also uses the term "writing," rather than "document," because "writing" is used throughout the Rules and is a defined term under Rule 1.0.1</p>

* Proposed Rule 4.4, Draft 2 (11/21/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u>*</p> <p align="center">Rule 4.4 Respect for Rights of Third Persons</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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. If this Rule is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and to prevent <u>The purpose of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. If this Rule is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and to prevent</u> unwarranted intrusions into privileged or confidential relationships, such as the client-lawyer relationship. <u>unwarranted intrusions into privileged or confidential relationships,</u></p>	<p>Most of this Comment is deleted to conform to the deletion of paragraph (a).</p>
<p>[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document 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 original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For</p>	<p>[2]- Paragraph (b) <u>This Rule</u> recognizes that lawyers sometimes receive documents that <u>are obviously privileged or confidential and</u> were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or <u>where it is</u> reasonably should know <u>apparent</u> that such a document 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 original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. <u>See Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807, 818.</u> Similarly, this Rule does not address the legal duties of a lawyer who receives</p>	<p>This Comment conforms to the limitation of the Rule to writings which obviously appear to be privileged or confidential. The last sentence is substantially revised to reflect the change from "documents" to "writings" in the Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.</p>	<p>a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes ofAs used in this Rule, "document" includes e-mail<u>"privileged or other electronic modes of transmission"</u>confidential refers to a writing that is subject to being reada statutory or put into readable formcommon law privilege or the work product rule.</p>	
<p>[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.</p>	<p>[[3]Some lawyers A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.</p>	

Rule 4.4: Respect for Rights of Third Persons (Commission's Proposed Rule – Clean Version)

A lawyer who receives a writing that obviously appears to be privileged or confidential and knows or where it is reasonably apparent that the writing was inadvertently sent shall promptly notify the sender.

inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

COMMENT

- [1] The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.
- [2] Paragraph (b) recognizes that lawyers sometimes receive documents that are obviously privileged or confidential and were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or where it is reasonably apparent that such a document 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 original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. As used in this Rule, "privileged or confidential" refers to a writing that is subject to a statutory or common law privilege or the work product rule.
- [3] A lawyer may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was

Rule 4.4: Respect for Rights of 3rd Persons

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona has adopted ABA Model Rule 4.4(b) but, in addition to requiring the lawyer who receives an inadvertently transmitted document to notify the sender Arizona Rule 4.4(b) requires the lawyer to “preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.”

California: Rule 3-200(A) provides that a member “shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.” Rule 5-100 provides:

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term “administrative charges” means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an

administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

California Business & Professions Code §§6068(c), 6068(f), and 6068(g) provide that it is the “duty” of an attorney to do all of the following:

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense....

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

Section 6128(b) provides that an attorney is guilty of a misdemeanor who “[w]illfully delays his client’s suit with a view to his own gain.”

Colorado adds the following additional paragraph to Rule 4.4:

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer’s client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender’s instructions as to its disposition.

Colorado has also adopted the following Rule 4.5:

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other’s conduct may violate criminal, administrative or disciplinary rules or statutes.

(A version of Rule 4.5(a) is in the ABA Code of Professional Responsibility as DR 7-105 but is limited to criminal conduct.)

District of Columbia: Rule 4.4(b) provides that a lawyer who receives a “writing” relating to the representation of a client and “knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.”

Florida: Rule 4.4(a) provides that a lawyer shall not “knowingly” use methods of obtaining evidence that violate the legal rights of a third person. Florida has adopted ABA Model Rule 4.4(b) verbatim.

Idaho: Rule 4.4 provides that a lawyer, in representing a client, shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, “including conduct intended to appeal to or engender bias against a person on account of that person’s gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.” In subparagraphs (a)(3) and (a)(4), Idaho retains the substance of DR 7-105 of the ABA Model Code of Professional Responsibility. Idaho Rule 4.4(b) deletes the phrase “relating to the representation of the lawyer’s client.”

Kansas and Michigan omit Rule 4.4(b).

Louisiana adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Maryland adds the following paragraph (b) to Rule 4.1(a):

(b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information

that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

New Jersey adopts ABA Model Rule 4.4(a) verbatim but modifies Rule 4.4(b) to provide as follows:

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

New York has no direct counterpart to ABA Model Rule 4.4(a) or (b), but New York prohibits various forms of misconduct toward witnesses, jurors, and others in DR 7-102(A)(1), DR 7-106(C)(2), and DR 7-108(D) and (E).

North Carolina: Rule 4.4(b) replaces the ABA phrase “document relating to the representation of the lawyer’s client” with the single word “writing.”

North Dakota adds a new Rule 4.5(a) that is identical to ABA Model Rule 4.4(b), and adds a new Rule 4.5(b) providing that a lawyer who receives a document under the circumstances specified in Rule 4.5(a) “does not violate Rule 1.2 or Rule 1.4 by not communicating to or consulting with the client regarding the receipt or the return of the document.”

Ohio: Rule 4.4(a) adds the word “harass” to the list of forbidden purposes

South Carolina adds a new Rule 4.5, which says a lawyer “shall not present, participate in presenting, or threaten to

present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.”

Texas: Rule 4.04(b) forbids lawyers to present or threaten disciplinary or criminal charges “solely to gain an advantage in a civil matter” or civil, criminal, or disciplinary charges “solely” to prevent participation by a complainant or witness in a disciplinary matter.

Virginia: Rule 4.4(a) deletes the word “substantial” before the word “purpose.” Virginia has not adopted Rule 4.4(b).

Wyoming adds Rule 4.4(c), which provides that a lawyer “shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

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March 10, 2010 McCurdy E-mail to Drafters (Martinez, Tuft), cc Chair, Vice-Chairs & Staff:

Rule 4.4 Drafting Team (MARTINEZ/TUFT):

This message provides the assignment background materials for Rule 4.4 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

RRC - [4-4] - Dashboard - ADOPT - DFT2 (03-10-10).doc
RRC - [4-4] - Compare - Introduction - DFT1 (12-10-09) RD-MY-LM.doc
RRC - [4-4] - Compare - Rule & Comment Explanation - DFT2 (12-10-09)MY-LM.doc
RRC - [4-4] - Rule - DFT2 (11-21-09)-CLEAN-LAND.doc
RRC - [4-4] - Public Comment Complete - REV (03-10-10).pdf
RRC - [4-4] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
RRC - [4-4] - State Variations (2009).pdf

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 2/12/10.
2. Full E-mail compilation, revised 1/19/10.

Please let me know if you have any questions.

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsisized and added to this chart. Please go ahead and add any missing comment synopsis and responses yourself in the extra rows at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

Since the last transmission, comments from the following commenters were received:

OCTC
COPRAC

Any additional comments received will be sent to you as soon as they are received.

Attached:

RRC - [4-4] - Public Comment Complete - REV (03-15-10).pdf
RRC - [4-4] - Public Comment Chart - By Commenter - DFT1.1 (03-15-10)AT.doc

March 17, 2010 Tuft E-mail to Martinez, cc Difuntorum & KEM:

Here is a draft of the public comment chart for your review. I did not modify the rule, although, as you will see, agree with the comments of OCTC that we are sending the wrong message by not adopting a version of paragraph (a) of the rule. I also added San Diego's somewhat nebulous comment. Finally, I would delete the entry by Santa Clara since that bar association make no comment.

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - DFT2 (03-17-10).doc

March 18, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:

I've attached the following:

Public Comment Chart, Draft 2.1 (3/18/10).

Here is Mark's transmittal message to Raul from yesterday:

Here is a draft of the public comment chart for your review. I did not modify the rule, although, as you will see, agree with the comments of OCTC that we are sending the wrong message by not adopting a version of paragraph (a) of the rule. I also added San Diego's somewhat nebulous comment. Finally, I would delete the entry by Santa Clara since that bar association make no comment.

I disagree with deleting the Santa Clara comment. A number of public commenters have approved the rule w/o providing a comment. It is important information we should transmit to BOG and the S.Ct. in the chart.

Please note that I've added COPRAC's comment that came in late and to which neither Mark nor Raul have had an opportunity to respond. I have shaded the COPRAC comment in rainy gray in the attached chart. Perhaps they will have a chance to draft a response to each before next week's meeting.

Please let me know if you have any questions.

March 18, 2010 Martinez E-mail to KEM, cc Drafters, Chair & Staff:

I don't agree with OCTC's recommendation to retain ABA 4.4(a), so it should read "one of the drafters..."

March 18, 2010 KEM E-mail to Martinez, cc Drafters, Chair & Staff:

Thanks, Raul. I've made the requested change.

Lauren, the attached draft 2.2 (3/18/10)MLT-RM should be substituted in the agenda materials.

March 20, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. The COPRAC comment near the bottom of agenda p. 416 recommends adding the work product doctrine to paragraph (b). This was suggested at our 11/09 meeting but never voted on for reasons I cannot recall. I request that this point be considered.
2. As in the MR, paragraph (b) covers materials that are "sent" while Comment [2] refers to materials that are "sent or produced". Given that there is a particular risk when producing large volumes of materials in litigation, I wonder why we don't use "sent or produced" in both places.
3. The first sentence of Comment [2] is inconsistent with the Rule b/c it omits the "reasonably apparent" standard, that that standard is included in its second sentence.

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (3/24/2010)**

There is another inconsistency b/c the Rule refers to writings but the Comment to documents. Also, and as is true in the MR, the first sentence refers to materials sent or produced by an opposing party or its lawyer, but that limitation is not found in the Rule. I ask that the Commission consider whether the source of the document should be in the Rule. Assuming not, I suggest revising the first two sentences of Comment [2] along the following lines: "Paragraph (b) recognizes that lawyers sometimes receive writings that are obviously privileged or confidential, where it is reasonably apparent that the writing was sent [or produced] inadvertently. When this occurs, this Rule requires" (This would have to be revisited if the Commission decides to include the work product reference as recommended by COPRAC).

4. I think that the dashboard (agenda p. 435) should refer to current rule 3-200(A) and to B&P C. sections 6068(c), (f), and (g).
5. There is a typo in the first word of the Introduction (agenda p. 437). "Mode" should be "Model".

March 21, 2010 KEM E-mail to RRC re 4.4, 1.5.1 & 1.8.6:

Given the Commission's decision to strike MR 4.4(a), shouldn't we change the title of this Rule, currently titled "Respect for Rights of Third Persons" to something that is more descriptive of the Rule, e.g., "Duties Concerning Inadvertently Transmitted Writings"?

And while I'm at it, how about changing 1.5.1 [2-200], currently titled "Financial Arrangements Among Lawyers" to the more descriptive "Fee Divisions With Lawyers". The current title made sense as a parallel construction when we had 1-320 ("Financial Arrangements Among Lawyers"), but we've merged that rule into 5.4 and 7.2(b).

Finally, for 1.8.6 (current "Payments Not From Client"), how about "third party payments," which is how the situation is described in case law and ethics opinions? I realize we've used "payments not from client" to capture the joint client situation (e.g., employer paying for employee and itself), so this is probably a loser, but "third party payments" will make the provision easier to find, especially as we have a cross-reference in 1.7 to this rule for the joint client situation. (see 1.7, cmt. [13]). Moreover, a payment from a joint client is not a "payment not from [a] client". :-)

Just a thought. I wouldn't want us to get sidetracked at the meeting on the titles.

March 22, 2010 Sapiro E-mail to RRC List:

1. In proposed Comment [2] the initial phrase "Paragraph (b)" should be deleted. I would replace it with the phrase "This Rule. . . ."
2. I agree with COPRAC in regard to adding work product to paragraph (b) and with regard to adding to the first sentence of Comment [2] the phrase "and were inadvertently sent to the lawyer."

3. In the first sentence of proposed Comment [2], we use the phrase “and were mistakenly sent or produced” The rule, itself, however, uses the phrase “reasonably apparent that the writing was inadvertently sent.” I would substitute “were inadvertently sent” for the phrase “were mistakenly sent or produced.”

4. That raises the question of why the word “produced” is not in the black letter rule. I prefer that it not be included. If parties are producing large volumes of documents, they can [and often do] protect against inadvertent production by a stipulation that gives the producing party the right to withdraw a document within a finite period of time. I do not think a Rule of Professional Conduct needs to deal with that type of situation.

March 23, 2010 Lampport E-mail to RRC:

1. I continue to believe that Model Rule 4.4(a) should not be adopted. I think the OCBA comment makes a good point in that regard (although it is not reflected on the table). I think we should indicate that we agree with the OCBA comment in the response. I think we should reiterate the reasons why we should not adopt (a) and add what OCBA stated in its comment in response to OCTC's comment.

Having said this, I am intrigued by COPRAC's suggested rewrite of 4.4(a), which melds 6068(f) and the last clause from the Model Rule. If we were to have a rule, I would prefer the COPRAC version to the Model Rule. At least we would be restating a standard that is already in Section 6068, but I would prefer that we not include the clause from the Model Rule that is in the COPRAC proposal. That is if we were to adopt a version of 4.4(a).

Overall, I am persuaded that we do not need 4.4(a). Abusive discovery and litigation tactics are best addressed in the courts. I am not aware of any contention that the State Bar is better equipped to handle these issues than the courts. To the extent that the State Bar Act applies in these types of situations, I do not see why we need to create another scary new standard that opposing litigants can assert before the State Bar instead of in the courts. To the extent that we need to allay a concern that were are sending the wrong message, I think we can explain in our submission to the Court that the Rule is not needed in light of these other provisions. I do not agree that we should be adopting a rule that could produce the mischief this Rule could produce for sake of appearances.

2. I do not think we should adopt Rule 4.4(b). I think the law in this field is still evolving. Mitsubishi is problematic and hard to reconcile with Aerojet General, which the Mitsubishi court cites with approval. In Comment [2] we attempt to address the obviously privileged document that comes from someone other than the holder of the privilege. It is not clear that the older cases on which this Comment is based will remain good law in the future. I am not sure why this needs to be elevated to a disciplinary standard or why we should be fixing the limits of this standard while the law in this field is still emerging.

3. If we are going forward with this Rule, I agree with the COPRAC comment that the Rule should more closely conform to the standard expressed in Mitsubishi. I agree with COPRAC that the text of the Rule should be revised accordingly.

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (3/24/2010)**

4. If we are going forward with this Rule, I agree with Bob that we should use the phrase "sent or produced" in the Rule. I agree with Jerry that we should use the phrase "inadvertently sent or produced" rather than "mistakenly sent or produced" in Comment [2].

March 23, 2010 Sondheim E-mail to RRC:

COPRAC's comments still need a response.