

Marlaud, Angela

RE: Rule 4.4
12/11&12/09 Commission Meeting
Open Session Agenda Item IV.D.

From: Marlaud, Angela
Sent: Monday, November 23, 2009 10:48 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapk@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: Final RRC Agenda Submission - Rule 4.4 - IV.D. - December11-12, 2009 Agenda
Attachments: RRC - 4-4 - Compare - Rule & Comment Explanation - DFT 2.doc; Proposed Rule 4.4 Dashboard.doc

From: Raul Martinez [mailto:MARTINEZ@lbbslaw.com]
Sent: Monday, November 23, 2009 10:47 AM
To: Marlaud, Angela
Cc: Mark Tuft
Subject: Final RRC Agenda Submission - Rule 4.4 - IV.D. - December11-12, 2009 Agenda

Attached is the comparison chart and dashboard re Rule 4.4.

Raul L. Martinez
Lewis Brisbois Bisgaard & Smith
221 N. Figueroa St.
Los Angeles, CA 90012-2601
(213) 250-1800 Phone
(213) 250-7900 Fax
martinez@lbbslaw.com

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

Primary Factors Considered

- Existing California Law
- Rule
- Statute
- Case law
- 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
(14 Members Total)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____
Opposed Rule as Recommended for Adoption _____
Abstain/Not Voting _____

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial – Explanation:

<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"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons</p>	<p 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.¹</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.</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.</p> <p>(b) A lawyer who receives a writing² that obviously appears to be privileged or confidential and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.³</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

¹ The RRC voted to delete paragraph (a) at its 11/6/09 meeting.

² The term "document" was changed to "writing" by the RRC on 11/6/09 to conform to the use of "writing" in other rules and Rule 1.0.1.

³ The language of (b) was revised by the RRC on 11/6/09 to track *Rico v. Mitsubishi* and to limit the obligation to privileged or confidential documents.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons 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] <u>The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.</u> 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>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</p>	<p>[2] Paragraph (b) 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 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. <u>See Rico v. Mitsubishi Motors Corp. (2007) 42 Cal.4th 807, 818.</u> Similarly, this Rule does not</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 deleted to reflect the change from “documents” to “writings” in the Rule.</p>

* Proposed Rule 4.4, Draft 1 (XX/XX/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 Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.4 Respect for Rights of Third Persons Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>wrongfully obtained by the sending person. For 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>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.</p> <p>For 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>[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 <u>A</u> 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>	

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.”