

Proposed Rule 4.4 [N/A] “Respect for Rights of Third Persons”

(Draft #1, 10/28/09)

Summary:

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input 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

Rules

Statute

Case law

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

Other Primary Factor(s)

Stakeholders and Level of Controversy

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

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

<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.</p>	<p>The drafting group is divided on deleting the last clause.</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 <u>privileged or confidential</u> 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>The drafters are divided on whether to limit this paragraph to privileged or confidential documents or whether it should apply to any document that was inadvertently produced. <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807, 818 limited these obligations to privileged documents. <i>Rico</i> also provides guidance to lawyers on the subject by holding that upon receiving documents or material that "obviously appear" to be confidential and privileged (or attorney work product) and which were provided inadvertently, a lawyer should (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged; (2) immediately notify the sender that he or she possesses material that appears to be privileged; and (3) proceed to resolve the situation by agreement with the sender or resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. The ABA Rule does not provide such guidance and only requires notification of the sender.</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>[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. 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>This deletion conforms to the deletion in 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 purposes of this Rule, "document" includes e-mail or</p>	<p>[2] Paragraph (b) recognizes that lawyers sometimes receive <u>privileged or confidential</u> 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. See Rico v. Mitsubishi Motors Corp. (2007)</p>	<p>The drafters disagree on whether the obligation should be limited to privileged or confidential documents. The question is whether the duty should extend to any document that is inadvertently produced. The added language follows <i>Rico</i> and the comment provides further guidance beyond what the ABA rule comment provides. The ABA rule only requires that the sender be notified, and leaves the balance of any duties to substantive law. Hence the reference to <i>Rico</i>.</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</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>other electronic modes of transmission subject to being read or put into readable form.</p>	<p>42 Cal.4th 807, 818 [upon receiving documents or material that obviously appear to be confidential and privileged and which were provided inadvertently, a lawyer should (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged; (2) immediately notify the sender that he or she possesses material that appears to be privileged; and (3) proceed to resolve the situation by agreement with the sender or resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.]</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 Third Persons (Commission's Proposed Rule – Clean Version)

- (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.
- (b) A lawyer who receives a privileged or confidential 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.

COMMENT

- [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.
- [2] Paragraph (b) recognizes that lawyers sometimes receive privileged or confidential 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. See *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818 [upon receiving documents or material that obviously appear to be confidential and privileged and which were provided inadvertently, a lawyer should (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged; (2) immediately notify the sender that he or she possesses material that appears to be privileged; and (3) proceed to resolve the situation by agreement with the sender or resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.]

For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

- [3] 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.

Table of Contents

October 26, 2009 McCurdy E-mail to Drafters (Martinez & Tuft), cc Chair & Staff:.....	1
October 26, 2009 Tuft E-mail to Martinez, cc Chair & Staff:.....	1
October 26, 2009 Martinez E-mail to Tuft, cc Chair & Staff:.....	1
October 27, 2009 Tuft E-mail to Martinez, cc Chair & Staff:.....	1
October 27, 2009 Martinez E-mail to Tuft, cc Chair & Staff:.....	2
October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:.....	2
October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:.....	2
October 28, 2009 Tuft E-mail to Martinez, cc Chair & Staff:.....	2
October 31, 2009 Kehr E-mail to RRC:.....	3
November 1, 2009 Martinez E-mail to Kehr, cc RRC:	4
November 1, 2009 Sapiro E-mail to RRC List:	4
November 2, 2009 Sondheim E-mail to RRC:	5
November 2, 2009 Tuft E-mail to RRC:	5
November 2, 2009 Martinez E-mail to RRC List:	6

October 26, 2009 McCurdy E-mail to Drafters (Martinez & Tuft), cc Chair & Staff:

Rule 4.1 & 4.2 Codrafters:

The first draft of the rule & comment comparison table for these rules is attached. The Model Rule text has been dropped into the left column.

The assignments for the November meeting are due this Wednesday, October 28th.

Attachments:

RRC - 2-100 [4-1] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc

RRC - 2-100 [4-4] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc

October 26, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Raul, I propose we recommend adoption of Model Rule 4.4 without modification. Paragraph (b) is consistent with the Supreme Court's views expressed in *Rico v. Mitsubishi Motors, Inc.* (2007) 42 Cal. 4th 807. Paragraph (a) may be more controversial but it has been applied by some federal district courts in California.

October 26, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Mark, it goes further than Rico because it applies to any document inadvertently sent, whether privileged or not. It also requires a mind reading exercise to determine if the disclosure in fact was inadvertent.

October 27, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Raul, here is a proposed comparison chart for Rule 4.4.

I do not agree that the rule goes farther than current California law. Rico involved a document claimed to be protected as work product and not the attorney client privilege. The Model Rule is narrower than the court of appeals decision in WPS that the Supreme Court cited with approval in Rico. WPS was based on former ABA opinion 92-363 which has been withdrawn. My limited research reveals that only Louisiana limits its version of Rule 4.4(b) to a "writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential. . . ." The rule is intended to apply if the lawyer receives a document the lawyers knows or reasonably should know was sent by mistake, whether the document appear to be privileged. The lawyer's duty under the rule is limited to notifying the sender. The rule is intended to apply, for example, when the lawyer inadvertently receives trade secret and other non privileged information that the lawyer knows is not intended for him.

Attachment:

RRC - 2-100 [4-4] - Compare - Rule & Comment Explanation - DFT2 (10-26-09)MLT.doc

October 27, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Rico is limited to "privileged" documents (which includes work product). The Supreme Court states: "Here we consider what action is required of an attorney who receives privileged documents through inadvertence and whether the remedy of disqualification is appropriate. We conclude that, under the authority of *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644 (*State Fund*), an attorney in these circumstances may not read a document any more closely than is necessary to ascertain that it is privileged. Once it becomes apparent that the content is privileged, counsel must immediately notify opposing counsel and try to resolve the situation."

I am not opposed to including "confidential" documents within the formulation (assuming we can agree on what "confidential" means). But requiring that a lawyer return **any** document that may have been sent inadvertently is absurd. In discovery, lawyers produce tons of documents they probably should not have produced, and it makes no sense to require the receiving lawyer to notify the opponent that certain documents may have been produced "by mistake." The only legitimate interest to be protected relates to privileged or confidential documents, and not just any document.

By the way, the chart you sent is blank. Does that mean you want to approve the ABA rule without modification?

Also, the ABA rule doesn't go far enough and certainly not as far as *Rico* in that it only requires a lawyer to *notify* the sender. The ABA rule doesn't preclude the lawyer from reading it first. Comment [2] also raises questions that *Rico* answers re the duties of the lawyer.

October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Mark, I favor deleting the last clause: "or use methods of obtaining evidence that violate the legal rights of such a person." As is the ABA's insidious custom, they draft the rule too broadly. Sending out a burdensome or objectionable discovery request would fall under the rule since it would violate the discovery rights of a person. And the word "method" is very vague.

October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Mark, for purposes of laying out the issues and disagreements for the Commission and since what you propose is essentially to adopt the ABA Rule wholesale, I suggest we use my chart which is attached.

Attachment:

RRC - 2-100 [4-4] - Compare - Rule & Comment Explanation - DFT2.1 (10-26-09)MLT-RM.doc

October 28, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Raul, your changes and explanation of the differences are very fair and I agree this is in adequate shape to submit by the deadline for consideration by the Commission. Thanks for taking the lead on this.

October 31, 2009 Kehr E-mail to RRC:

Here are my comments on this draft:

1. The first sentence of the paragraph (b) explanation discusses a disagreement among the drafters as to whether to limit paragraph (b) to materials protected by an applicable privilege or the work-product doctrine. If that limit were removed, a lawyer would be subject to discipline for conduct not serious enough to serve as the basis for the lawyer's disqualification. I believe that result would turn things on its head by creating the possibility of discipline for failing to return an inadvertently sent document no matter how insignificant it is. Whether or not one thinks there would be a real risk of discipline for failing to return minor documents, the disciplinary rules are used for leverage in civil matters, and I don't believe either the lawyer or the lawyer's client should be subjected to any civil threat for failing to return something of no significance.
2. The placement of "privileged or confidential" in paragraph (b) seems to put it outside the knowledge limitation. Subject to my next point, my view is that a knowledge limitation should apply both to the inadvertence of production and to the protected nature of the material.
3. The Supreme Court in *Rico* adopted the following standard from *State Fund*: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence," (underlining added) The "reasonably apparent" standard seems to me to be consistent with the MR's "knows or reasonably should know", but I'm not certain this can be said about "obviously appear" or "clearly appear". I request the views of others on this. Thus, while I believe the confidential nature of the material must be subject to some standard – and the current draft has none – I think we should discuss whether "reasonably should know" is a proper translation of "obviously appear".
4. I wonder why the MR uses the word "document", which then requires the definition added at the end of Comment [2]. Wouldn't it be simpler to substitute "writing", which the MR (with our change from "denotes" to "means") defines as: "'Writing" or "written" means a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." I would replace "document" with "writing" everywhere in the Rule and Comment.

Based on all this, and subject to the question raised in the third point, I suggest revising paragraph (b) to say: "A lawyer who receives a writing relating to the representation of the lawyer's client, and who knows or reasonable should know that (i) the writing was inadvertently sent and (ii) is subject to the lawyer-client or other privilege or the work-product doctrine, promptly shall notify the sender."

November 1, 2009 Martinez E-mail to Kehr, cc RRC:

I believe there is an overlap between the scienter element re whether the document was sent inadvertently and the scienter as to whether the document is privileged. If a document is clearly privileged, this detracts from a claim that the document was not sent inadvertently. By the same token, if there are questions as to whether the document is in fact privileged--i.e., if there was a possible or arguable waiver of the privilege or an exception to a privilege--then this would tend to support the conclusion that the document was not sent inadvertently. Therefore, I would not split the rule into two scienter elements. However, the "should reasonably know" standard in the ABA Rule seems lower than the Supreme Court's "obviously appear" or "clearly appear" standard in Rico, but the former refers to the inadvertence part of the rule. I think I would prefer to let Rico and future case law address the issue of scienter regarding knowledge of the privileged status of the document, rather than being too specific in the rule itself.

With respect to the separate definition of "document" in Comment [2], a broader definition includes things like audio and video recordings which may not comport with this particular rule and the need to return the "document" to the sender. Some communications cannot easily be returned to the sender and it may not be feasible to refrain from examining the materials before returning them.

November 1, 2009 Sapiro E-mail to RRC List:

1. I am concerned about the breadth of proposed paragraph (a). When we are advocates for our clients, delay may often benefit our clients. Does this mean that every delaying tactic should be the subject of a State Bar disciplinary complaint? If I move for a continuance of a hearing or a trial, should I be disciplined? I think not. However, there is no modification of the word "delay" in the proposed rule. Similarly, everything we do may impose a "burden" on the third person. The form interrogatories in an employment case are vexatiously broad. Where does reasonable burden end and a disciplinary burden begin? That is not made clear by this rule. This is another example of an ethical precept that does not work as a disciplinary rule. To me, a disciplinary rule should make clear what conduct will or will not be a violation. This proposal does not and can be a cause of selective enforcement.
2. Regarding paragraph (b), I am concerned that the *mens rea* element is not broad enough. To me, a lawyer should not be subject to a duty to notify the sender unless the recipient knows both that the document is privileged or confidential and that it was delivered inadvertently. In addition, the requirement of "prompt" notice to the sender may be impossible in many circumstances. If a confidential document has been delivered as part of document production or in response to a Freedom of Information Act request, the recipient should be entitled to assume that it was produced on purpose. The burden should be on the party that produced it to prove that the production was accidental and not on the recipient to decide whether the production was accidental and notify the sender.
3. Absent other facts, if a lawyer receives in document production a copy of a "smoking gun" that might otherwise have been privileged, he or she should not have a duty to act under this rule. On the other hand, if a lawyer receives from an opponent a copy of an email addressed to the opponent's client, and the lawyer knows the copy was accidentally sent, notice to the opponent should be required. Triggering the duty when the opponent can argue that the recipient "should have known" I did not intend to send it creates too much opportunity for

mischief. That approach requires the recipient to guess the mental state of the sender at the recipient's peril.

4. Having a rule that the recipient "promptly" notify the sender is also an invitation to needless complaints to OCTC. A lawyer may receive a document and not realize until later that it was accidentally sent. That should not be a trigger for discipline. For example, if I receive an email today, glance at it, and do not realize its significance until tomorrow, or until next month, when I have time to think about it, am I to be disciplined? And if the inadvertently produced document is part of a substantial document production, is the recipient to be disciplined for not "promptly" notifying the sender? What is wrong with waiting to notify the sender after reviewing the entire production of documents in context?

5. In short, paragraph (b) is oversimplified, assumes facts that rarely occur, and would unjustly be applied in too many situations. If the rule tracked the elements of *Rico v. Mitsubishi* or of *State Fund*, I would find it more acceptable.

6. And what if the item received is not a "document" but is a writing as defined by the Evidence Code? Is it exempt from this rule?

7. This rule should not be recommended for adoption at this time. Instead, we need to take our time to work out the nuances of it and recommend a rule that is practical and correct.

November 2, 2009 Sondheim E-mail to RRC:

1. We will first consider paragraph (a) regarding whether the last clause should be deleted and then consider Jerry's concerns regarding this paragraph.

2. We will then consider Bob's redraft of paragraph (b), in light of Raul's and Jerry's concerns subject to a separate consideration of:

(a). The word "writing."

(b) Whether "reasonably should know" is a proper translation of "obviously appear."

(c) The use of the word "promptly."

November 2, 2009 Tuft E-mail to RRC:

I would like to explain my disagreement with deleting the last clause in Rule 4.4(a). But first, in response to Jerry's concern, the first part of the rule is limited to abusive conduct that has no "substantial purpose other than" to embarrass, delay or burden another person. It does not apply to delay for which there is a legitimate purpose. In that sense, it is not significantly different from Bus. & Prof. Code section 6128(b) that makes it a misdemeanor for a lawyer to willfully delay his client's suit with a view to his own gain.

The last clause is different and is intended to protect against procuring evidence that violates the legal rights of others, such as obtaining an incriminating declaration from a criminal defendant (e.g, *In re Dale*) or a witness's medical records or documents from a third person who is under a duty to protect them under a confidentiality agreement or court order. It includes

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (11/3/2009)**

but is not limited to evidence that is subject to a privilege. The misconduct prohibited by the last clause of the rule is consistent with Bus. & Prof. Code sections (c) (f) and (g). We would be sending the wrong message if we recommend adoption of paragraph (a) without the last clause.

I hesitate to point out that Florida's 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. I am not in favor of adding an additional scienter requirement, but point this out to assuage those who believe the rule unfairly deflates legitimate advocacy.

November 2, 2009 Martinez E-mail to RRC List:

Let me explain my position on deleting the last clause in paragraph (a). First, this clause is too broad and chills legitimate advocacy. Sending out a burdensome or objectionable discovery request would fall under the rule since it would violate the "legal rights" of a person. Aggressive questioning of a third-party witness at a deposition could be construed to violate the rule. The word "method" is very vague. More importantly, the rule is not limited to improper methods of obtaining evidence--it covers any method that violates a persons rights. Any rule in this area should catalog which methods are prohibited, and not just refer to any method that violates a person's rights (whatever those might be).

Second, the fact that Mark has to explain what the rule means proves the point. If the rule was sufficiently clear and straightforward for an ordinary lawyer to understand, an explanation from an expert on ethics would not be necessary. Sure, we can all come up with examples where a particular rule would apply to prohibit conduct we think is reprehensible. But this is not a sufficient reason to adopt a rule that is vague and overly broad. The fishing net may work great at catching fish, but why adopt a rule that also catches a lot of innocent dolphins and seals. (That's the superficial attraction of a vague rule.) If we have concerns about particular methods of obtaining evidence, then the rule should address those methods, and not draft a "catch-all" rule that potentially reaches innocent conduct and fails to give fair warning of the conduct that is prohibited.