

Rule 4.4 Respect for Rights of Third Persons [Sorted by Commenter]						TOTAL = <u>5</u> Agree = <u>1</u> Disagree = <u>2</u> Modify = <u>2</u> NI = <u> </u>
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	COPRAC	A	Yes		Support as drafted.	No response required. [Alternative Response by Mark Tuft] The Commission agrees with OCTC and the law professors group that the rule should include a version of paragraph (a) that substantially tracks the Model Rule.
1	Law Practice Management & Technology Section, State Bar	D	Yes		<p>LPMT's comment on Proposed Rule 4.4 concerns what was originally paragraph (b) but now constitutes the entire rule. We recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.</p> <p>ABA Model Rule 4.4(b) is as Unsusceptible as 4.4(a) to Migration to the California RPC Rule 4.4 of the ABA Model Rules of Professional Conduct (MPRC) – from which Proposed Rule 4.4 is drawn – has always been a bit odd. With the title “Respect for Rights of Third Persons”, MPRC 4.4 paragraph (b) would appear tacked on for lack of a better home. Paragraph (a) is the only part that refers to third persons.</p> <p>The Commission has correctly decided not to keep paragraph (a). It should do the</p>	The Commission disagrees with the commenter's recommendation to remove the rule. The Commission agrees with COPRAC and the San Diego Bar Ethics Committee that the proposed rule is appropriate as a rule of professional conduct. The rule is positioned to track the location of the Model Rule counterpart for ease of comparison. The title accurately reflects the rule's subject matter. The rule is not inconsistent with existing decisional or statutory law, including the EDA and the commenter does not point out any inconsistency. The Supreme Court has confirmed that it is professional duty of lawyers to notify the sender of obvious privileged information that has clearly been sent inadvertently. Most other jurisdictions agree. The Commission disagrees that the rule would any more deter development of the law regarding meta data or other aspects of technology than Model Rule 4.4(b)

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					<p>same for paragraph (b). We assume the Commission considered 4.4 because it was already part of the MRPC.</p> <p>Once the Commission decided to consider and revise rules of the MPRC for application to California, Rule 4.4 came up for review. Otherwise we doubt that the Commission would find a need for what has become Proposed Rule 4.4. It has no precedent in the CRPC, and its significance relates primarily to discovery, a topic generally omitted from the CRPC and the current proposed rule revisions.</p> <p>Even those in favor of MRPC 4.4(b) [now the entire Proposed Rule 4.4], recognized the anomaly. See, e.g., Orange County Bar Association, Comments at Rule 4.4 Discussion Draft (April 24, 2010) at 24 (“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.”). Indeed, the Commission decided to split off MRPC 4.4(b), keeping only it, and the narrowing it further.</p>	

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					<p>Although the latest version bears the date of April 24, 2010, the Commission's decision to include MRPC 4.4(b) [in the Public Comment version] presumably occurred before the enactment of the Electronic Discovery Act ("EDA") (signed by the Governor on June 29, 2009) regarding electronic discovery.</p> <p>In any event, it appears unlikely the Commission took the EDA into account because it does not cite the EDA in its listing of Existing California Law section 2031.285 of the California Code of Civil Procedure ("C.C.P."), which regulates inadvertently produced electronically stored information ("ESI") in discovery.</p> <p>In addition, it appears unlikely the Commission took into account the Judicial Council's subsequent related amendments to California Rules of Court, Rule 3.724. Duty to meet and confer.</p> <p>We should hesitate to select from the many California Supreme Court and Court of Appeal decisions regarding what parties and their attorneys must do and create a disciplinary rule where none existed before. In support of Proposed Rule 4.4, the</p>	

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					<p>Commission cites <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]. <i>Rico</i> provides a California rationale for Rule 4.4(b), but it is doubtful that proposed rule 4.4(a) would have made it onto the Commission's plate if there had been no MRPC on the subject. Existing law already gives lawyers the same guidance, if not more.</p> <p>Where a statute and a rule of court address a lawyer's conduct in a particular circumstance, we believe the State Bar need not add a separate injunction. Among other reasons, the judicial interpretation of the concepts underlying a particular statute and a rule of court should retain primacy, especially where the application of a disciplinary rule by the State Bar may in time diverge from such judicial interpretation.</p> <p>A particular feature of American jurisprudence is that courts do not give advisory opinions. Rather American case law develops in response to disputes regarding the application of law to specific facts. Even when a senior appellate body, such as the California makes a broad pronouncement, it is left to the lower court to develop the contours of the law as applied, the nuances, and, for example here,</p>	

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					<p>such terms as “obviously appears”, “reasonably apparent”, and, particularly, “inadvertently.”</p> <p>It is misguided to focus on the recipient-attorney instead of the producing/sending attorney.</p> <p>Upon reviewing the rule, LPMT Executive Committee members reacted first – when noticing the title of <i>Duties Concerning Inadvertently Transmitted Writings</i> – that the emphasis in any rules governing a lawyer’s conduct regarding transmitted writings should be on the duties of the sending or producing lawyer. That is not to say the Commission need add more to rule 4.4 – after all, California Business and Professions Code §6068(e)(1) already deals with a lawyer’s disclosure of her or his client’s confidential information.</p> <p>In addition the law and practice regarding the inadvertent sending and producing of confidential information is evolving. Rather, the proposed discipline by the State Bar of the receiving attorney for a lack of action is inapt. The State Bar should save its powder and devote its resources to helping lawyers develop procedures to reduce the risk of</p>	

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					<p>inadvertently sending a client's confidential information to another.</p> <p>As the Commission has stressed, "the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy . . . when the law provides other . . . remedies." Proposed Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation, Explanation of Changes to the California Rule 2-400, at 7.</p> <p>Inadvertent disclosure is a nuanced area, due to differences between litigation-related and transactional exchanges of information.</p> <p>As with the two salient California Supreme Court cases on the issue of inadvertent disclosure, the issue usually arises in the context of litigation. Indeed, the Commission recognizes as much when it inserts "or produced" into the equivalent text of the MRPC: "where it is reasonably apparent that the writing was inadvertently sent <i>or produced</i>, [the receiving lawyer] shall promptly notify the sender."</p>	

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					<p>The <i>Rico</i> court's agreement with <i>amicus curiae</i> The Product Liability Advisory Council, Inc. refers to the burden's of responding to "a request for mass production." <i>Rico</i> at *5. Hence, the tribunal before which an instance of inadvertent disclosure arises has sufficient authority to sanction attorneys – including referral to the State Bar – if warranted.</p> <p>Metadata's complexity and still-developing ethical principles warrant that the Commission decline to adopt Proposed Rule 4.4.</p> <p>LPMT has a further concern, particularly as the use of technology by lawyers is right in LPMT's wheelhouse. Complex issues regarding the receipt of confidential material lie just under the surface of what appears to be a straightforward rule. An important example is that of the propriety of a receiving lawyer's accessing or viewing metadata in the received item.</p> <p>Metadata is the hidden or embedded data in writing in an electronic medium. For such a writing, The Electronic Discovery Act uses the term "electronically stored information" (ESI). "Electronically stored information' means information that is stored in an electronic</p>	

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					<p>medium.” C.C.P. § 2016.020(e).⁴ Examples of metadata include the “properties” in a Microsoft Word file (document), for example, when it was created and last modified. Formulas and comments in a spreadsheet, usually not visible in a printed copy, provide another example.</p> <p>An attorney may be unaware, however, of metadata’s presence or significance because:</p> <ul style="list-style-type: none"> • Metadata is often hidden. • Metadata is often created automatically by the user’s computer. • As a piece of computer mumbo-jumbo, attorneys may be unaware of what metadata is or that it even exists. • Even those attorneys who know about metadata may be unaware of its special characteristics or what special care must be taken regarding it. • Metadata may be revealed by certain applications’ features such as MS Word’s Track Changes, of which many people are unaware. <p>(See full text of comment for more examples)</p>	

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					<p>Regarding metadata received from opposing counsel, even outside the context of litigation, several state ethics opinions prohibit the receiving party's viewing of any metadata. This prohibition may even apply to metadata that ordinarily would not be considered confidential – for example, the “full header” (a.k.a. “Internet header”⁶) of a non-confidential email.</p> <p>Many states' ethics opinions decry such viewing of received metadata as unethical and worse.⁸ The heart of the matter is that such state ethics opinions presume that metadata is <i>per se</i> confidential to its author. Thus, even if the on its face the document is not confidential, these ethics opinions presume that the associated metadata is.</p> <p>There is a broad debate among attorneys who focus on technology and rules of professional conduct regarding those states' ethics opinions. Many criticize them as not comprehending the nuances of metadata. It should be noted that several jurisdictions have not adopted – or have specifically rejected – the proscriptions describe above. [See infra LPMT's comments on Proposed Rule 8.5 regarding the difficulties that would</p>	

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					<p>arise if a rule such as Proposed Rule 4.4 were part of the CRPC's extraterritorial scope.]</p> <p>California should follow the law as it evolves and not begin to discipline lawyers as prescribed by Proposed Rule 4.4. The rule is unnecessary in light of existing statute and case law. In addition, it is premature and likely unwise considering the many related but unacknowledged issues re e-discovery, including the appropriateness of accessing metadata in a document received from another party or its attorney.</p> <p>For the foregoing reasons, we recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.</p>	
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>OCTC is concerned that this Proposed Rule deviates substantially from the ABA Rule by eliminating the ABA's subparagraph (a), which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted that they are concerned regarding the vagueness and over breadth of such terms as embarrass, delay, or burden a third person in the ABA rule and the resulting</p>	<p>[Response proposed by Mark Tuft] The Commission agrees with OCTC and has changed the rule to include a version of paragraph (a) which substantially tracks Model Rule 4.4(a). While the Commission does not agree with all of the reasons expressed by the commenter in recommending that paragraph (a) be included in the rule, the Commission agrees that eliminating paragraph (a) entirely would single to lawyers practicing in California that there is no duty to respect the rights of thirds persons and having no provision would be inconsistent with existing case law and the State Bar</p>

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					<p>chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and when balanced against the need to prevent litigation abuse, OCTC believes the ABA has it correct.</p> <p>Further, the State Bar Act already prohibits counseling or maintaining actions, proceedings, or defenses only as appear to him or her legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct already prohibit 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 F2d 1190, 1197.)</p> <p>In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear</p>	<p>Act. The Commission also notes that a portion of paragraph (a) already appears in Rule 4.3(b).</p> <p>[Response proposed by Raul Martinez]</p> <p>It is difficult to imagine a more vague and overly broad rule. Rule 4.4(a) will have the undesired result of chilling legitimate advocacy. Prohibiting the "use of methods of obtaining evidence that violate the legal rights of a person" potentially encompasses routine civil discovery requests. Sending out a burdensome or objectionable discovery request would fall under the Rule since it would violate the "legal rights" of a person, a term which is left undefined in the Rule. Additionally, aggressive questioning of a witness at a deposition could be construed to violate the rule as it could be seen as embarrassing or harassing. The word "method" is also vague and undefined. While discovery codes are careful to define the methods of prohibited discovery, this rule provides absolutely no guidance.</p> <p>The first phrase of the rule, which refers to "means" that have no substantial purpose other than to "embarrass, harass or maliciously injure a third person," also fails to provide any proper line of demarcation between aggressive, yet permissible</p>

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					<p>misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive personality." While some of this misconduct can be handled under other rules, not all of it can or should be and this would give better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that 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 are consistent with the California Supreme Court's decision in <i>Rico v. Mitsubishi</i>. We find either acceptable.</p>	<p>litigation tactics, and those that supposedly cross the line. Conduct which may be perceived by one person to be embarrassing or harassing, may not be perceived in the same manner by another person.</p> <p>The Rule thus contains absolutely no objective standard to guide enforcement. A vague rule is, by definition, a rule with respect to which persons of common intelligence must necessarily guess as to its meaning and differ as to its application. See, e.g., <i>U.S. v. Wunsch</i> (9th Cir. 1996) 84 F.3d 1110, 1119 [because the term "'offensive personality' could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute."]</p> <p>No response is necessary.</p> <p>The Commission disagrees and believes the comments provide useful guidance in apply the rule.</p> <p>Although there could be two comments instead of</p>
				Comments [1] and [3]	Comments [1] and [3] seem more appropriate for a treatise, law review article, or ethics opinion.	
				Comment	Comment [2] is too long and covers at least	

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				[2]	two distinct concepts. It could be two Comments.	one, the Commission is sensitive to OCTC's concern that the proposed rules have too many comments.
5	San Diego County Bar Legal Ethics Committee ("SDCBA")	D	Yes	(b)	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.	No response necessary.
3	Zitrin, Richard (law professors group)	M	Yes	(a)	<p>The Commission is concerned that such a rule might have "a chilling effect on legitimate advocacy."</p> <p>However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply <u>prevent</u> actions that embarrass, delay and burden. Rather it limits a lawyer where s/he uses "means that have <u>no substantial purpose</u> other than" these impermissible goals. Emphasis added.</p>	[Proposed Response by Mark Tuft] The Commission agrees with the Commenters' and has modified Rule 4.4 by adding paragraph (a) that substantially tracks Model Rule paragraph (a).

637000.1

June 9, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsisizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.0 (Agenda Item III.A)
- 3.3 (Agenda Item III.MM)
- 4.3 (Agenda Item III.WW)
- 5.1 (Agenda Item III.ZZ)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf
- RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

- 1.1 = VAPNEK (Peck, Ruvolo)
- 1.5 = VAPNEK (Ruvolo)
- 1.16 = KEHR (Foy, Melchior)
- 5.1 = TUFT (Martinez, Peck)

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (6/21/2010)**

4.4 = MARTINEZ/TUFT
7.3 = MOHR (Julien, Ruvolo)
8.3 = KEHR (Peck, Tuft, Vapnek)
8.4.1 = PECK (Martinez)
8.5 = MELCHIOR (Lampert, Peck)

Attached:

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

June 16, 2010 McCurdy E-mail to Martinez, cc Chair, Vice-Chairs & Staff:

Raul,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentstrrc/byrule>).

4.1 (Agenda Item III.UU) - Co-Lead with/Tuft – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

4.2 (Agenda Item III.VV) 4 Comments: **San Bernardino County Public Defender, Oliver & Dalton (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

MR 4.4(a) (Agenda Item III.XX – NRFA) 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

4.4 (Agenda Item III.YY) – OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 2-100 [4-2] - 06-15-10 Dalton Letter to RRC.pdf
RRC - 2-100 [4-2] - 06-14-10 Oliver Letter to RRC.pdf
RRC - 2-100 [4-2] - 06-15-10 San Bernardino PD [Boxer] Letter to RRC.pdf

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<http://sites.google.com/site/commentsrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK)- OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 5.1 (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 5.2 (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 5.3 (Agenda Item III.BBB) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

June 16, 2010 Tuft E-mail to McCurdy, cc Martinez, Chair, Vice-Chairs & Staff:

As a co-drafter of this rule, I agree with the comments of the 29 California ethics law professors who strongly recommend implementation of Model Rule 4.4(a) and move that we reconsider our decision not to recommend this provision of the rule.

June 18, 2010 Tuft E-mail to Martinez, cc Difuntorum, McCurdy, Sondheim & KEM:

What about the 5th amendment that applies to appointed counsel in Immigration and parental rights cases? Do we want to "flag" that as well? Each time we come up with a creative comment for one class of lawyers there are invariably unintended consequences. There is legal support for prosecutors which the ABA and most jurisdictions recognize in applying 4.2. I am not aware of any precedent for what you propose and I don't believe we should be making one up.

June 21, 2010 McCurdy E-mail to Martinez, cc Drafters, Chair & Staff:

Raul,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - XDF (06-21-10).doc
RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

June 21, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (6/21/2010)**

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc
RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

June 22, 2010 Tuft E-mail to RRC List:

I submit a revised version of the Commenters chart to reflect my proposed responses to the recently received comments by LPMT, OCTC and the Law Professors Group. It will come as no surprise that I agree with OCTC and the Law Professors Group that the complete elimination of paragraph (a) is inconsistent with existing California law and bad policy. I believe the absence of any version of the rule will signal that lawyers practicing in California will have no obligation to respect the rights of third persons in obtaining evidence. If the majority is not swayed by these comments, someone else can write a response that explains why we prefer to not have this rule.

My propose response says that we would include a version of Model Rule 4.4(a). I understand the concern express by some that the wording of Model Rule 4.4(a) is too broad. However, OCTC is correct that California has law that is scattered in different places that reflects most of the concepts in paragraph (a) We also have moved a portion of what should be in paragraph (a) to Rule 4.3(b), which is be difficult for comparison purposes. The Law Professors Group is correct that has been no showing that the rule adopted in most states has "chilled" legitimate advocacy.

I recommend the following version of paragraph (a) which addresses some of the concerns raised by those who voted to eliminate paragraph (a) altogether:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, harass or maliciously injure a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

**RRC – Rule 4.4 [MR 4.4]
E-mails, etc., -- Revised (6/21/2010)**

I believe this narrower rule is consistent with current rule 3-200 and Business and Professions Code sections 6068(f) and (g) and should be included in the rules. I have added the qualifier "knowingly in the second part of the rule to make is clearer that the lawyer is purposefully using methods to obtain evidence that will violate a person's legal rights. Florida employs "knowingly" in its version of paragraph (a).

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-MLT.doc

June 22, 2010 Martinez E-mail to RRC List:

I have added a response to Mark's objection to not adopting 4.4(a) which is set forth in the attached amended commenter chart.

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-MLT-RM.doc

June 22, 2010 KEM E-mail to McCurdy, cc Difuntorum:

I've attached the following files, which are the files Raul sent earlier, reformatted:

RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)RM.doc

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-MLT-RM.doc

That's it for now on public comment charts. I'll start sending the e-mail compilations presently.

June 22, 2010 Martinez E-mail to McCurdy, cc Chair, Vice-Chairs & Staff:

Here is the commenter chart on 4.4a. (I did not realize we had two charts on 4.4.)

Attached:

RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-RM.doc

Rule 4.4: Duties Concerning Inadvertently Transmitted Writings

(Commission's Proposed Rule – Clean Version)

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

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 inadvertently 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 [68 Cal.Rptr.3d 758]. 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.
- [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