

# Proposed Rule 4.4 [n/a]

## “Duties Concerning Inadvertently Transmitted Writings”

(Draft #5, 04/21/10)

**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 checked="" 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

Rule 3-200.

Statute

Bus. & Prof. Code §§ 6128(b); 6068(f).

Case law

*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]

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

- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 8

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar

Approved by Consensus

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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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 Commission members and other 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

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 4.4\* Duties Concerning Inadvertently Transmitted Writings

April 2010

(Draft rule following consideration of 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 Model Rule 4.4(a) 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 Model Rule 4.4(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. Because it has recommended that Model Rule 4.4(a) not be adopted, the Commission has recommended changing the title of the Rule to more accurately describe its scope.

*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.

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\* Proposed Rule 4.4, Draft 5 (04-21-10).

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 4.4 Respect for Rights of Third Persons</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 4.4 <del>Respect for Rights of Third Persons</del> <u>Duties Concerning Inadvertently Transmitted Writings</u></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><del>(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.</del></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. &amp; Prof. Code § 6128(b). In addition, the rule title has been revised to conform to the limited scope of the Commission's proposed rule which does not include a counterpart to paragraph (a) of the Model Rule.</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><del>(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or where it is reasonably should know</del> <u>apparent</u> that the <del>document</del> <u>writing</u> was inadvertently sent <u>or produced</u>, shall promptly notify the sender.</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 subject to the work product doctrine, or are 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 5 (4/21/10). Redline/strikeout showing changes to the ABA Model Rule

<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 Comment</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u></p> <p style="text-align: center;">Rule 4.4 <del>Respect for Rights of Third Persons</del> <u>Duties Concerning Inadvertently Transmitted</u> <u>Writings</u> Comment</p>	<p style="text-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><del>[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.</del></p>	<p>Comment [1] is deleted to conform to the deletion of paragraph (a).</p>
	<p><u>[1] The purpose of this Rule is to prevent unwarranted intrusions into privileged or confidential relationships.</u></p>	<p>This Comment clarifies the limited purpose of the Commission's proposed Rule, which does not include a counterpart to paragraph (a) of the Model Rule.</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</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 <u>where it is</u> reasonably <del>should know</del><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</p>	<p>Comment [2] is based on Model Rule 4.4, cmt. [2], but has been revised to conform to the Rule's application only to writings which obviously appear to be privileged or confidential. See Explanation of Rule. The last sentence is deleted as unnecessary given the Commission's use of the defined term "writings," which encompasses documents such as emails. See proposed Rule 1.0.1(n).</p>

<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 Comment</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 4.4 <del>Respect for Rights of Third Persons</del> <u>Duties Concerning Inadvertently Transmitted</u> <u>Writings</u> Comment</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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 other electronic modes of transmission subject to being read or put into readable form.</p>	<p>beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. <a href="#">See <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807, 818 [68 Cal.Rptr.3d 758].</a> 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. <del>For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.</del></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] <del>Some lawyers</del> <a href="#">A lawyer</a> 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>The substitution of "[a] lawyer" for "[s]ome lawyers" conforms to the stylistic preference for drafting in the singular under the Bryan A. Garner Style Manual (see General Convention 2.1).</p>

## Rule 4.4: ~~Respect for Rights of Third Persons~~ Duties Concerning Inadvertently Transmitted Writings

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

A lawyer who receives a writing that obviously appears to be privileged or confidential ~~and knows~~ 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.

[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.

### 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~~ 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. ~~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.~~

## 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

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	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.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	M		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. 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 with which he or she is charged, and shall</p>	The Commission is not recommending adoption of paragraph (a) because of 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). The Commission also agrees with the OCBA comment (see below) indicating that the adoption of paragraph (a) would improperly encourage litigants to bring discovery disputes out of the courtroom and into the State Bar disciplinary system. While COPRAC's suggested edits to paragraph (a) might be an improvement over the Model Rule approach, the Commission believes that repeating the substance of Bus. & Prof. Code § 6068(f) is unnecessary.

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				4.4(b)	<p>not use methods of obtaining evidence that violate the legal rights of a party or witness.</p> <p>2. 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>3. 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.</p>	<p>No response necessary.</p> <p>The Commission agrees and added a reference to the writings protected by the work product doctrine.</p>

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>4. 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.”</p> <p>5. 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</p>	<p>In response to this concern, the Commission substituted the phrase “sent or produced” for the word “sent” in the rule itself.</p> <p>The Commission does not believe that the use of the term “confidential” is confusing in the context of this proposed rule. The term “confidential” is used to be consistent with the policy of, and language used in, <i>Rico v. Mitsubishi Motors Corp.</i> (2007) 42 Cal.4th 807.</p>

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					“privilege.” If this is not clarified, we are concerned that the use of the term “confidential” will be misunderstood.	
3	Office of the Chief Trial Counsel (“OCTC”)	M		4.4(a)	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. 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> (9 <sup>th</sup> Cir. 1981) 638 F.2d 1190, 1197.) OCTC believes	The Commission is not recommending adoption of paragraph (a) because of 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). The Commission also agrees with the OCBA comment (see below) indicating that the adoption of paragraph (a) would improperly encourage litigants to bring discovery disputes out of the courtroom and into the State Bar disciplinary system.

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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>	The Commission disagrees that Comments [1] and [3] are not necessary. The Comments provide useful guidance on the purpose and application of the rule.
4	Orange County Bar Association ("OCBA")	A		4.4(a)	OCBA agrees with the Commission's proposal to delete the language in Model Rule 4.4(a). 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 Commission agrees and believes that OCBA's reasoning lends further support for the Commission's recommendation that paragraph (a) should not be adopted.
				4.4(b)	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	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.

**Rule 4.4 Duties Concerning Inadvertently Transmitted Writings  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 3**  
**Disagree = 0**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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.	
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.
6	Santa Clara County Bar Association	A			No comment.	No response required.

## Rule 4.4: Respect for Rights of 3<sup>rd</sup> Persons

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Alabama:** Effective June 23, 2008, Alabama Rule 4.4(b) to be subject to the attorney-client privilege or otherwise confidential, and who knows or reasonably should provides:

(b) A lawyer who receives a document that on its face appears know that the document was inadvertently sent, should promptly notify the sender and

(1) abide by the reasonable instructions of the sender regarding the disposition of the document; or

(2) submit the issue to an appropriate tribunal for a determination of the disposition of the document.

**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).

**Kentucky:** In the rules effective July 15, 2009, Kentucky Rule 4.4(b) provides as follows:

(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:

- (1) refrain from reading the document,
- (2) promptly notify the sender, and
- (3) abide by the instructions of the sender regarding its disposition.

**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:** In the rules effective April 1, 2009, Rule 4.4(a) substitutes "embarrass or harm" for "embarrass, delay, or burden" a third person. Rule 4.4(b) is the same as the Model Rule.

**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.”