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August 28, 2018

Larry Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2017-29: Proposed Amendment to Rule 4.4 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

The State Bar of Michigan (SBM) thanks the Court for publishing for comment the proposed amendments to Rule 4.4 of the Michigan Rules of Professional Conduct (MRPC). SBM proposed these amendments to clarify attorneys' ethical duties when they receive inadvertently disclosed privileged or confidential documents.[1] Advancements in technology and the proliferation of discoverable electronic evidence have increased the risk of accidental disclosures. The proposed amendment provides attorneys greater guidance on what they must do when they receive an inadvertently disclosed document.

While Rule 2.302(B)(7) of the Michigan Court Rules (MCR) provides attorneys guidance on how to deal with inadvertently disclosed documents in the context of civil litigation, the MRPC is silent on this issue. Instead, courts addressing this issue[2] have relied on ABA Formal Opinion 92-368.[3]

The proposed amendments to MRPC 4.4 differ from MCR 2.302(B)(7) in important ways. MCR 2.302(B)(7) focuses on what the sender may do if he or she discovers that privileged or trial preparation materials have been inadvertently produced. MCR 2.302(B)(7) leaves unanswered the question of what recipients must do when they discover that privileged or confidential information has been produced but they have not been notified by the sending party. The proposed amendments to MRPC 4.4 would clarify the receiving party's ethical duties in such cases.

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[1] This rule amendment was proposed by the Professional Ethics Committee, supported by the SBM Board of Commissioners, and approved with overwhelming support (79-12) by the Representative Assembly.
[2] See, e.g., *Holland v Gordy*, No. 231183, 2003 WL 1985800 (Mich App 2003) (relying on ABA Formal Opinion 92-368, rather than the MRPC, to hold that plaintiff had an ethical duty to notify defendants of inadvertently disclosed documents); *Resolution Trust Corp v First of America Bank*, 868 F Supp 217, 220-221 (WD Mich 1994) (same).
[3] ABA Formal Opinion 92-368 provides that "[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer if the sending lawyer remains ignorant of the problem[,] and abide [by] the sending lawyer's direction as to how to treat the disposition of the confidential materials."

In addition, the scope of MRPC 4.4 is broader than MCR 2.302(B)(7); the former applies to situations beyond discovery in civil litigation. For example, MRPC 4.4(b) applies to non-litigated matters and district court matters in which discovery is not allowed. In addition, MRPC 4.4(b) covers a broader range of materials – privileged or confidential information – whereas MCR 2.302(B)(7) is limited to privileged and trial preparation materials.

The staff comment to the administrative order questions whether the final paragraph of the comments to proposed MRPC 4.4 conflicts with MCR 2.302(B)(7). SBM does not believe any conflict exists. Rule 4.4 sets forth the baseline ethical duties an attorney must follow if he or she receives inadvertently disclosed privileged or confidential information. To the extent that other rules or laws impose additional requirements, the comments to the proposed rule make clear that the attorney must abide by those requirements. The comment expressly states that if other laws require the lawyer to do something with the inadvertently disclosed document or information, the attorney must follow those requirements:

> Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived.

In addition, an attorney's professional judgment in dealing with an inadvertently disclosed document only comes into play when other laws do not require action by the attorney:

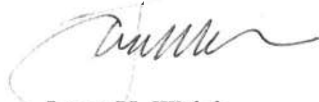
> Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer.

Because MCR 2.302(B)(7) requires an attorney to return, sequester, or destroy inadvertently disclosed documents after receiving notice by the sending party, the attorney would not have discretion under MRPC 4.4 to exercise his or her professional judgment.

For these reasons, SBM does not believe that the proposed amendments to MRPC 4.4 conflict with the requirements set forth in MCR 2.307(B)(7).

We thank the Court for the opportunity to comment on the rule proposal.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President, State Bar of Michigan