

**PROPOSED AMENDMENT OF RULE 4.4 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT**

**Issue**

Should the State Bar of Michigan support an amendment of Rule 4.4 of the Michigan Rules of Professional Conduct (MRPC) to add subsection (b) of the ABA Model Rules and the associated commentary?

RESOLVED, that the Representative Assembly approves of the proposed amendment to MRPC 4.4 to add subsection (b) of the ABA Model Rules.

**Rule 4.4 – Respect for Rights of Third Persons**

(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.

**(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information 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 legal restrictions on methods of obtaining evidence from third persons **and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.**

**[2]Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information 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 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. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving**

**lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.**

~~f3~~Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. 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. See Rules 1.2 and 1.4.

**Synopsis**

The current version of MRPC 4.4 is silent on what affirmative steps are necessary in the event of inadvertent receipt of protected documents. Given advances in technology and the concurrent growth of discoverable evidence, there is an increased risk of accidental disclosure. The proposed rule amendment addresses this issue by adding paragraph 4.4(b).

**Background**

In keeping with its jurisdictional mandate, the Professional Ethics Committee reviewed amendments to the ABA Model Rules of Professional Conduct and identified ABA Model Rule 4.4, subsection (b) as providing ethics guidance when a lawyer inadvertently receives protected documents. The current version of MRPC 4.4 is silent on this issue. To provide greater guidance to SBM members on this issue, the Professional Ethics Committee recommended amending MRPC 4.4 and its comments as presented above. The Professional Ethics Committee's recommendation was reviewed and embraced by the Professional Standards Committee of the Board of Commissioners. During its July 22, 2016 meeting, the Board of Commissioners referred the proposed amendment of MRPC 4.4 to the Representative Assembly for review.

*Holland v Gordy*<sup>1</sup> illustrates the need for Rule 4.4(b). In *Holland* the defendants inadvertently produced confidential records during a discovery production. The plaintiffs copied the records in question and did not notify the defendants of the error. The Michigan Court of Appeals affirmed the trial court's decision that the plaintiffs had an obligation not to review the records upon discovering that the documents were privileged and/or confidential and to further notify the defendants of the disclosure. The plaintiffs in *Holland* argued that MRPC did not require disclosure to opposing counsel of inadvertently disclosed records. Both the trial court and the Court of Appeals relied upon ABA Formal Opinion 92-368,<sup>2</sup> which requires opposing counsel to be notified of inadvertent disclosures of confidential information. Formal Opinion 92-368 interpreted prior ABA Model Rule 4.4, which at that time did not include 4.4(b). Neither court found the MRPC on point for the instant dispute. A federal district court reached the same conclusion in *Resolution Trust Corp v First of America Bank*.<sup>3</sup>

<sup>1</sup> 2003 WL 1985800 (Mich App 2003).

<sup>2</sup> The opinion provides in relevant part: "[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 the sending lawyer's direction as to how to treat the disposition of the confidential materials."

<sup>3</sup> 868 F Supp 217 (WD Mich 1994).

The addition of subsection (b) to Rule 4.4 would provide necessary guidance to practitioners in an age of exponentially increasing volume of documents and electronically-stored information in discovery. While ABA Formal Opinion 92-368 arguably provides guidance in interpreting current MRPC 4.4, most practitioners are unlikely to be aware of it, let alone how it applies by virtue of its interpretation of the prior ABA Model Rule that did not include subsection (b). Subsection (b) was added to the ABA Model Rule in 2002.

**Opposition**

None known.

**Prior Action by Representative Assembly**

None known.

**Fiscal and Staffing Impact on State Bar of Michigan**

None.

**STATE BAR OF MICHIGAN POSITION**

**By vote of the Representative Assembly on September 22, 2016.**

Should the State Bar of Michigan adopt the above resolution to support an amendment of Rule 4.4 of the Michigan Rules of Professional Conduct (MRPC) to add subsection (b) of the ABA Model Rules and the associate commentary?

The above Resolution should be adopted.

(a) Yes

or

(b) No