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

Issue

Should the State Bar of Michigan submit to the Michigan Supreme Court a request to amend Rule 4.4 of the Michigan Rules of Professional Conduct (MRPC) to add a subsection (b) adapted from ABA Model Rule 4.4(b)?

RESOLVED, that the Representative Assembly approves of the proposed amendment to MRPC 4.4 to add a subsection (b) adapted from the ABA Model Rules as follows:

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 that the lawyer knows or reasonably should know (i) was inadvertently sent and (ii) is subject to a claim of privilege or of protection as trial-preparation material shall promptly notify the sender.

Comment: 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 inadvertent intrusions into privileged relationships, such as the client-lawyer relationship.

Paragraph (b) recognizes that lawyers may receive a document that was mistakenly sent or produced by opposing parties or their lawyers. A document is inadvertently sent when an email or letter is misaddressed or a document is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document was sent inadvertently, and that the document is subject to a claim of privilege or work product, 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, 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 inappropriately obtained by the sending person. For purposes of this Rule, the term "document" has the meaning used in MCR 2.310(A)(1) (and expressly includes electronically-stored information ("ESI"). The term includes 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.

Some lawyers may choose to return a document or delete the document without reading it, 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 or delete such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Proponent

The Standing Committee on Professional Ethics presented by Chair Edward Hood, Clark Hill PLC, 500 Woodward Ave, Ste 3500, Detroit MI, 48826, (313) 965-8591, ehood@clarkhill.com.

Synopsis

The current version of MRPC 4.4 is silent on what affirmative steps must be taken by a recipient of documents, when the recipient knows or should know that the documents were inadvertently sent and are subject to a claim of privilege or protection as trial preparation materials. While this situation is not a new phenomenon, it occurs with greater frequency due to advances in technology and the consequent exchange of enormous volumes of electronically-stored information ("ESI"). The proposed rule amendment addresses the recipient's dilemma. In doing so, the proposed amendment fills a void in the Michigan Rules of Professional Conduct.

Background

Existing Michigan law is insufficient to address the issue. Current MRPC 4.4 does not address the issue of what a recipient lawyer must do if that lawyer receives evidently protected documents by mistake. Because of that vacuum, courts have looked to other law or authority for guidance, resulting in a technically incorrect analysis. For instance, in *Holland v. Gordy*[1], the Michigan Court of Appeals relied on American Bar Association Formal Opinion 92-368 (issued prior to the ABA's adoption of Model Rule 4.4(b)) to interpret MRPC 4.4. The court concluded that the recipient was required to notify sending counsel, and to refrain from using information believed to have been inadvertently produced. The court held that counsel's failure to do so was sanctionable. Notably, the *Holland* court mistakenly reasoned that, as members of the ABA, the lawyers involved were bound by ABA Formal Opinion 92-368. The *Holland* decision was followed by at least one court, leaving some risk that the erroneous analysis may be perpetuated.

ABA Formal Opinion 92-368 can no longer be located through online resources and appears to have been withdrawn or de-published.

[1] *Holland v. Gordy,* Michigan Court of Appeals, unpublished opinion, 2003 WL 1985800 (Mich App 2003).

A similar amendment was proposed in ADM 2017-29, but was not approved. That proposal was to adopt the ABA Model Rule counterpart 4.4(b) verbatim.[2] The current proposal adjusts the proposed language in subsection (b) to coalesce with the terms used in MCR 2.302(B)(7). More importantly, the PEC believes that the passage of time has validated the need for this amendment as voluminous electronic data productions increase. It will provide helpful guidance to members of the Michigan Bar, as well as the courts, which are increasingly called on to address these issues.

At the time of the first proposal, some believed that the proposed amendment would conflict with MCR 2.302(B)(7). The PEC submits that this position is misplaced and that, indeed, the proposed 4.4(b) complements MCR 2.302(B)(7).

MCR 2.302(B)(7) provides:

> *Information Inadvertently Produced.* If information that is subject to a claim of privilege or of protection as trial-preparation material is produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Proposed MRPC 4.4(b) is not redundant to MCR 2.302(B)(7). Instead, the addition of subsection (b) provides guidance to a *recipient* of material that the recipient knows or reasonably should know was inadvertently sent and is subject to a claim of privilege or protection as trial-preparation material. On the other hand, MCR 2.302(B)(7) affords a right to the *sender* of inadvertently-produced privileged or confidential material; it provides no guidance to the recipient who knows or should know that the material was sent in error yet is not notified by the sender of a potentially inadvertent production.

Further, proposed Rule 4.4(b) would apply to situations not covered at all by MCR 2.302(B)(7), including non-litigated matters (to which discovery court rules do not apply), and litigated matters where discovery is not permitted. Moreover, unlike the court rule, proposed 4.4(b) is not limited to privileged or work-product information in a specific case. One can readily envision situations where privileged or work-product information from an unrelated case or matter is inadvertently produced to a lawyer working on a different case or matter.

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[2] The ABA counterpart 4.4(b) states: "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."

Opposition

On October 23, 2024, the Supreme Court entered its order administratively closing the file without further action: Order. On August 28, 2018, the State Bar of Michigan supported the recommended amendment: 2017-29_2018-08-28_commentfromsbm.pdf; as did the Attorney Grievance Commission: 2017-29_2018-08-28_commentfromagc.pdf. There was one comment in opposition: 2017-29_2018-09-16_commentfromj.allen.pdf, however, the concerns addressed therein have been alleviated by the current proposal.

Prior Action by Representative Assembly

On September 22, 2016, the Representative Assembly supported a similar amendment to the Michigan Rules of Professional Conduct. At the meeting, upon a motion made and supported, after discussion, the proposal passed 79 to 12. A transcript of the meeting may be located here: Representative Assembly: 9-22-16 Meeting Transcript, starting on page 28.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 19, 2025

Should the Representative Assembly adopt the above resolution and submit to the Michigan Supreme Court a request to amend Rule 4.4 of the Michigan Rules of Professional Conduct (MRPC) to add the following subsection (b) adapted from ABA Model Rule 4.4(b), and the associated comments?

> (b) A lawyer who receives a document(s) that the lawyer knows or reasonably should know (i) was inadvertently sent and (ii) is subject to a claim of privilege or of protection as trial-preparation material shall promptly notify the sender.

(a) Yes

or

(b) No