

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 4.4**

PETITION OF THE VIRGINIA STATE BAR

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed amendments to Rule of Professional Conduct 4.4, as set forth below. The proposed rule amendment was approved by unanimous vote of the Council of the Virginia State Bar on June 13, 2019 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics (“Committee”) has proposed amendments to Rule 4.4, Respect for Rights of Third Persons, including new Comments [2] and [3]. The proposed changes to the Rule add paragraph (b), which codifies the guidance currently found in LEO 1702 regarding a lawyer who receives privileged information that was inadvertently sent. Specifically, paragraph (b) requires that a lawyer who receives information relating to the representation of the lawyer’s client and who knows that the information is

privileged and was inadvertently sent must immediately terminate review or use of the information, promptly notify the sender, and abide by the sender's instructions, if applicable, to return or destroy the information.

Proposed Comment [2] further explains the scope of the rule by defining when a document is inadvertently sent and when the lawyer knows or reasonably should know that that is the case. Proposed Comment [2] also clarifies that the rule does not apply to information that was wrongfully obtained rather than inadvertently obtained, and that it only applies to metadata if the metadata is privileged and inadvertently disclosed.

Finally, proposed Comment [3] explains that the rule, and LEO 1702, are justified by the extreme importance of preserving lawyer-client confidences, and that the duties established by the proposed rule override the lawyer's duty of communication under Rule 1.4. Proposed Comment [3] concludes by distinguishing situations involving pre-trial discovery and other situations where rules of court or other law permit the receiving lawyer to contest a sender's claim of privilege following an inadvertent disclosure; the proposed rule does not prohibit such actions and the recipient is permitted to sequester the inadvertently sent document pending use of such a process.

The proposed amendment was first presented to Council in February 2019.

During discussion of the proposed rule, Council member Bill Moffet made a motion that the proposal be sent back to the Committee for further study of whether it would be appropriate and necessary to add an exception to the proposed rule permitting a lawyer to use inadvertently disclosed privileged information to reveal a fraud on the court. Mr. Moffet gave an example of false testimony by an opposing party that was revealed to be false by apparently inadvertently produced, privileged information from the party's former counsel.

The Committee considered this issue at its April meeting, and concluded that no further changes to the rule were needed. First, the Committee believes that Rule 4.4(b) does not limit a lawyer's duties under Rule 3.3(d) to report fraud on a tribunal by a third party, once that fraud is clearly established. Second, in any situation where fraud on a tribunal is a concern, the matter would by definition be before a tribunal for purposes of proposed Comment [3], which allows the receiving lawyer to raise the matter to the court for resolution. Finally, the Committee was concerned about the possibility that creating an exception to the rule would create a slippery slope – if lawyers are permitted to review and use information that they believe establishes a fraud on a tribunal, then a lawyer who receives inadvertently disclosed information would be much more likely to review the information hoping to find justification to use the information to her client's advantage.

The proposed amendments are included below in Section III, indicated by underlining.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendments at its meeting on October 9, 2018 (Appendix, Page 4). The Virginia State Bar issued a publication release dated October 11, 2018, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 5). Notice of the proposed amendments were also published on the bar's website on the "Rule Changes" page (Appendix, Page 7) and in the bar's E-News on November 1, 2018 (Appendix, Page 10).

One comment was received, from John C. Blair, II on behalf of the Local Government Attorneys of Virginia (Appendix, Page 15), explaining that they have no comment on the proposed amendments.

III. Proposed Rule Change

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 is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Comments

[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 and is privileged, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures and to abide by any instructions to return or destroy the document or information that was inadvertently sent. Regardless of whether it is obvious that the document or electronically stored information was inadvertently sent, the receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake. If the receiving lawyer lacks actual or constructive knowledge that the document or electronically stored information was inadvertently sent, then paragraph (b) does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.

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 and that it contains privileged information.

[3] Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to gain an undue advantage. See LEO 1702. This means that the lawyer is prohibited from informing the lawyer's client of relevant, though inadvertently disclosed, information, and that the lawyer is prevented from using information that is of great significance to the client's case. In such cases, paragraph (b) overrides the lawyer's communication duty under Rule 1.4. As stated in Comment 1, diligent representation of the client's interests does not authorize or warrant intrusions into privileged communications.

Where applicable discovery rules, agreements, or other law permit the recipient to contest the sender's claim of privilege, use of such a process does not constitute "use" as prohibited by this rule, and the recipient may sequester the document or information pending resolution of that process. When there is no such applicable law, such as in a matter that does not involve litigation, the recipient lawyer must abide by the sender's instructions to return or destroy the document.

See also LEO 1871.

IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and the Rules of Professional Conduct are promulgated and implemented. The proposed rule change was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendments to Rule 4.4 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in black ink, appearing to read 'Marni E. Byrum', with a long horizontal flourish extending to the right.

Marni E. Byrum, President

A handwritten signature in black ink, reading "Karen A. Gould". The signature is fluid and cursive, with a large loop at the end of the word "Gould".

Karen A. Gould, Executive Director

Dated this 19th day of June, 2019.