

Rule 4.4: Respect for Rights of Third Persons

1. Current Kentucky Rule with Official Comments:

SCR 3.130(4.4) Respect for rights of third persons

In representing a client, a lawyer shall not knowingly use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

Supreme Court Commentary

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.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(4.4) Respect for rights of third persons

(a) In representing a client, a lawyer shall not ~~knowingly~~ use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or ~~knowingly~~ use methods of obtaining evidence that violate the legal rights of such a person.

(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.

~~Supreme Court Commentary~~ 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 documents or other communications that were mistakenly sent or produced by opposing parties or their

lawyers. If it is clear from the circumstances that the document was not intended for the receiving lawyer, that lawyer must avoid reading the substance of the communication, notify the sender of the mistake, and comply with any reasonable request of the sender, allowing for protective measures (e.g. returning to sender, deleting or otherwise destroying the communication). The question whether the privileged status of such a document has been waived, is a matter of law beyond the scope of these Rules. Similarly, this Rule does not address the legal duties of a lawyer who received 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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) Paragraph (a) of the current KRPC 4.4 contains a scienter element of "knowingly," and, in that sense, departs from the ABA Ethics 2000 MR (as it departed from the previous MR). Paragraph (a) of the proposed Kentucky Rule now tracks precisely the MR.

(2) Paragraph (b) imposes upon the receiving lawyer duties that do not appear in the MR: the duty to refrain from reading the document; and the duty (in addition to notifying the sender) to abide by the sender's instructions as to the disposition of the document.

b. Detailed discussion of reason for variance from the ABA Model Rule (if any).

(1) The proposed Kentucky Rule 4.4 (a) is now wholly consistent with the MR. The Committee recommends conforming the language in paragraph (a) of the Rule, and accordingly deleted the "knowingly" reservation which appears in the present Kentucky Rule and which, in the opinion of the Committee, is redundant inasmuch as the prohibited conduct could only be perpetrated intentionally. The "knowingly" language suggests a safe harbor that does not and should not exist. Those facts, together, with the recognized value of adhering, where possible, to the language of the MR are offered in support of the Committee's position.

(2) Comment [1] is identical to Comment [1] of the MR including the additional example of violations of the rights of third persons addressed in paragraph (a) (unwarranted intrusions into privileged relationships) which was not in the prior Kentucky Rule but which the Committee believes provides useful guidance to a Kentucky practitioner.

(3) Paragraph (b) of the proposed Rule addresses the growing problem of misdirected faxes and e-mails which arrive in an attorney's office and provides guidance on the extent of the receiving lawyer's obligations. Comment [2] varies from the MR to address the additional obligations imposed upon the receiving lawyer by the Kentucky proposed Rule.

(4) ABA Formal Ethics Op. 92-368 imposed upon lawyers who receive documents sent in error the very obligations that are set forth in the proposed KRPC 4.4(b). KBA Ethics Op. E-374 (1995) followed closely the ABA opinion. When the Commission addressed the Rule (in part because of criticism that Ethics Op. 92-368 was not moored to a

specific ethics Rule), it adopted a “conservative” approach and limited the receiving lawyer’s obligation to one of notification, leaving to that lawyer’s discretion what further steps might be required, and looking to Rules 1.2 and 1.4 to guide the receiving lawyer’s actions. See, MR 4.4, Comments [2] and [3]. The MR approach may be described as “middle of the road.” A number of courts and bars have opted for the Rule as codified in the proposed Kentucky Rule or a close variation. [e.g. District of Columbia (awaiting court approval); New Jersey and Maryland (both in effect) Others have taken a more lenient approach, placing no obligation upon the receiving lawyer. See, gen., cases collected in ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct*, at 441 (5th Ed. 2003); and charts available at www.abanet.org/cpr.

(5) The Committee elected the more stringent requirements of refraining from examining the substance of the document, notifying the sender and abiding by instructions as to disposition. Because electronic communication is so prone to this kind of error, the Committee concluded that principles of fairness should govern attorney behavior in these circumstances which, in turn, will promote both just ends and civility in the means of achieving them.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.