

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of October, 2019.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective December 1, 2019.

On June 19, 2019, came the Virginia State Bar, by Marni E. Byrum, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Rule 4.4, Part Six, Section II of the Rules of Court, be amended. The petition is approved and Rule 4.4 is amended to read 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 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.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective December 1, 2019.

A Copy,

Teste:



Clerk