#015

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JOHN J. HOFFMAN
Acting Attorney General

September 21, 2015

Honorable Glenn A. Grant, J.A.D.
Acting Director, Administrative Office of the Courts
Comments: Special Committee on Attorney Ethics and Admissions
Richard J. Hughes Justice Complex
District of New Jersey
P.O. Box 037
Trenton, New Jersey 08625

Re: Proposed Supreme Court Amendment to N.J. R.P.C. 4.4

Dear Judge Grant,

In accordance with the Notices to the Bar dated June 9 and July 31, 2015, we write to comment on proposed changes to New Jersey Rule 4.4(b) that the Special Committee on Attorney Ethics and Admissions (the "Committee") proposed in its May 12, 2015, Report and Recommendations (the "Report"). We thank you for your courtesy in allowing us until today to submit these comments. That courtesy allowed us to coordinate our comments with the Office of the United States Attorney for the District of New Jersey, whose concerns with the proposed amendments closely parallel ours.

Principally, we are concerned that — though certainly not by design — some of the proposed changes to Rule 4.4(b) could adversely affect the State's handling of criminal and civil investigations and litigation. We suspect it was not the Committee's intent that the amended Rule's notification and return provisions should apply to Government attorneys who receive information from bona fide whistleblowers, informants and others with knowledge of illegal activity. Any doubt about the applicability of these provisions, however, threaten to inhibit lawful Governmental investigations or, worse, prevent those who would approach the government with this critical information from doing so.

We therefore respectfully request that if the Supreme Court is inclined to amend Rule 4.4(b) in the manner proposed by the Committee, it should do so using the alternative language proposed by the United States Attorney , which I copy below for the Court's convenience:

A lawyer who receives a document or electronic information that contains lawyer-client communications that are privileged pursuant to applicable law, involving an adverse or third party, and ~~who~~ where the lawyer has reasonable cause to believe that the document or information was wrongfully obtained, the lawyer shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information and (2) return the document or information to the other lawyer and, if in electronic form, delete it. A document will not be considered "wrongfully obtained if it was obtained for the purposes of encouraging, participating in, cooperating with, or conducting an actual or potential law enforcement, regulatory, or other governmental investigation. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

Government attorneys who have lawfully received materials that could be considered to be inadvertently sent or wrongfully obtained under this Rule are not subject to the notification and return requirements of this subsection when such requirements could impair the legitimate interests of law enforcement.

If the lawyer who receives documents that were inadvertently sent or wrongfully obtained has questions as to his or her obligations under this subsection, the lawyer may promptly bring the matter to the attention of the appropriate court, and for good cause, the court may relieve the lawyer of any obligations he or she might have under this subsection. The lawyer may preserve the document or information, and not return it or delete it, pending review and disposition by the court.

If the Court is not inclined to accept these amendments, we believe it would be preferable to retain the present version of Rule 4.4(b), rather than adopting the Committee's proposal without these changes. We appreciate the intentions behind the Committee's proposals, but the potential adverse effects on important Governmental investigations are significant and, in our view, outweigh the benefits of adopting the Committee's proposal unaltered. The Court may be able to address our concerns through an Official Comment dealing with Governmental investigations, but without seeing the language of such a comment, we would hesitate to conclude that the comment would provide sufficient protections.

The changes we seek would (1) make clear that the Rule's definition of a "privileged" document parallels applicable privilege law; (2) categorically exempt government attorneys pursuing legitimate law enforcement interests; and (3) give private counsel representing whistleblowers a clear path to obtaining judicial approval to receive and retain privileged information from legitimate whistleblowers.

"Privileged communications," as that term is used in the proposed Rule, should not apply to communications that would not be considered privileged pursuant to Evid. R. 504 and its federal parallels. For example, if a communication was made "in the course of legal service sought or obtained in aid of the commission of a crime or fraud," we do not believe a criminal or civil investigator should be required to notify the attorney-author of such communications upon coming into possession of those communications. Public policy would be better served if the new Rule makes clear on its face that it incorporates the exceptions to the privilege codified in applicable law.

With respect to the Rule's coverage, if Government attorneys do not receive categorical protection when pursuing law enforcement concerns, Government attorneys investigating False Claims Act cases could be whipsawed between the Committee-proposed Rule's disclosure requirements and the prohibition against disclosing the existence of a *qui tam* complaint filed under seal. See N.J.S.A. 2A:32C-5(c). "The purpose of th[is] sealing provisions is to allow the government time to investigate the alleged false claim and to prevent qui tam plaintiffs from alerting a putative defendant to possible investigations." United States v. DHL Express (USA), Inc., 742 F.3d 51, 54 (2d Cir. 2014). Even if the Rule's ethical requirement were held to trump the prohibition against disclosure, premature disclosure would frustrate the purpose of the False Claims Act.

Of course, our office handles privileged information it receives with great care, not sharing it with members of a trial team unless and until it is formally determined that the information can be used at trial. The issue posed by the proposed Rule amendment, however, is whether any governmental attorney, even someone walled off from the investigation until privilege issues are resolved, can review and retain a possibly privileged document, without having to disclose its receipt of that document to the actual or potential target of an investigation. No such disclosure requirement presently exists, nor do we believe a requirement to be appropriate or justified.

We note that courts have protected the rights of whistleblowers to turn over to investigators documents that are subject to civil non-disclosure agreements, because of the strong public policy in favor of stopping fraud against the government. See, e.g., United States ex. rel. Ruhe v. Masimo Corp., 929 F. Supp.2d 1033, 1039 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus the taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government."); United States ex. rel. Head v. Kane Co., 668 F. Supp.2d 146, 152 (D.D.C. 2009) ("Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of [the False Claims Act].").

Private counsel for whistleblowers need not receive categorical protection, but the public policy considerations above militate in favor of private counsel being able to receive judicial permission to receive and retain documents for the purpose of encouraging or assisting in Governmental investigations. Our proposed amendment would make clear what we believe the Committee's proposal implied: that courts receiving applications from (among others) private counsel for whistleblowers can relieve them of their disclosure and return obligations for good cause.

[REST OF PAGE INTENTIONALLY LEFT BLANK]

We thank you for your consideration.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____
Jeffrey S. Jacobson
Chief Counsel