U.S. Department of Justice #020

United States Attorney
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September 21, 2015

Via Electronic and U.S. Mail

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments: Special Committee on Attorney Ethics and Admissions
Richard J. Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey, 08625-0037

Re: Proposed Amendments to New Jersey Rule 4.4(b)

Dear Judge Grant:

In accordance with the Notices to the Bar dated June 9, 2015 and July 31, 2015, I write to comment on proposed changes to New Jersey Rule 4.4(b) that the Special Committee on Attorney Ethics and Admissions (Committee) proposed in its May 12, 2015, Report and Recommendations (Report). Thank you for your courtesy in allowing me until September 21, 2015 to submit these comments.

The Committee's Report reflects a great deal of thought and, on the whole, contains many sound recommendations. Some of the proposed changes to Rule 4.4(b), however, could adversely affect the Government's handling of criminal and civil investigations and litigation. Specifically, the proposed notification and return provisions may inhibit Government attorneys from obtaining information that they are lawfully entitled to receive in order to investigate illegal activity and may deter bona fide whistleblowers, informants, and others with inside information about illegal activity from disclosing evidence of wrongdoing to the Government out of a fear of reprisal. Moreover, the proposed Rule does not go far enough in defining a Court's role in interpreting an attorney's obligations under Rule 4.4(b). Finally, the Rule should make clear that the only "lawyer-client" communications covered by this Rule are communications that are in fact privileged under applicable law.

Accordingly, if the Supreme Court is inclined to amend Rule 4.4(b), I respectfully request that the Court adopt the alternative language proposed in section V. below. On the other hand, if the Court is not inclined to accept this alternative language, I respectfully request that the Court refrain from adopting the changes to Rule 4.4(b) proposed by the Committee.

I. The Proposed Rule

The Committee proposed the following changes to New Jersey Rule 4.4(b):

> (b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information, or, if he or she has begun to do so, shall stop reading [the document,] it. The lawyer shall (1) promptly notify the sender[,] and (2) return the document or information to the sender and, if in electronic form, delete it.
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> A lawyer who receives a document or electronic information that contains lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained 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 lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.
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> 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. The lawyer may preserve the document or information (and not return it or delete it) pending review and disposition by the court.
>
> Official Comment
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> A lawyer receiving a document electronically should not examine any accompanying metadata unless the metadata was specifically requested.

Report at 36 (new material underscored in original).

II. The Proposed Rule 4.4(b) As Presently Drafted May Inhibit the Government from Obtaining Information Necessary to Investigate Illegal Activity

Prosecutors and Government attorneys involved in civil enforcement investigations often receive information from "whistleblowers" who believe that individuals or corporations are, or have been, engaged in fraudulent or illegal conduct. Information from whistleblowers comes in various forms, including documents and electronic evidence that the whistleblowers obtained during the course of their employment. Sometimes, this information is disclosed in arguable violation of employment contracts, corporate codes of conduct, or confidentiality agreements.

Under prevailing legal and ethical standards, prosecutors and other Government attorneys are free to accept and use documents and information from someone who may have been unauthorized to access that information or provide it to others.[1] However, whenever we receive such information, we are always mindful of the attorney-client privilege, and we seek to protect it. Thus, when any information appears to be protected by a valid privilege that has not been waived, attorneys in my Office are instructed to, and do, segregate that information and refrain from using it or considering it. Moreover, if there is reason to believe that potentially privileged material may be interspersed within

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[1] *See, e.g.,* Va. Legal Ethics Op. 1786 (2004) (opining that receiving documents from a government informant who obtained documents from organization without its consent or knowledge is ethically permissible during a law enforcement investigation because "collection of documents is part of the lawful operation of the U.S. Attorney's investigations;" noting that Rule Virginia Rule 4.4, which is similar to current New Jersey Rule 4.4(a) "precludes only those methods that violate the legal rights of another"); *Carda v. Oftedal*, 2005 WL 2121972 *3 (D.S.D. 2005) (finding plaintiff's attorney did not violate Rule 4.4(a) when receiving documents from his client where lawyer did not direct client to copy documents from client's former employer without permission); *Sequa v. Lititech*, 807 F.Supp. 653, 661 (D. Col. 1992) (denying defendant's motion to disqualify plaintiff's counsel and refusing to find misconduct where a witness broke into an office and stole documents because attorneys did not instruct her to undertake such conduct; "they had no obligation to control her unforeseeable conduct").

New Jersey Supreme Court Advisory Commission on Professional Ethics Opinion 680 is distinguishable. In that situation, the Advisory Committee on Professional Ethics opined that an attorney would run afoul of New Jersey Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice) if she failed to notify opposing counsel that her client stole information out of opposing counsel's briefcase. *See* N.J. Supreme Court Advisory Comm. On Prof'l Ethics, Op. 680 (1995). Turning a blind eye to a client's theft of documents from an opponent's brief case is much different from obtaining information about potential wrongdoing and reviewing the information to determine whether illegal conduct has occurred.

a large document production, my Office customarily assigns a "filter team" to review the materials, to segregate the privileged materials, and to disclose to the prosecution or litigation team only those materials that are not privileged. The filter team then maintains the privileged materials (or copies) so that a Court can review them if necessary, and absent unusual circumstances, the filter team will return the privileged materials to the privilege holder at the appropriate time. Such procedures are consistent with federal law and practice. *See, e.g., United States v. Bergrin,* 2011 WL 4368970 *6 (D.N.J. 2011) (acknowledging the use of a filter team without comment or criticism)*; United States v. LeCroy,* 348 F. Supp. 2d 375, 377 (E.D. Pa. 2004) (same).

The proposed changes to Rule 4.4(b) would not, on their face, directly alter the Government's ability to collect and review information from whistleblowers, informants, and others with inside information about suspected wrongdoing. Nor would they alter the manner in which the Government segregates potentially privileged information through procedures such as filter teams. But, the notification and return provision of the proposed Rule,[2] which would require Government attorneys to also "promptly notify the lawyer whose [privileged] communications are contained in the document or information [that they are in possession of that document or information]," would have a serious and deleterious indirect effect on our ability to enforce the law.

First, notification would alert potential witnesses, subjects, and targets of the investigation, or potential investigation. This in turn would likely eliminate the efficacy of using covert investigation techniques in order to gather evidence. Moreover, notification might have the unfortunate consequence of causing

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[2] The notification and return requirement appears to be an attempt to codify the New Jersey Supreme Court's holding in *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 325-26 (2010). *See* Report at 32-35. In *Stengart,* the Court ruled that an employer's lawyer who obtained attorney-client communications that were left in an employee's electronic files after she was terminated had an obligation under New Jersey Rule 4.4(b) to stop reading the materials when the lawyer realized the communications were privileged and to notify the former employee's counsel. Because of the public interest in protecting the attorney-client relationship from unwarranted intrusion, the Court found that these materials were within the scope of the Rule even though they technically were not "inadvertently sent." *Id.* at 326.

Stengart involved a private civil matter, and it is not clear whether the Court would have reached the same result in applying New Jersey Rule 4.4 to government attorneys engaging in law enforcement investigations, prosecutions, and litigation. And it is also not clear whether the Committee specifically intended their proposed version of Rule 4.4(b) to apply to situations in which the government receives information from an unauthorized source pursuant to a lawful enforcement investigation when disclosing the existence of that information could result in the disclosure of a covert investigation.

subjects and targets to destroy evidence that the Government has not yet gathered.

Second, notification could reveal the identity of the whistleblower, resulting in negative consequences not only to the investigation, but to the whistleblower himself. For example, if the whistleblower was employed by the individual or corporation whose conduct was being reviewed, disclosure could potentially put the whistleblower's job at risk and, depending upon the nature of the criminal or fraudulent activity, perhaps his safety. This is the case even when the investigation itself is already overt, as the Government frequently protects the identity of the whistleblower long after revealing the existence of an investigation to a potential defendant.[3]

Third, notification could chill the flow of information from whistleblowers to law enforcement authorities.[4] Information from whistleblowers is vital to those Government attorneys engaged in law enforcement and regulatory investigations, prosecutions, and litigation; without this information, it would be difficult, if not impossible, to bring many of the corporate prosecutions that my Office pursues both criminally and civilly. Knowledge that the Government would have to disclose the receipt of putatively privileged information from a whistleblower may chill those with information about wrongdoing from coming forward due to fear of reprisal because they could no longer trust that we would protect their identities from disclosure.

Nor would it be sufficient to modify the proposed rule to postpone disclosures during active, covert investigations. It is frequently the case that whistleblowers have a good faith belief that they have identified wrongdoing that should be exposed, but are without sufficient information to fully investigate and make a conclusive determination as to the existence of wrongdoing. As a result, although whistleblower complaints frequently lead to significant investigations and prosecutions, other whistleblower complaints are ultimately identified by the Government (or private attorneys representing whistleblowers) as not meritorious. Because whistleblowers will not know where their information will lead the Government, however, any requirement

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[3] As noted in the comments from the New Jersey Attorney General's Office, the protection of whistleblowers is consistent with law and public policy. *See also* 15 U.S.C. 78u-6(h); 7 U.S.C. 26(h) (Dodd-Frank Act protects whistleblowers who report wrongdoing to the SEC or the CFTC); 31 U.S.C. 3730(h) (qui-tam whistleblowers are protected from retaliation).

[4] It could also chill the flow of information from whistleblowers to private counsel. That issue was addressed in greater detail in the submission of Eric Jaso, Esq., a former Assistant United States Attorney who now frequently represents whistleblowers who file *qui tam* complaints in the District of New Jersey and elsewhere.

that might lead to the disclosure of a whistleblower's identity could chill all potential whistleblowers from providing information to law enforcement.

III. Because Proposed Rule 4.4(b) Does Not Adequately Define A Court's Role In Interpreting This Section, Prosecutors Could Be Placed In Ethically Untenable Positions

The Committee has proposed the following language at the end of Rule 4.4(b):

> 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. The lawyer may preserve the document or information (and not return it or delete it) pending review and disposition by the court.

Allowing attorneys to seek guidance from the Court concerning their obligations under Rule 4.4(b) is an excellent suggestion. The Committee's proposal, however, does not go far enough.

The following example is illustrative of my concern.

In criminal cases, attorneys acting as prosecutors have an obligation to disclose exculpatory material to the defense. This is mandated by federal constitutional law. *Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States,* 405 U.S. 150 (1972). It is mandated by the New Jersey Rules of Professional Conduct. NJ RPC 3.8(d).

The proposed wording of Rule 4.4(b) could, in at least one situation, create tension between a prosecutor's obligation to disclose exculpatory material and his obligations under Rule 4.4(b). For example, assume that a prosecutor receives an electronic document from an attorney that would fall within the scope of the attorney-client privilege; that the document was inadvertently sent or was within the meaning of the Rule; and that the document contains exculpatory information about a defendant being prosecuted by the prosecutor's office. If the proposed changes to Rule 4.4(b) are adopted, the prosecutor would have an obligation to delete the document. But, because the document contains exculpatory information, the prosecutor may have an obligation to disclose the document to the defense. Given these conflicting requirements, a prudent prosecutor would likely seek guidance from the appropriate court pursuant to the final paragraph of the proposed Rule

4.4(b).[5] At that point, however, the Court's authority to solve the prosecutor's dilemma is not entirely clear. Specifically, it is not clear from the wording of the final paragraph of the proposed rule that the Court has the authority to relieve the prosecutor of his ethical obligation to delete the document if the Court rules that the Constitutional and ethical obligation to disclose the document to the defense trumps the attorney-client privilege.

IV. The Rule Should Clearly State That Only Privileged Lawyer-Client Communications Are Covered

In the proposed Rule, the Committee indicated that "lawyer-client" communications are covered by the notification and return provisions of the Rule. But, that language is overly broad because it could protect non-privileged communications that do not deserve such protection. For example, it could arguably cover lawyer-client communications that fall within the crime-fraud exception to the attorney-client privilege. It seems highly unlikely that the Committee intended such a result, and thus, the proposed Rule should make clear that the Rule covers only lawyer-client communications that are privileged under applicable law.

V. Proposed Alternatives

If the Court is inclined to amend Rule 4.4(b), I respectfully ask that the court insert the following language, which is underscored:

> A lawyer who receives a document or electronic information that contains lawyer-client communications <u>that are privileged pursuant to applicable law</u>, involving an adverse or third party, and the lawyer has reasonable cause to believe 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 communication 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. <u>A document will not be considered "wrongfully obtained" if it was obtained for the purposes of encouraging, participating in, cooperating</u>

[5] Of course, the same conflict could also arise in other situations, such as if the prosecutor obtained the document from someone who had "wrongfully obtained" it within the meaning of the proposed Rule.

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 the lawyer 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.

On the other hand, given the choice between the Committee's proposed changes to Rule 4.4(b) and the present version of Rule 4.4(b), the current version is the better option. The Committee's proposed changes to Rule 4.4(b), although well-intentioned, are not necessary to protect the attorney-client privilege. Moreover, when the adverse effects of these proposed changes are balanced against their likely benefits, the scale tips in favor of rejecting the amendments. Thus, if the Court is not inclined to accept the alternative language suggested above, I respectfully request that the Court reject the changes to Rule 4.4(b) proposed by the Committee.

I appreciate the opportunity to submit these comments and concerns. If you have any questions or would like any further information, please feel free to contact me or my Counsel, John M. Fietkiewicz. Mr. Fietkiewicz's number is 973-645-2780, and his email address is John.Fietkiewicz@usdoj.gov.

Respectfully submitted,

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United States Attorney