AGENDA MATERIALS FOR

III.B. Rule 3-500 (Communication)

- Drafting Team's Report & Recommendation on Rule 3-500 [1.4]*
- Assignment Document

* **NOTE**: These material have been carried over from the June meeting.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-500

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

I. CURRENT CALIFORNIA RULE

Clean:

Rule 3-500 Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-500

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

III. PROPOSED RULE (CLEAN)

Rule 1.4 Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which written disclosure or the client's informed consent, as defined in Rule 1.01(e), is required by these Rules or the State Bar Act;

(2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably informed about significant developments relating to the representation;

(4) promptly comply with reasonable requests for information;

(5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed about significant developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[NOTE: The following text is a placeholder as this topic is the subject of a separate report on Rule 3-510.]

(c) A lawyer shall promptly communicate to the lawyer's client:

(1) all terms and conditions of any offer made to the client in a criminal matter; and

(2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

Comments:

[1] Rule 1.4 is not intended to change a lawyer's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant

documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule does not prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[3] In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law.

[NOTE: Place holder for comments by the Rule 3-510 drafting team pertaining to communication of settlement offers.]

IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 1.4)

Rule ~~3-500~~1.4 Communication with Clients

(a) A ~~member~~lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which written disclosure or the client's informed consent, as defined in Rule 1.01(e), is required by these Rules or the State Bar Act;

(2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep ~~a~~the client reasonably informed about significant developments relating to the ~~employment or~~ representation~~, including~~;

(4) promptly ~~complying~~comply with reasonable requests for information~~ and copies of~~ ;

(5) promptly comply with reasonable client requests for access to significant documents ~~when~~ necessary to keep the client ~~so informed.~~reasonably informed about significant

developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[NOTE: The following text is a placeholder as this topic is the subject of a separate report on Rule 3-510.]

(c) A lawyer shall promptly communicate to the lawyer's client:

(1) all terms and conditions of any offer made to the client in a criminal matter; and

(2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

~~Discussion~~Comments

[1] Rule ~~3-500~~1.4 is not intended to change a ~~member's~~lawyer's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

[2] A ~~member~~lawyer may ~~contract~~comply with paragraph (a)(5) by providing to the client ~~in their employment agreement~~ copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents~~. This rule is not intended to~~ the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule does not prohibit a claim for the recovery of the ~~member's~~lawyer's expense in any subsequent legal proceeding.

[3] ~~3-500~~In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule does not require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. ~~Additionally, this~~

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

~~rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.~~

[NOTE: Place holder for comments by the Rule 3-510 drafting team pertaining to communication of settlement offers.]

V. PUBLIC COMMENTS SUMMARY

No public comments have been received.

VI. OCTC / STATE BAR COURT COMMENTS

JAYNE KIM, CHIEF TRIAL COUNSEL, OFFICE OF THE CHIEF TRIAL COUNSEL, (June 4, 2015):

1. Rule 3-500 does not need to state that the duties imposed by the rule do not affect the work product privilege. The Rules of Professional Conduct are disciplinary rules that neither establish nor limit evidentiary privileges.

2. Rule 3-500 should not permit an attorney to respond to a client's request for copies of documents by providing the client mere access to the documents. The duty to provide documents exists for the protection of the client. Clients, not attorneys, should determine whether they want or need physical copies of documents.

Revising this rule to permit attorneys to only grant a client access to documents would also be inconsistent with Business and Professions Code section 6068(n). Section 6068(n) requires attorneys "to provide copies to client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt."

3. Rule 3-500 should clarify whether providing the client with electronic copies of documents complies with the rule and that the decision of whether an electronic copy is sufficient should be made by the client.

4. Rule 3-500 should clarify that where the law prohibits the disclosure of documents or information to the client, the attorney cannot provide that information. For example, Penal Code section 1054.2 prohibits an attorney from disclosing to the defendant, members of the defendant's family, or anyone else the address or telephone number of the victim or witnesses whose names and addresses are protected under Penal Code section 1054.1. A failure to disclose information to a client pursuant to this statute or any other law prohibiting disclosure should not result in discipline.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-500

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Colorado RPC 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

California Context

a. State Bar Act. There are two sections of the State Bar Act that contain the same substance as current rule 3-500: sections 6068(m) (duty to respond promptly to client requests concerning status of the matter) and 6068(n) (duty to provide copies of certain documents to client).

b. Common Law Duty To Communicate. Although section 6068(m) was added by statute in 1986 and rule 3-500 was promulgated in 1989, members have been subject to a common law duty to communicate set forth in discipline case law that predates these provisions See In the Matter of Respondent C (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, at pp. 450-451 [1991 WL 63249] ("Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)" (Spindell v. State Bar (1975) 13 Cal.3d 253, 260; see also Taylor v. State Bar (1974) 11 Cal.3d 424, 429-432; Chefsky v. State Bar (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in Aronin v. State Bar (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068(m), as falling within the parameters of an attorney's oath and duties, under the general

provisions of sections 6068(a) (duty to support the laws). (See e.g., Taylor v. State Bar, supra; Aronin v. State Bar, supra.)").

Duty To Communicate With Non-client. Although 6068(m) and rule 3-500 state a duty owed to a "client," case law has interpreted the duty to communicate to apply to a non-client in at least one special circumstance. In *Butler v. State Bar* (1986) 42 Cal.3d 323, at p. 329 [228 Cal.Rptr. 499], the Supreme Court found that an attorney's duty to communicate includes the duty to advise people who, to the attorney's knowledge, reasonably believe they are clients, that they are, in fact, not clients.

The ABA State Adoption Chart for Model Rule 1.4, which is the direct counterpart to rule 3-500 as modified to proposed Rule 1.4, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.authcheckdam.pdf
- 18 states adopted 1.4 verbatim (CO, CT, DE, IL, IA, KY, MN, MT, NE, NC, OK, PA, SC, TN UT VT, WV, WY)
- 4 states have adopted the former version of MR 1.4 (DC, MS,MI, OR,TX);
- 20 jurisdictions have adopted something substantially similar to model rule 1.4 (AL,AK, AZ, , FL, GA, HI, ID, IN, KS, ME, MD, MA, MO; NH, NM, NY, ND, VA, WA, WI)
- 8 states have adopted MR 1.4 with substantial differences or additions (AK adds notice of receipt of settlement proceeds; LA adds financial assistance section; NV adds lawyer biographical data disclosure; NJ adds sections on how client may communicate with the lawyer and where the client files are kept; OH adds professional liability insurance and fee split disclosures; RI adds "informed consent" requirement; SD adds professional liability insurance disclosure)
- 1 state has not adopted model rule 1.4 (CA).

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

Existing rule 3-500 and issues related to communication with clients were examined. As drafted and recommended, Rule 1.4 combines Rule 3-500 (Communication) and Rule 3-510 (settlement offers) and includes revisions to both. The title is also changed to "COMMUNICATION WITH CLIENTS" to add greater clarity. This report shows this drafting team's version of combined Rule 1.4 but defers discussion of the section dealing with conveyance of settlement offers to the drafting team for Rule 3-510.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-500

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

Existing Rule 3-500 and the charge of the commission to consider the historical purpose and ensure clear and enforceable disciplinary standards, as opposed to purely aspirational objectives were reviewed. In this regard the rules adopted by other states, the Model Rules and the recommendations of the First Commission were considered. The proposed communication provisions of proposed Rule 1.4 are generally consistent with existing Rule 3-500. The recommended provisions of Rule 1.4 attempt to more clearly state lawyer's communication obligations with clients by using the language of the MR as adopted by the large majority of jurisdictions. The clearer language is intended to enhance protection of the public. While advising the adoption of most of the language in the model rule the drafting team deleted section (a) (6) of MR 1.4[1] as aspirational, difficult to define and inconsistent with the history of the Rules of Professional Conduct in California. All of the Comments in the 3-500 aspect of the first Commission's Rule 1.4 were reviewed. The comments that were not included in this draft were rejected as tending more to practice guidance than an explanation of the meaning of the Rule.

The definition of client in this Rule was discussed and flagged for later discussion and possible incorporation in a separate terminology section of the rules. The First Commission included a comment on "client" to proposed Rule 1.4, "As used in paragraph (c), "client" includes: (i) a person who possesses the authority to accept an offer of settlement or plea, (ii) representatives of an organizational client authorized by the client to communicate with the lawyer regarding an offer of settlement or plea, or, (iii) in a class action, all the named representatives of the class. that applied to clients and settlements." The discussion of a definition of client in settlement communications was deferred to the Rule 3-510 drafting team.

The drafting team discussed the OCTC's previous requested that "shall" be changed to "must". Shall is an older term associated with "legalese". However when examining the historic context of California's rules the usage in the Model Rules and other states it appears that "shall" is the standard usage. It is used in many places in existing rules, the MR and across the board nationally. Accordingly shall was used. If there was a desire by the commission to make a global change throughout the new rules this could be altered but is not advocating for that.

The "discussion" relating to settlement offers was deferred to the Rule 3-510 team

Concepts Accepted (Pros and Cons):

- Implement changes to more clearly list communication obligations of lawyers with clients.
    - Pros: Improves public protection. Provides positive obligations of lawyers to inform clients about important aspects of cases and case events and provide access to file documents when necessary

[1] (a)(6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

- Cons: There are no known cons to adopting the proposed rule.

Concepts Rejected (Pros and Cons):

- Keep current rule without any changes
- Pros: Comports with and simply states CA's longstanding lawyer client communication obligations
- Cons: Arguably does not clearly specify some important communication obligations of lawyers to clients

Changes in Duties/Substantive Changes to the Current Rule:

1. Duty to inform clients when written disclosure or informed consent is involved
2. Duty to discuss means by which to accomplish the client's objectives
3. Provide access to significant documents
4. Explain a matter to the extent reasonably necessary to permit the client to make informed decisions

Non-Substantive Changes to the Current Rule:

The proposed Rule 1.4 is entirely reworked from existing Rule 3-500 (and 3-510) pursuant to current drafting rules and consistent with usage in other states and the Model Rule. Due to California historical usage, shall was retained rather than substituting "must".

Alternatives Considered:

- Include definition of client in Rule 3-500
- Include additional comments as proposed in RRC 1

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

Whether to revise the rule to require that a client be informed about the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. (See RRC1, Proposed Rule 1.4, cmt. [1].)

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-500

Lead Drafter: Harris
Co-Drafters: Kehr, Clinch
Meeting Date: June 26, 2015

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

- 06/08/15: 7:04 PM email from Lee Harris to Robert Kehr, Nanci Clinch, et al including chain of prior emails in text.

- 06/07/15: 9:30 AM email from Nanci Clinch to Lee Harris, Robert Kehr, et al including chain of prior emails in text.

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

The Commission adopt proposed amended Rule 1.4 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1.4 in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

CURRENT CALIFORNIA RULE 3-500
"Communication"

I. Text of Current Rule:

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, §6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.

II. Background/Purpose:

In 1989, a new rule 3-500 was adopted from ABA Model Rule 1.4(a). This rule was intended to set forth the duty of the attorney to keep clients reasonably informed as to the status of their matter. This rule was proposed to set a standard in the Rules of Professional Conduct regarding this conduct because of the frequency of client complaints relating to the failure to adequately communicate with a client.

Rule 3-500 is consistent with Business and Professions Code section 6068, subdivision (m), which places a duty on the attorney to promptly respond to reasonable client inquiries and to keep clients reasonably informed of significant developments in their matters.[1]

---

[1] Bus. & Prof. Code § 6068(m) provides it is the duty of an attorney:

> (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

In 1997 amendments to rule 3-500 were made following the State Bar's submission to the Supreme Court of a proposed new rule 3-520 (Provision of Documents to Client). Proposed new rule 3-520 responded to California Business and Professions Code section 6068, subdivision (n), which states:

> It is the duty of an attorney . . .
>
> > (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

The Supreme Court declined to approve proposed rule 3-520 but approved amendments to rule 3 500 that incorporated the substance of the rejected rule. These amendments became operative in 1997. No further amendments have been made to rule 3-500.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a September 27, 2001 memorandum to the first Commission, OCTC provided the following comment regarding rule 3-500:

OCTC's recommends adding to and clarifying the nature and extent of communications required of the lawyer with his or her client.

Revise the rule as follows:

> (*A*) A member ~~shall~~ *must* keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

And add the following:

> *(B) A member must (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the Rules of Professional Conduct or the State Bar Act; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; and (3) consult with the client about any relevant limitation on the member's conduct when the member knows the client expects assistance not permitted by the Rules of Professional Conduct, the State Bar Act, or other law. A member shall explain a matter to the extent reasonably necessary to permit the client to make informed*

decisions regarding the representation.[2]

(C) A member must reasonably communicate with an individual who is not a client to the extent necessary to explain that there is no attorney-client relationship.

Add the following to the discussion section of the rule:

Discussion

This duty includes the member's duty to communicate with a person who reasonably believes they are a client, at least to the extent of advising them that they are not a client. (Butler v. State Bar (1986) 42 Cal.3d 323,)

OCTC recommends some additions to the rule regarding communications with a client. These additions do not change existing law, but clarify and codify existing law.

B. In a May __, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-500:

[TO BE ADDED UPON RECEIPT FROM OCTC]

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC.

---

[2] OCTC's proposed new paragraph (B) largely tracked the black letter of Model Rule 1.4, which provides:

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

B. Although the current rule requires that copies of significant documents be provided to the client, it does not expressly address the practice in the legal profession of maintaining and transferring documents in electronic format.[3]

V. California Context:

A. State Bar Act. As noted in Section II (Background/Purpose:), there are two sections of the State Bar Act that contain the same substance as current rule 3-500: sections 6068(m) (duty to respond promptly to client requests concerning status of the matter) and 6068(n) (duty to provide copies of certain documents to client).

B. Common Law Duty To Communicate. Although section 6068(m) was added by statute in 1986 and rule 3-500 was promulgated in 1989, members have been subject to a common law duty to communicate set forth in discipline case law that predates these provisions See *In the Matter of Respondent C* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, at pp. 450-451 [1991 WL 63249] ("Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. (Citations.)" (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260; see also Taylor v. State Bar (1974) 11 Cal.3d 424, 429-432; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in *Aronin v. State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068(m), as falling within the parameters of an attorney's oath and duties, under the general provisions of sections 6068(a) (duty to support the laws). (See e.g., *Taylor v. State Bar, supra*; *Aronin v. State Bar, supra*.)").

C. Duty To Communicate With Non-client. Although 6068(m) and rule 3-500 state a duty owed to a "client," case law has interpreted the duty to communicate to apply to a non-client in at least one special circumstance. In *Butler v. State Bar* (1986) 42 Cal.3d 323, at p. 329 [228 Cal.Rptr. 499], the Supreme Court found that an attorney's duty to communicate includes the duty to advise people who, to the attorney's knowledge, reasonably believe they are clients, that they are, in fact, not clients.

---

[3] Although not true when rule 3-500 was last reviewed and amended, (see II. Background/Purpose), certain original client documents are now prepared, filed and served in electronic form. See, e.g., Cal. Rules of Court, Rules 8.70 – 8.79 concerning e-filing and e-service in California courts. This electronic handling of documents is a reality in the practice of law in California that might warrant clarifying how a lawyer can comply with the duty to provide copies of significant documents to clients.

VII. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.4: Communications," revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.authcheckdam.pdf [Last visited 5/19/15]

B. According to the ABA Chart, nineteen jurisdictions have adopted Model Rule 1.4 verbatim.[4] Twenty-six jurisdictions have adopted a slightly modified version of Model Rule 1.4.[5] Six jurisdictions have adopted a version of the rule that is substantially different to Model Rule 1.4.[6]

---

[4] The nineteen jurisdictions are: Colorado, Connecticut, Delaware, Illinois, Iowa, Kentucky, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming.

[5] The twenty-six jurisdictions are: Alaska, Arkansas, Arizona, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, Texas, Virginia, and Wisconsin.

[6] The six jurisdictions are: Alaska, California, Louisiana, Nevada, Ohio, and South Dakota. With the exception of California, however, the differences between the rules in these jurisdictions arise from additions to, rather than substantial revisions of, the Model Rule language.

For example, **Alaska Rule 1.4** adds paragraph (c), which requires that lawyers inform a client if they do not maintain malpractice insurance. (Compare Cal. Rule 3-410.)

Louisiana Rule 1.4 adds paragraph (c), which provides:

> (c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Nevada Rule 1.4 adds paragraph (c), which provides that each lawyer or law firm must complete a "Lawyer's Biographical Data Form" which the lawyer or law firm "shall have available in written form to be provided upon request of the State Bar or a client or prospective client a factual statement detailing the background, training and experience of each lawyer or law firm."

Ohio Rule 1.4(c) requires that lawyers inform a client if they do not maintain malpractice insurance. (Compare Cal. Rule 3-410.)

South Dakota Rule 1.4 adds paragraphs (c) – (e), all related to a requirement that lawyers inform a client if they do not maintain malpractice insurance. (Compare Cal. Rule 3-410.)

IX. Public Comment Received by the First Commission:

A. The clean text of a proposed new rule 1.4 drafted by the first Commission and adopted by the Board to replace rule 3-500 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 3-500, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-500 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

X. Possible Issues Identified by Professional Competence Staff Following Review of the Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should clarify that the duties imposed by the rule are not intended to affect the work product doctrine.

(2) Whether to revise the rule to allow a lawyer to give a client access to documents as a means of responding to a client's request for copies of documents.

(3) Whether to revise the rule to clarify that providing the client with electronic copies of documents complies with the rule.

(4) Whether to revise the rule to require that a client be informed about the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. (See RRC1, Proposed Rule 1.4, cmt. [1].)

(5) Whether to change the title of the rule to “Communications With Clients” or something similar to better describe the subject matter of rule 3-500 and distinguish it from subject matter of rule 1-400, which concerns communications made to the public (prospective clients) concerning a lawyer’s availability to provide legal services.

XI. Research Resources:

1. California Rule of Professional Conduct 3-500
2. Business & Professions Code § 6068(m).
3. Business & Professions Code § 6068(n).
4. Rules of Procedure of the State Bar, Title 4, Standard 2.5, fn. 20.