

## AGENDA MATERIALS FOR

### **III.C. Rule 3-510 (Communication of Settlement Offers)**

- Drafting Team's Report & Recommendation on Rule 3-510 [1.4]  
(Revised)
- Email Compilation
  - Bob Kehr's Comments
- Assignment Document



***This item was carried over from the June meeting and the Report & Recommendation document has since then been revised.***

**III.C. Rule 3-510  
August 14, 2015  
Open Session**

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

### **I. CURRENT CALIFORNIA RULE**

#### **Rule 3-510 Communication of Settlement Offers**

(A) A member shall promptly communicate to the member'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.

(B) As used in this Rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

#### **Discussion:**

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of Rule 3-500.

### **II. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

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

### **III. PROPOSED RULE(S) (CLEAN)**

#### **Rule 3-510 Communication of Settlement Offers**

##### **Option 1:(Preferred)**

**Combine the previous Commission's revisions to Rule 3-500 that was renumbered as Rule 1.4 with the Proposed Revised Rule 3-510 as Rule 1.4(c).**

#### **RULE 1.4 Communication**

(A) A lawyer shall:

- (1) Promptly inform the client of any decision or circumstances with respect to which written disclosure or the client's informed consent, as defined in Rule 1.0(3), is required by these

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

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

(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.

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

(C) A lawyer shall promptly communicate to the lawyer's client all terms and conditions of any settlement offer made to the client in a criminal or civil matter. As used in this Rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class, or a representative authorized by the client to communicate with the lawyer regarding settlement offers.

**Review and revision of Rule 3-500 and Comments relating to Rule 3-500 to be determined by the drafting team assigned to Rule 3-500.**

**Option 2: (Not Preferred)**

### **RULE 3-510 Communication of Settlement Offers**

A lawyer shall promptly communicate to the lawyer's client all terms and conditions of any settlement offer made to the client in a criminal or civil matter. As used in this Rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class, or a representative authorized by the client to communicate with the lawyer regarding settlement offers.

**No Comments Required for Proposed Rule 3-510.**

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510  
(Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

**IV. PROPOSED RULE(S) (REDLINE TO CURRENT CALIFORNIA RULE 3-510)**

**RULE ~~3-510~~1.4 Communication of Settlement Offers**

\* \* \* \* \*

~~(C)~~(A) A ~~member~~lawyer shall promptly communicate to the ~~member's~~lawyer's client:

~~(1) All~~all terms and conditions of any settlement offer made to the client in a criminal or civil matter; ~~and~~

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

~~(B)~~ As used in this ~~Rule~~rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class, or a representative authorized by the client to communicate with the lawyer regarding settlement offers.

**Discussion:**

~~Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.~~

~~Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of Rule 3-500.~~

**Comments for Proposed Rule 1.4(c) or 3-510, from the previous Commission's Proposed Rule Revision of 3-500 numbered as Rule 1.4.**

~~[5]— Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that that counsel in a criminal matter convey to the client all offers, whether written or oral. As used in this rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.~~

~~[6]— Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been change in circumstances that requires the lawyer to consult with the client. See Rule 1.2(a).~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

~~[7]— Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.~~

### V. PUBLIC COMMENTS SUMMARY

No public comments to date.

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 6/4/2015:**

The communication of a settlement offer should be made in writing. Such a rule would reduce civil and disciplinary disputes as to whether or not a settlement offer was communicated to a client and would be consistent with the rules addressing conflict disclosures and waivers. A writing also provides the client a document that can be discussed and reviewed with another attorney or advisor.

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

**The ABA Model Rules do not have a black letter rule on a lawyer's duty to communicate settlement offers.** No other black letter rule in the current ABA Rules of Professional Conduct specifically addresses the lawyer's duty to communicate all offers of settlement and this drafting team opines that this should be the appropriate duty of all lawyers.

ABA Model Rule 1.2(a) states: ". . . a lawyer shall abide by a client's decision whether to settle a matter."

ABA Model Rule 1.4(a)(1) requires that a lawyer . . . "promptly inform the client of any decision or circumstances with respect to which the client's informed consent," as defined in Rule 1.0(e) is required by these Rules.

ABA Model Rule 1.4(a)(3) requires that a lawyer . . . "shall keep the client reasonably informed about the status of a matter."

ABA Model Rule 1.4, Comment 1 states, that a lawyer who receives an offer of settlement in a civil controversy or criminal case must promptly inform the client unless the client has previously indicated that the proposal/offer will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer."

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

The ABA State Adoption Chart for the ABA Model Rule 1.2, which is related to Rule 3-510, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_2.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.pdf)
- 5 states include a provision that require attorneys to abide by a clients decision on whether to accept an offer of settlement (AK, GA, MI, MO, SC).

The ABA State Adoption Chart for the ABA Model Rule 1.4, which is related to Rule 3-510, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_4.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.pdf)

7 jurisdictions include a provision that requires attorneys to communicate an offer of settlement or plea bargain (AZ, CA, DC, HI, MI, NY, VA).

According to the ABA Chart Model Rule 1.4 has been adopted in 45 jurisdictions with identical or slightly modified language related to communicating offers of settlement.

### **Comments to Rule 1.4(c) contained in the previous Commission's Rule Revisions.**

This drafting team suggests that no comments are needed for the Proposed Revised Rule 3-510.

### **Other Jurisdictions Re Rule 3-510 Settlement Offers**

The California *Business & Professions Code*, Section 6068 does not specifically address the duty to communicate offers of settlement.

### **Michigan Rule 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer.**

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this Rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyers, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510  
(Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

\* \* \* \* \*

**The Proposed Rule Revision of 3-510 is consistent with Michigan's Rule 1.4(a)**

**Michigan Rule 1.4(a) Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains. (Emphasis added).

**Minnesota** Rule 1.4 requires that all settlement offers must be promptly communicated:

(2) If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

The **District of Columbia** adds language to Model Rule 1.4(a) that states, "A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case, shall inform the client promptly of the substance of the communication."

**Hawaii** Rule 1.0(a)(6) states: "promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case . . ."

**New York** Rule 1.2 re: communicating settlement offers says: "lawyer shall abide by a client's decision concerning these objectives of representation. A lawyer shall abide by a client's decision whether to settle a matter . . ."

**New York** Model Rule 1.4(i)(ii) adds: "any information required by Court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers."

**New York** RPC 1.4(a)(1)(iii) imposes a duty to inform the client of "material developments in the matter, including settlement or plea offers."

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

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

#### A. Concepts Accepted(Pros and Cons):

1. Propose the use of the term “lawyer” instead of “member” with the appropriate definition for “lawyer” in a separate terminology section as done in the ABA Rules.
  - Pros: The use of “member” is contrary to the rules in every other jurisdiction that has adopted the term “lawyer.” The term “lawyer” is broader and more inclusive. Further the term “lawyer” more accurately defines the category of individuals subject to discipline under the rules.
  - Cons: None
2. Should Rule 3-500 and Rule 3-510 be combined and adopt a rule number consistent with the ABA Model Rule? If so, should Rule 3-510 be combined with the existing Rule 3-500 or with the prior Commission’s Proposed Rule 1.4 and numbered 1.4(c)? This drafting team recommends the combination of the prior Commission’s Proposed Rule 3-500 will be renumbered as 1.4 and Rule 3-510 will be numbered as 1.4(c).
  - Pros: Combining Rules 3-500 and 3-510 appears to work well in mirroring the ABA Model Rules while improving the California Rule to better protect the client and the public.
  - Cons: Each rule can and should stand on its own and Proposed Rule 3-510 is an important, simple, and critical Rule that can stand on its own.
3. Should we expand a lawyer’s duty to communicate all offers of settlement?
  - Pros: A lawyer’s professional and fiduciary obligation to best serve and protect the client clearly requires that all settlement offers be communicated to the client for consideration and response. To limit the lawyer’s duty to communicate only written offers in a civil case is not in the best interest of the client or the judicial system. Incomplete disclosure of offers opens the door to potentially inaccurate information being provided to the client about a resolution, disposition, or settlement of a matter in dispute. In criminal and civil cases, verbal negotiations take place and have value in educating and informing the client. These Rules represent the minimal standards of communications and it seems professionally imperative, at a minimum, to require that lawyers communicate all offers to the client verbally, with the better approach and higher standard being to communicate all offers in writing. The State Bar Court in (See Lewis v. State Bar (1973) 9 Cal. 3d 704, 713) states in relevant part:

“To construe Rule 3-510’s requirement that an attorney communicate to his client any offer of settlement, we must first consider an attorney’s “common law” fiduciary duties to his clients and his duty to communicate under Rule 3-500. At common law, a fiduciary owes his beneficiary a duty of full and frank disclosure of all relevant information relating to affairs of the relationship. (See generally, Rest. 2d Agency, Section 381). Because the attorney client relationship is a

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

fiduciary relationship of the very highest character in which the attorney is the fiduciary and the client is the beneficiary, there can be no question but that an attorney owes his client this duty of full and frank disclosure.”

These Rules should honor and endorse this fiduciary obligation to keep our clients fully informed.

The California Supreme Court decision in the case of *Beery v. State Bar* (1987) 43 Cal. 3d 802, 813 et seq, 239 Cal. Rptr. 121, 126 et seq., held in relevant part as follows:

The attorney-client relationship is a fiduciary relation of the very highest character imposing on the attorney a duty to communicate to the client whatever information the attorney has or may acquire in relation to the subject matter of the transaction. ( *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189-190 [98 Cal. Rptr. 837, 491 P.2d 421]; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146-148 [77 Cal. Rptr. 657, 454 P.2d 329].) "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." ( *Barbara A. v. John G.* (1983) 145 Cal. App. 3d 369, 383 [193 Cal. Rptr. 422].) An attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney-client relationship. ( *Worth v. State Bar* (1976) 17 Cal.3d 337, 341 [130 Cal. Rptr. 712, 551 P.2d 16]; *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 429 [121 Cal. Rptr. 467, 535 P.2d 331]; *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713 [108 Cal. Rptr. 821, 511 P.2d 1173].)

This proposed Rule revision is also consistent with the California *Code of Civil Procedure*, Section 283, which states in relevant part, “an attorney has no authority to compromise a client’s claim without the client’s knowledge . . .”

- Cons: This expands the duties of the lawyer and may require repetitive disclosures and disclosures of insignificant offers or terms.
4. Should we add language to Rule 3-510 to better define “client” by adding the revision proposed by the previous Commission “**or a representative authorized by the client to communicate with the lawyer regarding settlement offers?**”
- Pros: The additional language approved by the prior Commission correctly added this language to provide a necessary mechanism to ensure that a properly authorized representative may accept or reject the settlement offer. This is necessary for many practical reasons including, but not limited to, protection of clients who are minors, disabled, or incompetent.
  - Cons: None

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

### B. Concepts Rejected (Pros and Cons):

1. **Proposed Rule 3-510 Option 3:** We should not utilize and combine existing Rule 3-500 with no changes with proposed Rule 3-510 with the proposed changes.
  - Pros: Combining Revised Rule 3-500 and 3-510 into one rule numbered 1.4 and titled Communication appears to be a better way to organize and communicate these rules.
  - Cons: None
2. Should revised Proposed Rule 3-510 require any comments or discussion?
  - Pros: Could explain some of the concepts.
  - Cons: Comments are not needed or are covered by other rules, case law, and ethics opinions.
3. Title: Re: Option 2: Should we change the Title of Rule 3-510 to “Communication of Settlement Offers” in Criminal and Civil Matters?
  - Pros: Ease of locating this Rule. More accurate title.
  - Cons: Not necessary
4. Should we retain the language in the Discussion Section relating to the duty to communicate only significant offers?
  - Pros: The use of the term “significant offers” relieves the lawyer from the substantive duty of communicating the terms of “insignificant” offers.
  - Cons: The use of the term “significant offers” in the second Paragraph of the Discussion Section is subjective, ambiguous, and invites misinterpretation. It should not be included in this Rule. In order to avoid vague interpretations, it is in the client’s best interest to communicate all offers. Deleting this comment and the term “significant offers” and using “all offers” is important to best protect the client. Ultimately, it is for the client to determine if an offer is “significant.” This comment is unnecessary for the Proposed Rule.
5. Should we expand the lawyer’s present duty to only communicate written offers in a civil matter to require that lawyers communicate all offers of settlement in a civil matter?
  - Pros: The existing Rule that requires communication of “all written offers” in a civil matter may deprive the client of important and necessary information from the adverse party in arriving at a decision about resolution of the case. See #3 above under Concepts Accepted.
  - Cons: Some offers made by counsel are quickly revised or are repetitive, irrelevant, or too vague and ambiguous to constitute an offer.
6. Should the Rule require a lawyer to retain any writing relating to communication of settlement offers in a criminal or civil matter? Will a note to the file or email to the client suffice? Should any and all communications of settlement offers whether given in

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg

**Co-Drafters:** Carol Langford; MayorAja Brown

**Meeting Date:** June 26, 2015 > August 14, 2015

writing or verbally be noted in client's files and retained during the pendency of representation and for a reasonable period thereafter not to exceed 5 years?

- **Pros:** Retaining writings would establish that the lawyer performed his duty to communicate.
- **Cons:** No writings should be required as this has not been required by any rule in any jurisdiction.

7. Should this Rule add language to add a duty requiring a lawyer to locate a missing client to communicate an offer of settlement?

- **Pros:** State Bar Formal Opinion No. 2002-160, states in part:

In State Bar Formal Opinion Number 1989-1111, the State Bar articulated some of the ethical ramifications of representing client who cannot be located. In that opinion, they pointed out that under agency law, an attorney has no authority to enter into settlements without the client's express consent. "[W]ithout the express consent of a client, an attorney cannot enter into a settlement agreement, [citations] endorse a client's name on a check, [citation] or dismiss a cause of action [citation]. It is clear the attorney is severely limited in the substantive acts the attorney may take on behalf of a client when the client cannot be located." (Cal. State Bar Formal Opn. No. 1989-111, at p.1.)

Attorneys have been disciplined for settling a client's case without the client's knowledge or consent. (*Bambic v. State Bar* (1985) 40 Cal.3d 314[219 Cal. Rptr. 489]; *Sampson v. State Bar* (1974) 12 Cal.3d 70 [115 Cal.Rptr. 43]; *Bodisco v. State Bar* (1962) 58 Cal.2d 495 [24 Cal.Rptr. 835].

Although there is no definitive standard governing efforts to locate missing clients, the attorney should consider the procedures discussed in State Bar Formal Opinion Number 1989-111, including retention of a private investigator or skip-tracing service, search of public records, use of registered or certified mail with return receipt or address correction requested, and telephone contact with the missing client's relatives or colleagues. In addition, the attorney might utilize interest resources in seeking a missing client. Further in attempting to locate the mission client, the "attorney should not weigh the value of the client's case or the attorney's desire to withdraw from employment against the costs" of conducting a reasonably diligent search for the client. (Cal. State Bar Formal Opn. No. 1989-111, at p. 2.)

In light of the principles discussed above, Attorney cannot accept any settlement offer at variance with her authority from Client. ((*Silver v. state Bar* (1974) 13 Cal. 3d 134, 144 [117 Cal. Rptr. 82]; *Sampson v. State Bar*, supra, 12 Cal.3d at p. 82; *Alvarado Community Hospital v. superior Court*, supra, 173 Cal. App. 3d at p. 480.)

- **Cons:** This should be adequately addressed in other rules, comments, applicable case law, and ethics opinions .

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510 (Revised 07/29/15)

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

8. Should a client's instructions not to accept an offer unless it meets specific criteria, relieve the lawyer of his duty to communicate all offers that do not meet that specific criteria?
- Pros: Avoids repetitive communications or irrelevant information.
  - Cons: No, because circumstances and evidence in the case may materially change or require a client to modify his demands and expectations at any time during the representation. E.g., if a client tells lawyer he will "never settle for a penny less than \$500,000" and later finds out that the Defendant has no assets and a maximum liability insurance limit of \$250,000, the client may change his demands and authorize lawyer to make a policy limits demand pursuant to Code of Civil Procedure, Section 998 to settle for the maximum liability insurance limits to allow the lawyer to pursue additional damages from client's underinsured motorist coverage. Therefore, lawyers should be obligated to communicate all offers in civil and criminal matters so the client can consider changed circumstances.
9. Should we delete Comments as to Proposed Rule 1.4(c) or 3-510? This drafting team recommends that no comments are needed for this Rule.

~~[5]—Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that that counsel in a criminal matter convey to the client all offers, whether written or oral. As used in this rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.~~

~~[6]—Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been change in circumstances that requires the lawyer to consult with the client. See Rule 1.2(a).~~

~~[7]—Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.~~

- Pros: None of these comments are needed in the Proposed Revised Rule 3-510.
- Cons: None

### **C. Changes in Duties/Substantive Changes to the Current Rule: Option 1 and 2**

The proposed Rule substantively changes the lawyer's duty requiring communication of all offers of settlement in a criminal or civil matter. The proposed Rule eliminates the duty to only communicate written offers in civil matters. This Rule also eliminates the lawyer's duty to only communicate "significant" offers in civil matters.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510  
(Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

**D. Non-Substantive Changes to the Current Rule:**  
Changing “member to “lawyer.”  
Deleting all comments to Rule 3-510.

**E. Alternatives Considered:**

- See above.

**IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

(1) See Section VI above regarding the June 4, 2015 comment from the OCTC. The drafting team is recommending that the rule 3-510 be broadened to require the communication of *all* offers of settlement. The drafting team believes it is appropriate to consider this issue first before addressing the OCTC proposal to require that a lawyer’s communication of a settlement offer be transmitted in writing to a client. If the Commission agrees with the drafting team’s recommended broadening of the rule, then that decision would likely influence the Commission’s consideration of OCTC’s proposal.

**X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

**Howard C. Kornberg:** None.

**Aja Brown:** None.

**Carol Langford:** None.

**XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommends that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-510 [1.4] in the form set forth in 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 3-510 [1.4] in the form set forth in this Report and Recommendation.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-510  
(Revised 07/29/15)**

**Lead Drafter:** Howard C. Kornberg  
**Co-Drafters:** Carol Langford; MayorAja Brown  
**Meeting Date:** June 26, 2015 > August 14, 2015

**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]



**Table of Contents**

POST JUNE 26, 2015 AGENDA MAILING:..... 1  
June 14, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:..... 1



## POST JUNE 26, 2015 AGENDA MAILING:

### June 14, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:

I have the following comments and drafting suggestions on this proposed Rule:

1) This proposal would require a lawyer to communicate to the client all settlement offers in a civil matter without regard to materiality. To the contrary, current rule 3-510 is connected to the materiality element of current rule 3-500 by way of a Discussion sentence. Thus, the current rule 3-510 is not intended to require a lawyer to communicate a settlement offer in a civil matter that is not a significant development. The first Commission's Comment [6] provided an example, which is an offer that the client already has rejected, unless there has been a change in the circumstances. I am not aware of any demonstration that the current rule is deficient, and I consider the proposed expansion on this point to be unnecessarily rigid. It also would be a civil threat to lawyers b/c it might serve as a basis for a claim of fiduciary breach when a lawyer has failed to communicate a settlement offer that was not a significant development. I recommend adhering to the current rule in this respect. I have additional thoughts about the proposed absolute requirement, and about the proposal to remove "written" from what now is 3-510(A)(2), below at ¶4).

2) The argument in favor of this expansion of current rule 3-510 is contained in ¶8.3 on p. 7 of the Drafting Team Report and Recommendation. This cites *Lewis v. State Bar* but the quoted language does not come from *Lewis* (a case that does not involve a settlement, but where the fiduciary duty to disclose was involved b/c a lawyer who was acting as a general partner (not as a lawyer) hid information about the limited partnership from his limited partners). The quoted language instead comes from *In the Matter of Yagman*, 3 Cal. State Bar Ct. Rptr. 788, 1997 Calif. Op. LEXIS 8 (1997). The quoted language is part of a paragraph that continues with the point I made in my preceding paragraph:

However, we are not concerned with and do not address the scope [of the duty to disclose settlement offers] or extent of that duty because, for disciplinary purposes, in this context, it has been "defined" by rule 3-500. Rule 3-500 provides that an attorney "shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." 1997 Calif. Op. LEXIS at \*15 (italics added).

3) The proposed combination into a single paragraph of what currently are paragraphs 3-510(A)(1) and (2) has two aspects:

a. Unlike the current rule, it would use the word "settlement" with respect to criminal matters. I don't know enough about criminal practice to be certain of this, but I expect that a "settlement offer" is narrower than an "offer" in a criminal matter. In any event, wouldn't the change imply an intent to alter the duties of criminal defense lawyers? Is this a situation in which what is not broken doesn't need repair?

b. The combination of what were separate subparagraphs would remove the word "amounts" from the disclosure required in civil matters. If we were starting fresh, I might be inclined to think that the disclosure obligation with or without "amounts" would be the same but, given the long history of our Rules having that word, I would not want to create any uncertainty about the meaning of the recommended change. Again, I don't think the current rule needs fixing.

c. For these reasons, I would endorse maintaining the current (A)(1) and (2) language (still saving my thoughts on "written").

4) The limitation to written settlement offers in what currently is (A)(2) would be eliminated by the proposed joining of (A)(1) and (2). The discussion draft of proposed Rule amendments dated August 1986 that was issued by an earlier version of this Commission, I think as part of the public comment process, provides the only explanation that I know of for the limitation to written offers in civil matters. It says: "The proposed rule would treat oral offers in civil matters differently from such offers made in criminal matters as a result of the realities of negotiations common in civil cases: where offers and counter offers are made in a continuing negotiating process, it is untenable to require counsel to contact his or her client after each such offer or counter offer. The proposed amendments to the rule also recognize that lawyers in civil matters are often given authority to negotiate for a settlement within a specified range. The proposed rule makes clear, however that counsel in a civil matter is required to convey any written offer to his client, as does present rule 5-105. Thus, if opposing counsel and his or her client seek to insure that an offer will be transmitted to the client, the offer may be made in writing." This explanation seems entirely correct to me, and I therefore believe that civil and criminal offers should be treated separately and that the treatment of the former should be limited to written offers.

5) The definition of "client" in what I think would be paragraph (c)(ii) does not quite work. The reason is that this definition is specific to settlements. This is likely to lead to confusion over the meaning and application of the paragraph in the balance of the Rule (does its repeated reference to settlements mean that other Rule 1.4 communications always must be with the client and may not be through a client's representative or agent? Lawyers commonly and properly communicate with clients through others, such as family members (sometimes b/c of language skills or the client's unavailability), accountants, business managers, and others. And of course it is possible to communicate with an organizational client only through its agents. This is unremarkable so as long as the lawyer reasonably believes that: (i) the representative has the authority to communicate on behalf of the client; and (ii) the representative is reliable. I would have no objection to the addition of a definition broad enough to cover all Rule 1.4 communications, but I don't think this is needed. Note that neither MR 1.0 nor the first Commission's Rule 1.0.1 included a definition of "client".

6) I ask that the Commission consider the adoption of a Comment along the lines of the second paragraph of the Discussion to current rule 3-510 if it retains "written", as I hope it will. That paragraph currently states: "Any oral offers of settlement made to the client in a civil matter should also be communicated if they are significant for purposes of rule 3-500." The reference to rule 3-500 would not be needed if both are combined in Rule 1.4. Also, the word "should" would be better stated as "must". I suggest: "Any oral settlement offer made to the client in a civil matter must be communicated if it is a significant development." This intentionally retains the passive voice because the lawyer need not communicate the offer if someone else has done so. I consider this an important clarification that should assure that paragraph (c) cannot be read as a limitation on the duty to communicate under paragraph (a).

7) I do not recommend that we retain the first paragraph of the current 3-510 Discussion. It is part of the Commission's August 1986 explanation for the difference in the drafting of (A)(1) and (2), but it merely repeats (A)(1). It therefore is surplusage that can be dropped in light of the Court's concern about the length of the Comments.

**CURRENT CALIFORNIA RULE 3-510**  
**“Communication of Settlement Offer”**

***I. Text of Current Rule:***

(A) A member shall promptly communicate to the member’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.

(B) As used in this rule, “client” includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

***Discussion:***

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are “significant” for the purposes of rule 3-500.

***II. Background/Purpose:***

Current rule 3-510 originated in 1979 and, at that time, was numbered rule 5-105. The 1979 version required a lawyer to promptly communicate to the lawyer’s client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. It also defined “client” to include a person who possesses authority to accept a settlement offer or, in a class action, the person who is the representative of the class.

The rule was revised and renumbered as rule 3-510, operative May 26, 1989, as part of the comprehensive revision of the entire rules. A new provision required that settlement offers in criminal matters be promptly communicated whether written or oral. A new Discussion paragraph cross-referenced rule 3-500 and clarified that oral offers of settlement in a civil matter should be communicated to the client if significant for purposes of rule 3-500. The State Bar’s memorandum to this Court included the following explanation.

Proposed rule 3 510 continues the requirement that an attorney promptly communicate to the client all written settlement offers.

It is proposed that the rule be divided into paragraphs to make it easier to follow. The rule has been expanded to require that an oral offer of settlement made in a criminal matter be promptly communicated to the client because the negotiations in criminal cases are most often oral.

(See page 37 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.).

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

A. In a 2001 Letter to the Prior Commission, OCTC did not offer any comments on rule 3-510.

B. New Comments from OCTC:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

**IV. *Potential Deficiencies in the Current Rule:***

A. See above input from OCTC.

B. [Insert Text Here]

C. [Insert Text Here]

**V. *California Context:***

A. [Insert Text Here]

**VI. *Approach in Other Jurisdictions (National Backdrop):***

A. In the ABA Model Rules, the closest counterpart to rule 3-510 is Model Rule 1.4. Model Rule 1.4(a)(3) provides that a lawyer shall "keep the client reasonably informed about the status of the matter." Although an explicit duty to communicate settlement offers is not mentioned in the black letter text of Model Rule 1.4, Comment [1], in part, states: "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer."

Eighteen states have adopted Model Rule 1.4 verbatim.<sup>1</sup> Twenty-seven jurisdictions have adopted a slightly modified version of Model Rule 1.4.<sup>2</sup> Six states have adopted a version of the rule that is significantly different to Model Rule 1.4.<sup>3</sup>

B. Thirteen states have adopted Model Rule 1.2 verbatim.<sup>4</sup> Eighteen jurisdictions have adopted a slightly modified version of Model Rule 1.2.<sup>5</sup> Twenty states have adopted a version of the rule that is significantly different to Model Rule 1.2.<sup>6</sup>

## **VII. Public Comment Received by the First Commission:**

A. The clean text of a proposed new rule 1.4 drafted by the prior Commission and adopted by the Board to replace the provision of rule 3-510 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. The proposed rule is similar to the current rule so the drafting team may consider to what extent, if any, the public comments received might offer helpful information in analyzing the current rule.

To facilitate understanding of these public comments, a redline comparison of the proposed rule showing changes to rule 3-510 is also enclosed with the prior public comment received. However, because the objective of taking a fresh look at rule revisions is part of the guidance given by the Board, a drafting team that considers amendments developed by the prior Commission should assume an intellectually critical posture rather than granting any presumptive correctness to the work of the prior Commission.

---

<sup>1</sup> The eighteen states are: Colorado, Connecticut, Delaware, Illinois, Iowa, Kentucky, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, and Washington.

<sup>2</sup> The twenty-seven 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, Rhode Island, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.

<sup>3</sup> The six states are: Alaska, California, Louisiana, Nevada, Ohio, and South Dakota.

<sup>4</sup> The thirteen states are: Arizona, Arkansas, Delaware, Iowa, Kentucky, Minnesota, Nevada, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Washington.

<sup>5</sup> The eighteen jurisdictions are: Colorado, District of Columbia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Virginia, and West Virginia.

<sup>6</sup> The twenty states are: Alabama, Alaska, California, Connecticut, Florida, Georgia, Hawaii, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New York, North Carolina, Ohio, Tennessee, Texas, Wisconsin, and Wyoming.

**VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the objective of taking a fresh look at the rules, Professional Competence staff lists the following rule amendment issues (in no particular order) that the drafting team may elect to consider. The assignment to the drafting team does not mandate that any of these issues be addressed by the drafting team. The drafting team is free to disregard any or all of them. For example, if a possible issue identified below is not determined by the drafting team to address an actual (as opposed to theoretical) public protection deficiency in the current rule as a traditional disciplinary standard used by the State Bar in disciplinary proceedings, then the drafting team should have serious reservations about recommending a change to the current rule notwithstanding the past decision of the prior Commission and Board to address that 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 national backdrop or prior public comment. Multiple mentions of an issue do not necessarily militate in favor of the drafting team taking any action on an issue.)

(1) Whether to revise the rule to require that a lawyer's communication of a settlement offer be transmitted in writing and, if so, whether to also require that the lawyer retain a copy of that writing to be made available to the State Bar in the event of a disciplinary investigation of the lawyer involving an issue of the lawyer's communication of a settlement offer.

**IX. Research Resources:**

1. California rule of Professional Conduct 3-500
2. [Business and Professions Code § 6068\(m\)](#)