



**THE STATE BAR  
OF CALIFORNIA**

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**III.D. Rule 3-500 [1.4]  
March 31 - April 1, 2016  
Open Session Agenda**

**M E M O R A N D U M**

**DATE:** March 18, 2016

**TO:** Members, Commission for the Revision of the Rules of Professional Conduct

**FROM:** Randall Difuntorum, Director, Professional Competence

**SUBJECT:** Proposed Rule 1.4 (3-500) Communication with Clients

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At the upcoming March 31<sup>st</sup> and April 1<sup>st</sup> meeting, it is anticipated that the Commission will complete its consideration of current rule 3-210 (Advising the Violation of Law) (see open agenda item III.C). At the last meeting in February, rule 3-210 was renumbered and reorganized as two separate rules: rule 1.2 (Scope of Representation and Allocation of Authority); and rule 1.2.1 (Advising Violation of Law). Each of those rules and their comments will be considered at the March/April meeting. The consideration of rule 1.2.1, Comment [4] necessitates further consideration of a previously adopted rule, proposed rule 1.4 (3-500) (Communication with Clients) (copy attached). In addition, staff has identified a separate unrelated clean-up revision to proposed rule 1.4.

**I. Consideration of Rule 1.2.1, Comment [4]**

As submitted by the drafting team, proposed rule 1.2.1 includes a Comment [4] stating:

[4] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer **must consult** with the client regarding the limitations on the lawyer's conduct." (Emphasis added.)

Proposed rule 1.4 (3-500) (Communication with Clients) was discussed at the Commission's September 25 – 26, 2015 meeting and adopted for recommendation to the Board for public comment distribution. As adopted, it included bracketed text as paragraph (a)(2) stating that a lawyer shall:

(2) reasonably **consult** with the client about the means by which to accomplish the client's objectives in the representation. (Emphasis Added.)

This above language was a placeholder pending the Commission's consideration of Model Rule 1.2.

The Commission also considered but did not adopt a proposed paragraph (a)(5) (derived from Model Rule 1.2(a)) stating that a lawyer shall:

(5) **consult** with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that that client expects assistance not

permitted by the Rules of Professional Conduct or other law. (Emphasis Added.)

These two paragraphs state client communication duties using the operative term “consult.” No other provisions in the Commission’s version of proposed rule 1.4 use the term “consult.” This creates a disconnect between rule 1.4 and rule 1.2.1. Rule 1.2.1 Comment [4] uses the phrase “must consult” but rule 1.4 omits the specific provision, paragraph (a)(5), establishing this duty. Rule 1.4 also places in brackets the only other provision, paragraph (a)(2), that uses the term “consult.”

There are at least three options for fixing this disconnect. One option is for the Commission to reconsider the decision to omit paragraph (a)(5) in rule 1.4. If paragraph (a)(5) is included in rule 1.4, then rule 1.2.1 Comment [4]’s use of the phrase “must consult” would relate directly to the duty set by rule 1.4(a)(5). This option would most closely approximate the approach taken in those jurisdictions that adopt Model Rules 1.2 and 1.4. In fact, the Model Rule’s version of the Commission’s rule 1.2 Comment [4] language ends with a short sentence providing an explicit cross reference to Model Rule 1.4(a)(5). (See the last sentence of Model Rule 1.2 Comment [13].)

A second option would be to add Model Rule 1.4(a)(5) as a new paragraph (c) to rule 1.2.1 to establish the “must consult” duty presently found only in Comment [4]. A new paragraph (c) would essentially take the omitted text of rule 1.4(a)(5) and include it in rule 1.2.1, thereby establishing a basis for Comment [4]’s reference to a “must consult” duty or even obviating the necessity of Comment [4].

A third option would be to deal with this issue in Comment [4], itself, by either deleting the comment in its entirety from rule 1.2.1, or by revising the language in Comment [4] to substitute the phrase “must inform” for “must consult with.” The former resolves the disconnect by eliminating a comment that refers to a duty that is not present in the rule 1.4. The latter resolves it by conforming the comment language to the actual duty in rule 1.4, which is a duty to “keep a client reasonably informed about significant developments.” A lawyer’s realization that a client expects assistance not permitted by the rules or the State Bar Act arguably qualifies as a “significant development” arising during the client’s representation and triggers the duty to communicate in rule 1.4.

## II. Clean-up Revision to Rule 1.4

Current rule 3-500 links the duty to provide copies of documents to the duty to keep a client reasonably informed about significant developments. The current rule states:

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.*** (Emphasis added.)

The version of proposed rule 1.4 adopted by the Commission implements a new structure using subparagraphs that inadvertently separates these duties. A correction that would restore the link but maintain the Commission’s new structure is set forth below (redline/strikeout showing changes to the rule adopted at the September meeting):

### Rule 3-500 [1.4] Communication with Clients

(a) A lawyer shall:

\* \* \* \* \*

- (3) keep the client reasonably informed about significant developments relating to the representation and shall provide the client with copies of significant documents that are necessary to keep the client so informed; and
- (4) promptly comply with the client's reasonable request for information about the client's matter.

The above edits preserve the precise statement of the duties in current rule 3-500. The duty concerning copies of documents is reconnected with the duty to keep a client informed of significant developments. In addition, the duty to promptly comply with any reasonable request for information made by a client about the client's matter is a standalone obligation imposed regardless of whether a significant development has occurred.

### **III. Action Requested:**

Please consider each of the above matters concerning rules 1.4 and be prepared to discuss what changes, if any, the Commission should make at this time. By making changes now, it will help avoid a required re-distribution for further public comment after the initial public comment distribution of all of the Commission's proposed rules.

## ATTACHMENT

### **Rule 3-500 [1.4] Communication with Clients (Commission's Proposed Rule Adopted on September 25 & 26, 2015 – Clean Version)**

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent, as defined in [Rule 1.0.1(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;] [This is a placeholder pending the Commission's consideration of Rule 1.2.]
  - (3) keep the client reasonably informed about significant developments relating to the representation; and
  - (4) promptly comply with the clients' reasonable request for information, including requests for documents, that are necessary to keep the client reasonably informed about the client's matter.
- (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 may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or statutory limitation.

#### **Comment**

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Business and Professions Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see [Rule 1.16(e)(1)]).

[4] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

## Rule 3-500 [1.4] Communication with Clients

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent, as defined in [Rule 1.0.1(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; [PLACEHOLDER for Consideration of Rule 1.2]
  - (3) keep the client reasonably informed about significant developments relating to the representation and shall provide the client with copies of significant documents that are necessary to keep the client so informed; and
  - (4) ~~Promptly~~promptly comply with the ~~clients'~~client's reasonable request for information, ~~including requests for documents, that are necessary to keep the client reasonably informed~~ about the client's matter.
  - (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. [PLACEHOLDER for Consideration of Rule 1.2]<sup>1</sup>
- (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 may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.

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<sup>1</sup> At its September 2015 meeting, the Commission voted not to include MR 1.4(a)(5). However, the 3-210 [1.2, 1.2.1] drafting team has tentatively recommended that Rule 1.2.1, Comment [4], which provides:

[4] [If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct.]

The foregoing comment mandates ("must") that the lawyer consult with the client, but without the duty appearing in the blackletter of the Rule.

Comment [4] is nearly verbatim derived from Model Rule 1.2, Comment [13]. However, the MR comment appropriately uses "must" because it expressly cross-references MR 1.4(a)(5).

If Rule 1.2.1 is to retain Comment [4], RRC2 should either restore MR 1.4(a)(5) to proposed Rule 1.4 or add a new paragraph (c) to proposed Rule 1.2. To avoid creating an unnecessary difference between California and the national standard, the better approach would be the former.

- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or statutory limitation.

**Comment**

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Business and Professions Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

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