

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.4 [3-500]

Commission Drafting Team Information

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I. CURRENT CALIFORNIA RULE

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.

I. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.4 [3-500]

Vote: 15 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.4 [3-500]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

II. COMMISSION'S PROPOSED RULE 1.4 [3-500] (CLEAN)

Rule 1.4 [3-500] 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,* 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, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and
 - (4) advise 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.
- (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 limitation under statutory or decisional law.

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 Bus. & Prof. 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)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking 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.

III. **COMMISSION'S PROPOSED RULE 1.4 [3-500]** **(REDLINE TO CURRENT CALIFORNIA RULE 3-500)**

Rule **1.4 [3-500]** 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,* 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) ~~A member shall~~ keep a~~the~~ 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
 - (4) advise 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.
- (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 limitation under statutory or decisional law.

Comment~~Discussion~~

[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 Bus. & Prof. Code, § 6068, ~~subd.~~ (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. 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

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

~~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.~~

[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 ~~3-500~~ is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the ~~member~~lawyer 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.~~

IV. RULE HISTORY

In 1989, a new rule 3-500, based in part on ABA Model Rule 1.4(a), was approved. This rule was intended to set forth the duty of a lawyer to keep clients reasonably informed as to the status of their matter. The rule had been proposed 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(m), which requires a lawyer to promptly respond to reasonable client inquiries and to keep clients reasonably informed of significant developments in their matters.¹

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). That rule was proposed to respond 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.

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.

The Supreme Court declined to approve proposed rule 3-520 but approved the 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.

V. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC is concerned that subsection (a)(3) excludes requiring that attorneys keep a client reasonably informed about significant developments relating to the employment and not just the representation. The current rule requires an attorney to keep a client informed about significant developments relating to the employment or representation. It is not clear that representation in the new proposed rule includes issues about the employment. Recently, the State Bar Court's hearing department dismissed a 6068(m) allegation that an attorney failed to inform the client that her dental malpractice case fell under MICRA limitations. The hearing department found that this failure did not constitute a failure to keep his client informed of significant developments. It held that the attorney's failure to advise his client that her lawsuit fell under MICRA fee limitations could have been classified as a competency issue pursuant to rule 3-110(A), but not a development. (In the Matter of Bolanos, Case No. 15-O-10896.) Prior to the enactment of section 6068(m), failures to communicate were recognized as a common law duty and as part of competent performance. (In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680.) Since the term employment is in the current rule, some attorneys will argue that the new rules removed any requirement that was included by the language in the old rule. (See e.g. In the Matter of Hindin, supra, 3 Cal. State Bar Ct. Rptr. at 684.)

2. OCTC is concerned with subsection (c) of this rule, which permits a lawyer to delay transmitting information to a client if the lawyer believes that the client would be likely to react in a way that may cause imminent harm to the client or others. This will probably be used to excuse failures to communicate by simply claiming that the attorney subjectively believed that the client would likely react in a way that may cause imminent harm to the client or others. Attorneys are not trained in psychology and this subsection would make enforcing the duty to communicate much more difficult and would approve the violation of an important duty of the attorney.

3. Comment 1 is unnecessary because subsection (a)(3) already states that the communication requirement is about significant developments.

4. OCTC supports Comments 2-4.

- **State Bar Court:** No comments were received from State Bar Court.

VI. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above-referenced comment from OCTC were received. One agreed with the proposed rule, two agreed only if modified. A public comment synopsis table, with the Commission's responses to the comments received, is provided at the end of this report.

VII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

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. 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 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. *Butler* was followed in *Gadda v. State Bar*, 50 Cal.3d 344, 353 (1990); *Matter of Kaplan*, 3 Cal. State Bar. Ct. Rptr. 547 (1996); and Cal. State Bar Ops. 2003-164, 2003-161, and 1995-141. *Matter of Kaplan* clarified that the *Butler* standard does not go to the lawyer's actual knowledge in the subjective sense, but facts from which the lawyer reasonably should have recognized the person's belief in the existence of a lawyer-client relationship.

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for Model Rule 1.4, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.4: Communication,” revised September 27, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.authcheckdam.pdf [Last visited 1/9/2016]
- 18 jurisdictions have adopted Model Rule 1.4 verbatim;² Five jurisdictions have retained the former, pre-Ethics2000 version of Model Rule 1.4;³ 20 jurisdictions have adopted a version that is substantially similar to Model Rule 1.4;⁴ seven jurisdictions have adopted a version of Model Rule 1.4 with substantial differences or additions.⁵ Only California has not adopted Model Rule 1.4.

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

A. Concepts Accepted (Pros and Cons):

1. Adopting paragraph (a) of Model Rule 1.4, revised to conform to provisions in the proposed Rules (e.g., paragraph (a)(1) references “disclosure” in addition to “informed consent”) or to carry forward provisions in current rule 3-500 (e.g., paragraph (a)(3)’s reference to “significant developments-”). In contrast to current rule 3-500 and Bus. & Prof. Code § 6068(m), proposed paragraph (a) provides a more detailed statement of a lawyer’s obligations to clients with regard to communication. Paragraph (a)(1) states a duty to inform clients when written disclosure or informed consent is required. Paragraph (a)(2) states a duty to discuss the means by which to accomplish

² The jurisdictions are: Colorado, Connecticut, Delaware, Illinois, Iowa, Kentucky, Minnesota, Montana, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wyoming.

³ The jurisdictions are: District of Columbia, Mississippi, Michigan, Oregon, and Texas.

⁴ The jurisdictions are Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Missouri; New Hampshire, New Mexico, New York, North Dakota, Virginia, Washington, and Wisconsin.

⁵ For example, Alaska adds a provision requiring notice of receipt of settlement proceeds; Louisiana adds provision requiring that a lawyer who provides financial assistance to a client provide written disclosures of the terms on which such assistance is being provided; Nevada adds a lawyer biographical data disclosure requirement; New Jersey adds provisions requiring the lawyer to inform a client on how the client may communicate with the lawyer and where the client files are kept; Ohio adds provisions requiring disclosure of whether the lawyer maintains professional liability insurance and information about fee divisions; Rhode Island adds “informed consent” requirement; South Dakota also adds a professional liability insurance disclosure requirement.)

a client's representation objectives. Paragraph (a)(3) most closely resembles current rule 3-500 and provides a duty to keep the client reasonably informed about significant developments relating to the representation, including providing access to significant documents. Paragraph (a)(4) requires a lawyer to advise the client about any ethical limitations the lawyer faces when a client expects assistance barred by the rules or the law.

- Pros: The change Improves public protection by identifying with specificity a lawyer's communication obligations, including the duty to inform clients about important aspects of cases. This specificity should also enhance lawyers' compliance by clearly identifying their obligations. Carrying forward current terminology (i.e., "significant developments") retains a provision around which case law has developed.
 - Cons: There is no evidence that current rule 3-500 has caused any problems of compliance or enforcement.
2. Adopting paragraph (b) of Model Rule 1.4, which requires a lawyer to explain matters so that the client can make informed decisions regarding the representation.
- Pros: This is an important concept. Only a client can make substantive decisions involving the representation, e.g., the decision to waive a jury trial or to settle a civil action or accept a plea bargain in a criminal matter. (See proposed rule 1.2, scope of representation and allocation of authority between lawyer and client) However, a client can only make an informed decision if the client's lawyer has provided the client with sufficient information and explanation to weigh the advantages and disadvantages of a particular course of conduct, and to understand the reasonably available alternative courses of action and their pros and cons. Specifying this duty in the proposed rule should therefore promote compliance with the other Rules, i.e., those that require informed consent or disclosure, and thus enhance public protection. The Commission believes this is consistent with existing case law and that stating these requirements in the Rule will enhance public protection.
 - Cons: There is case law that recognizes these lawyer duties. Again, there is no evidence that current rule 3-500 has caused any problems of compliance or enforcement.
3. Adopting paragraph (c), which permits a lawyer to delay transmission of information if "the client would be likely to react in a way that may cause imminent harm to the client or others."
- Pros: This provision has no counterpart in the blackletter of either current rule 3-500 or Model Rule 1.4. However, Model Rule 1.4 so

- provides in its Comment [7]. First, the exception is limited: a lawyer may delay transmission of information only if it would cause *imminent* harm to the client or others. This is a public protection measure. Second, because it creates an implied exception to the duty to communicate with a client, the provision belongs in the blackletter rather than in a comment as in the Model Rule. Paragraph (c) will permit a lawyer to exercise reasonable judgment without suffering disciplinary risk in doing so.
- Cons: Although the provision appears to be beneficial, it is not clear how a lawyer is to determine when such harm is “imminent.” This provision creates the potential for swallowing the duty to communicate.
4. Adopting paragraph (d), which provides an exception to the duty to provide information and documents to the client when non-disclosure is permitted by protective order, non-disclosure agreement, or statutory or decisional law.
- Pros: This provision simply carries forward the substance of current rule 3-500, Discussion ¶. 3. It belongs in the blackletter text because it provides an exception to the proposed rule’s general duty to communicate with the client.
 - Cons: None identified.
5. Adopt several comments that provide interpretative guidance on the meaning of the rule’s blackletter provisions and scope of their application.
- Pros: All of the comments conform to the Commission’s Charter principle that comments be used sparingly to elucidate the blackletter and not be conflict with it. Comment [1] clarifies that whether particular information is a “significant development” is a contextual inquiry. Comment [2] clarifies that subparagraph (a)(3)’s requirement of providing significant documents can be satisfied by providing electronic copies and that the lawyer can recover the cost from the client. (Compare current rule 3-500, Discussion ¶. 2. Comment [3] clarifies that, when paragraph (c) applies, it does not supersede obligations to provide the client file at the termination of the representation. Comment [4] clarifies that statutory and decisional law govern the lawyer’s duties with respect to providing the client with work product.
 - Cons: The black letter is sufficiently specific so as to obviate the need for explanatory comments.

B. Concepts Rejected (Pros and Cons):

1. Merge the concepts in current rule 3-500 (communication) and 3-510 (communication of settlement offers) in a single rule.
- Pros: The change would bring California in line with the ABA Model Rule

1.4 and every other jurisdiction in the country, none of which has a separate rule regarding communication of settlement offers.

- Cons: The concept in current rule 3-510, the communication of settlement offers and plea bargains to the client, is sufficiently important that it should continue to be stated in a separate, standalone rule. As explained in the Rule 1.4.1 [3-510], a lawyer's communicating such information is critical to enable a client to make an informed choice about a decision that only the client has authority to make under proposed Rule 1.2 and California decisional law. Retaining the concept of current rule 3-510 is not an "unnecessary difference" between the California rules and the rules in a preponderance of jurisdictions that should be eliminated.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

Substantive changes to current rule 3-500 include: (i) Paragraph (a)(1)'s requirement to promptly inform clients of any decision or matter when written disclosure or informed consent is required by the rules; (ii) paragraph (a)(2)'s requirement that a lawyer reasonably consult with the client about the objectives of the representation; (iii) paragraph (a)(4)'s requirement that the lawyer advise the client of limitations on the lawyer's ability to assist or advise the client in criminal or fraudulent conduct (see proposed rule 1.2.1); and (iv) paragraph (c)'s exception to the rule when the client will likely react in a way to cause imminent harm.

D. Non-Substantive Changes to the Current Rule:

The addition of paragraph (d) concerning the application of statutory or decisional law that might preclude compliance with the rule is not a substantive change as it carries forward current rule 3-500, Discussion ¶1.3. The formatting and structure of proposed Rule 1.4 diverges markedly from current rule 3-500 but is consistent with the approach in other jurisdictions, all of which have adopted the formatting and structure of the Model Rules. All other changes, including the numbering of the rule to conform with the Model Rule numbering scheme and the substitution of "lawyer" for "member" are non-substantive changes.

E. Alternatives Considered:

The only alternative considered was to retain the format and content current rule 3-500.

IX. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.4 [3-500] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.4 [3-500] in the form attached to this Report and Recommendation.