

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.4.1 [3-510]

Commission Drafting Team Information

Lead Drafter: Howard Kornberg

Co-Drafters: Carol Langford

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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.4.1 [3-510]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.4.1 [3-510]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 1.4.1 [3-510] (CLEAN)

Rule 1.4.1 [3-510] Communication of Settlement Offers

- (a) A lawyer shall promptly communicate to the lawyer's client:
- (1) all terms and conditions of a proposed plea bargain or other dispositive 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.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under Rule 1.4.

IV. COMMISSION'S PROPOSED RULE 1.4.1 [3-510] (REDLINE TO CURRENT CALIFORNIA RULE 3-510)

Rule 1.4.1 [3-510] Communication of Settlement ~~Offer~~Offers

- (a)~~(A)~~ A ~~member~~ lawyer shall promptly communicate to the ~~member's~~lawyer's client:
- (1) ~~All~~all terms and conditions of ~~anya~~ proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
 - (2) ~~All~~all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.
- (b)~~(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.

Comment~~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~~An oral ~~offers~~offer of settlement made to the client in a civil matter ~~should~~must also be communicated if ~~they are it is a~~ "significant" ~~for the purposes of rule 3-500.~~ development" under Rule 1.4.

V. RULE HISTORY

Current rule 3-510 originally became operative in 1979 as 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. Rule 5-105 defined "client" to include a person who possesses authority to accept a settlement offer or, in a class action, the class representative.

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 plea offers in criminal matters be promptly communicated, whether written or oral. A new Discussion paragraph cross-referenced rule 3-500, which requires that a lawyer inform the client about significant developments related to the representation, 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 the Supreme Court explained:

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.).

VI. 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 supports this rule and its Comments.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

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

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. ABA Model Rule Adoptions

The ABA Model Rules do not have a black letter rule on a lawyer's duty to communicate settlement offers. No black letter rule in the ABA Model Rules of Professional Conduct expressly addresses a lawyer's duty to *communicate* settlement offers to a client. However, there are other rules or comments in the Model Rules that expressly relate to settlement.

- 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, Comment [1] provides 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.”

In addition, other Model Rules impliedly impose obligations concerning settlement:

- ABA Model Rule 1.4(a)(1) provides that a lawyer shall “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. A lawyer cannot settle a client's matter without the client's informed consent. (See Model Rule 1.2(a), above. See also *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156] (Lawyer not permitted by virtue of having been retained by client to impair the client's substantial rights).)
- ABA Model Rule 1.4(a)(3) provides that a lawyer . . . “shall keep the client reasonably informed about the status of a matter.”

The ABA State Adoption Chart for the ABA Model Rule 1.2, modified July 15, 2015, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.pdf

The ABA State Adoption Chart for the ABA Model Rule 1.4, modified May 13, 2015, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_4.pdf
- Seven jurisdictions include a blackletter 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, 45 jurisdictions have adopted Model Rule 1.4 with identical or slightly modified language.

B. Other Jurisdictions Approaches to Settlement Offers

- **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.

* * * * *

- **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, Comment [2],** provides:

[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). (Emphasis added).

- **District of Columbia Rule 1.4(a)** adds the following language to MR 1.4(a): "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 1.4(a)(6)** provides a lawyer shall: "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 1.4(a)(1)(iii)** provides that a lawyer shall “promptly inform” the client of “material developments in the matter, including settlement or plea offers.”

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

A. Concepts Accepted (Pros and Cons):

1. Retain the dichotomy in current rule 3-510 between plea offers in criminal cases (all offers must be communicated) and settlement offers in civil cases (all *written* offers and any “significant” offer must be communicated).

- Pros: To require that every offer of settlement in a civil matter, regardless of its merit, be communicated to the client might superficially appear to be reasonable but such a requirement is impracticable in light of the realities of negotiation. A lawyer should not be required to break off potentially fruitful negotiations to communicate every offer, even those that are insignificant. Further, requiring communication of any civil offer would conflict with Bus. & Prof. Code 6103.5(a).¹

Communication of all proposed plea bargain or other dispositive offers to an accused is required for two reasons. First, give and take negotiations are less common in criminal matters and second, because the accused’s liberty interests are at stake, the accused should be a participant in any negotiations that occur.

- Cons: A lawyer’s fiduciary obligation to best serve and protect the client requires that all settlement offers be communicated to the client for consideration and response. (See also paragraph B.2, below.)
2. Include a more specific description of what must be communicated to an accused in a criminal matter: “any proposed plea bargain or other dispositive offer”.
- Pros: Eliminates ambiguity about whether dispositive offers that fall short of a “plea bargain,” e.g., an offer made in a pre-charge or pre-indictment context, must also be communicated to an accused.
 - Cons: None identified.

¹ Bus. & Prof. Code § 6103.5(a) provides:

(a) A member of the State Bar shall promptly communicate to the member’s client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. As used in this section, “client” includes any person employing the member of the State Bar who possesses the authority to accept an offer of settlement, or in a class action, who is a representative of the class.

3. Delete rule 3-510, Discussion ¶.1.²

- Pros: Discussion ¶.1 does not interpret the black letter or explain how the rule should be applied. It merely provides a rationale for why offers in criminal and civil matters are treated differently.
- Cons: None identified.

4. Retain rule 3-510, Discussion ¶.2, as revised, as the only comment to proposed rule 1.4.1.

- Pros: First, the paragraph is in current rule 3-510. Second, the sentence provides an important clarification of a lawyers duties under proposed Rule 1.4 [3-500], which requires the communication of “significant developments” in a matter to the client. Although proposed rule 1.4.1 does not require communication of oral settlement offers, the comment clarifies that proposed rule 1.4s’ requirement that “significant developments” be communicated mandates that any oral offer that is a “significant development” must also be communicated to the client. Third, cross-referencing the duty to communicate significant developments in rule 1.4 removes ambiguity of settlement offers that are “significant” in the current rule Discussion, which provides no explanation of what a “significant offer” is. Fourth, in response to the “Con” that the requirement belongs in the blackletter, it is in a comment because the communication is required under proposed rule 1.4, not rule 1.4.1.
- Cons: If there is a duty to communicate an oral offer in a civil case that is a “significant development,” it belongs in the blackletter of the rule.

B. Concepts Rejected (Pros and Cons):

1. Merge current rule 3-510 [proposed rule 1.4.1] with current rule 3-500 [proposed rule 1.4].

- Pros: A merger of the two rules would put all of a lawyer’s duties concerning communications to a client during a representation in a single rule. That is the approach taken in the ABA Model Rules and in every other jurisdiction, none of which devote a separate rule regulating a lawyer’s conduct with respect to settlement offers.
- Cons: Proposed Rule 1.4.1 [3-510] is an important Rule intended to clarify the important principle that only a client can decide whether to settle a matter

² Rule 3-510, Discussion ¶.1 provides:

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.

and so ensure that only a client will make decision that will affect the client's substantial rights. (See *Blanton v. Womanicare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Current rule 3-510 has been separate rule from the general communication rule, rule 3-500, for decades. It should continue to stand on its own to accentuate this important duty.

2. Expand a lawyer's duty to communicate all offers of settlement in a civil matter.

- 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. (See *Beery v. State Bar* (1987) 43 Cal. 3d 802, 813, [239 Cal. Rptr. 121] ("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."); *Lewis v. State Bar* (1973) 9 Cal. 3d 704, 713 ("Because the attorney client relationship is a 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.")). To limit the lawyer's duty to communicate only written offers in a civil matter is not in the best interest of the client or the judicial system. In both criminal and civil matters, oral negotiations take place and have value in educating and informing the client about the value of a written settlement offer ultimately made. The better approach is to require that a lawyer communicate all settlement offers to the client. This revision would also be 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: As noted in paragraph A.1, above, requiring that any offer of settlement in a civil matter, regardless of its merit, be communicated to the client might appear to be reasonable, but such a requirement is impracticable in light of the realities of negotiation. Further, requiring communication of any civil offer would conflict with Bus. & Prof. Code 6103.5(a).

3. Revise the definition of "client" in current rule 3-510(B) by adding the following clause: "or a representative authorized by the client to communicate with the lawyer regarding settlement offers?" The first Commission made a similar recommendation for inclusion in a comment to its proposed rule 1.4.

- Pros: The added clause will better identify the persons to whom a communication required under the rule may be made and thus remove ambiguity in the current rule. It is intended 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: The definition must be applicable in both the civil and criminal context. The proposed revision would expand the persons to whom a plea or other dispositive offer might be communicated beyond what is permitted under criminal law and procedure.
4. Title: Change the rule title to “Communication of Settlement Offers *in Criminal and Civil Matters*.” (Emphasis added.)
- Pros: It would be a more accurate title and remove any ambiguity that it is intended to apply in a criminal matter.
 - Cons: The change is not necessary. There is no evidence that
5. Add a provision to the proposed rule that would impose a duty on a lawyer to locate a missing client to communicate an offer of settlement?
- Pros: State Bar Formal Opinion No. 2002-160, which identified circumstances under which a lawyer would be required to locate a missing client and proposed possible approaches the lawyer could take to effectuate a successful search.
 - Cons: Because the duty to locate a client and the efforts that must be exerted to the search are fact dependent, any such duty is best addressed in case law and ethics opinions.
6. Include a comment similar to Model Rule 1.4, cmt. [2], that states a client’s instructions not to accept an offer unless it meets specific criteria, relieves the lawyer of the duty to communicate any offer that does not meet the client’s specific criteria?
- Pros: Such a comment will clarify that a lawyer need not communicate repetitive communications or irrelevant information that the client’s instructions indicate will not be accepted.
 - Cons: Including such a comment would be misleading. 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. For example, a client might have initially instructed a lawyer that the client would “never settle for a penny less than \$500,000” but later learns that the Defendant has no assets and a maximum liability insurance limit of \$250,000. Under those circumstances, the client might change the original instructions and authorize lawyer to make a policy limits demand
7. Require that communications of a settlement offers as required under the rule be in writing.
- Pros: Such a requirement 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.

- Cons: Similar to not requiring that all offers of settlement in a civil matter be in writing, the realities of the give and take of negotiation suggest that such a requirement should remain an aspirational best practice and not a disciplinary requirement.
8. As a corollary to the concept in paragraph 7, add a requirement that the lawyer retain any writing relating to communication of settlement offers in a criminal or civil matter?
- Pros: Retaining writings would establish that the lawyer performed his duty to communicate.
 - Cons: See paragraph 7, Cons.

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:

None.

D. Non-Substantive Changes to the Current Rule:

All of the proposed revisions to current rule 3-510 are non-substantive clarifying changes. In addition, the Commission recommends the following global, non-substantive changes:

1. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule

numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substitute the term “lawyer” for “member”.

- Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed amended Rule 1.4.1 [3-510] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed amended Rule 1.4.1 [3-510] in the form attached to this Report and Recommendation.