



**THE STATE BAR
OF CALIFORNIA**

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING, AND DEVELOPMENT

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DATE: August 13, 2009
TO: Members of the Commission for the Revision of the Rules of Professional Conduct
FROM: Randall Difuntorum, Commission Staff Counsel
SUBJECT: 10-day Ballot Circulation of Proposed Rule 1.4 [3-500]

Proposed Rule 1.4 [3-500] is being distributed for your consideration. The revisions adopted at the Commission's July 24 & 25, 2009 meeting have been implemented and approval of the revised rule is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be adopted subject to further public comment when the Commission's entire rules are distributed.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 1.4, Draft 7 (8/5/09), is provided as Enclosure 2. A redline version comparing the proposed rule to Draft 6.1 (6/19/07), the draft considered at the July 24 & 25, 2009 meeting, is provided as Enclosure 3.

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, August 24, 2009, proposed Rule 1.4 [3-500] will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 1.4 [3-500]

(Comparison Chart Showing Changes to Model Rule 1.4)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4* Communication

August 2009

(Draft rule to be considered for public comment)

INTRODUCTION:

Proposed Rule 1.4 conforms with ABA Model Rule 1.4 with some notable exceptions. The proposed Rule differs from the Model Rule in that it clarifies that a lawyer must consult with a client concerning accomplishing the client's objectives only as they relate to the representation. The proposed Rule also limits the duty to keep the client informed by requiring the lawyer to do so only as to significant developments relating to the representation; this change conforms the Rule to the language of Bus. & Prof. Code § 6068(m). Model Rule 1.4 provides broader obligations insofar as it requires the lawyer to "keep the client reasonably informed about the status of the matter" generally. The draft Rule also requires that a lawyer respond to client requests for information only to the extent the client asks for information relating to a significant development in the representation. There is no Model Rule counterpart to paragraph (c), which incorporates the general requirements in current Rule 3-510 that pertain to the specific duty of communications of settlement offers in criminal and civil matters. The Commission determined that retaining these specific sections will enhance public protection by clearly delineating a lawyer's duty when presented with offers to settle.

* Proposed Rule, Draft 7 (8/5/2009).

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.4 Communication</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall:</p> <p>(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;</p>	<p>(a) A lawyer shall:</p> <p>(1) promptly inform the client of any decision or circumstance with respect to which <u>written disclosure or</u> the client's informed consent, as defined in Rule [1.0(e)], is required by these Rules <u>or the State Bar Act</u>;</p>	<p>Subparagraph (a)(1) is based on Model Rule 1.4(a)(1).</p> <p>The Commission has added "written disclosure" to the Model Rule language because under some California rules, disclosure and not informed consent is required, and it is just as important to promptly provide the client with an appropriate disclosure.</p> <p>The reference to Rule 1.0(e) is in brackets pending the Commission's decisions concerning the terminology section.</p> <p>Difference simply conforms the Rule to the State Bar Act of California.</p>
<p>(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;</p>	<p>(2) reasonably consult with the client about the means by which <u>to accomplish</u> the client's objectives are to be accomplished <u>in the representation</u>;</p>	<p>Subparagraph (a)(2) is based on Model Rule 1.4(a)(2). Proposed subparagraph (a)(2) differs from the Model Rule in that it clarifies that a lawyer's duty is limited to consultations with the client concerning accomplishing the client's objectives only as they relate to the representation. This change also conforms the language of the Rule to Bus. & Prof. Code § 6068(m).</p> <p>In addition, proposed subparagraph (a)(2) is in the active voice to conform to California rules style. See, Bryan A. Garner, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996). No change in substance is intended.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.4 Communication</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(3) keep the client reasonably informed about the status of the matter;</p>	<p>(3) keep the client reasonably informed about <u>significant developments relating to the</u> status of the matter <u>representation</u>;</p>	<p>Subparagraph (a)(3) diverges from Model Rule 1.4(a)(3) in that it limits the duty to keep the client reasonably informed only as to significant developments relating to the representation. Model Rule 1.4 provides broader obligations insofar as it requires the lawyer to "keep the client reasonably informed about the status of the matter" generally. As previously noted, limiting the lawyers' obligations to developments "relating to the representation" conforms the Rule to Bus. & Prof. Code § 6068(m).</p> <p>A majority of the Commission believed that the ABA standard is somewhat vague and that retaining the "significant developments" standard found in current rule 3-500 provides better guidance to lawyers as to their duty without unduly restricting clients' access to information about their matters. For an explanation of what is intended by "significant development," see proposed Comment [1].</p>
<p>(4) promptly comply with reasonable requests for information; and</p>	<p>(4) promptly comply with reasonable requests for information; and</p>	<p>Subparagraph (a)(4) is identical to Model Rule 1.4(a)(4).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.4 Communication</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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</p>	<p>Subparagraph (a)(5) has no counterpart in the Model Rule. Its concept, however, can be found in current rule 3-500 and Bus. & Prof. Code § 6068(m), which include the requirement that a lawyer promptly comply “with reasonable requests for information and copies of significant documents when necessary to keep the client [reasonably] informed.” The last clause of the subparagraph specifies that a lawyer can achieve compliance by permitting inspection. See also Comment [2] concerning compliance with this subparagraph by providing the client with electronic copies.</p>
<p>(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.</p>	<p>(5)(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 the these Rules of Professional Conduct or other law.</p>	<p>Subparagraph (a)(6) is identical to Model Rule 1.4(a)(5), except that “these Rules,” a California rules style convention, has been substituted for “the Rules of Professional Conduct.” Although the Model Rules use “these Rules” and “the Rules of Professional Conduct” interchangeably, the Commission consistently uses “these Rules.”</p>
<p>(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.</p>	<p>(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.</p>	<p>Subparagraph (b) is identical to Model Rule 1.4(b).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.4 Communication</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) A lawyer shall promptly communicate to the lawyer's client:</p> <p>(1) all terms and conditions of any offer made to the client in a criminal matter; and</p> <p>(2) all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.</p>	<p>Paragraph (c) has no counterpart in the Model Rule. The Commission decided to include in this draft rule (as subparagraphs (c)(1) and (2)), the general requirements in current rule 3-510, which pertain to the specific duty of communications of settlement offers in criminal and civil matters. It was determined that retaining these specific sections will enhance public protection by clearly delineating a lawyer's duty when presented with offers to settle. The Commission believes including this requirement in the Rule itself is preferable to the hortatory language of Model Rule 1.4, cmt. [2].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.</p>	<p>[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.</p>	<p>The Commission recommends not adopting MR 1.4, cmt. [1], because it is unnecessary exposition.</p>
<p><i>Communicating with Client</i></p> <p>[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).</p>	<p><i>Communicating with Client</i></p> <p>[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).</p>	<p>The Commission recommends not adopting MR 1.4, cmt. [2]. It determined that the concept of the first sentence of MR 1.4, cmt. [2] is better placed in the Rule itself. See Explanation of Changes for paragraph (c).</p> <p>The Commission has moved the concept encompassed by the second sentence of MR 1.4, cmt. [2] to the second sentence of proposed Comment [6], below.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.</p>	<p>[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.¹</p>	<p>The Commission recommends not adopting the language of MR 1.4, cmt. [3]. Instead, the Commission recommends the adoption of proposed Comment [1], below, which is a more accurate statement of the lawyer's duties under paragraphs (a)(2) and (a)(3). See Explanation of Changes for proposed Comment [1], below.</p>

¹ **Note:** The drafters recommended that MR 1.4, cmt. [3] not be adopted and that recommendation was deemed approved. See 12/2/05 KEM Meeting Notes, III.B., at ¶. 14. This recommendation was made in light of the fact that our proposed Comment [1] already addressed the concepts in MR 1.4, cmt. [3]. See Draft 2.1 (11/15/05), at note 18.

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.</p>	<p>[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.</p>	<p>The Commission recommends not adopting MR 1.4, cmt. [4] because paragraph (a)(4) is self-explanatory, rendering the Model Rule comment unnecessary exposition.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in an abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.</p>	<p>Comment [1] is based on the concepts in MR 1.4, cmt. [3], but it is a more accurate statement of the lawyer's duties under paragraphs (a)(2) and (a)(3). Comment [1], by providing illustrative examples, is intended to give guidance to lawyers in determining what constitutes a "significant development relating to the representation" within the meaning of (a) (3). One of the examples included is whether an opportunity to engage in alternative dispute resolution constitutes a significant development under the circumstances then existing. There was strong sentiment expressed by the ADR community that the modern ubiquity of ADR justified it being included the text of the rule itself. Although the Model Rule does not limit communications to "significant developments," there is a reference to "significant developments" in MR 1.4, cmt. [3].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.</p>	<p>Comment [2] has no counterpart in the Model Rule because it is concerned with a rule provision without a Model Rule counterpart. The comment clarifies how the costs of providing "significant documents" to the client may be allocated. It also clarifies that even where the costs are to be borne by the client, the failure of the client to pay does not relieve the lawyer of the lawyer's obligations under (a)(5).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><i>Explaining Matters</i></p> <p>[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).</p>	<p><i>Explaining Matters</i></p> <p>[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).</p>	<p>The Commission recommends only the first sentence of Model Rule 1.4, cmt. [5] as accurately reflecting California law and explaining the Rule. The second sentence is not helpful without the examples that follow. The third sentence is an incorrect statement of law; a lawyer has no authority to accept an agreement without client consent. The fourth sentence relates to competence, not the lawyer's fiduciary duty of full disclosure. The fifth and sixth sentences of the comment are merely practice pointers.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[4] As used in paragraph (c), "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.</p>	<p>Comment [4], which clarifies who is the "client" for purposes of this Rule, has no counterpart in the Model Rule. Nevertheless, the Commission deemed this clarification necessary guidance for lawyers handling representative matters and matters where the lawyer reports to more than one person on behalf of an represented entity.</p>
	<p>[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.</p>	<p>Comments [5], [6] and [7] clarify a lawyer's duties concerning the communication of settlement offers. A carryover from current rule 3-510, it requires that in criminal matters, <i>all</i> offers, whether made orally or in writing, must be communicated.</p>
	<p>[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 no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].</p>	<p>Comment [6] clarifies under what circumstances written offers to settle in civil matters must be communicated. The last sentence of Comment [6] incorporates the concept in the last sentence of Model Rule 1.4, cmt. [2]. The language has been revised to recognize that the lawyer must consider whether circumstances have changed before invoking the client's pre-settlement offer authority. This is an important qualification intended to protect the client's interests.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[7] Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant.</p>	<p>Comment [7] has no counterpart in the Model Rule. A carryover provision from current rule 3-510, it clarifies when an oral settlement offer must be communicated, leaving it to the lawyers reasonable judgment whether such an offer is a "significant development."</p>
<p>[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.</p>	<p>[68] Ordinarily, A lawyer ordinarily should provide to the client the information to be provided is that would be appropriate for a client who is a comprehending and responsible adult. However, fully informing it can be impractical to inform the client fully according to this standard may be impracticable, for example, where when the client is a child or suffers from mental disability diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13]. Where many routine matters are involved, The lawyer may arrange a system of limited or occasional reporting may be arranged with the client when many routine matters are involved.</p>	<p>Comment [8] is based on Model Rule 1.4, cmt. [6]. It includes non-substantive textual differences with Model Rule 1.4. A majority of the Commission considers this version more readable and understandable.</p> <p>Minority. A minority of the Commission considers the differences so insignificant as not to justify departure from the Model Rule. Making non-substantive changes for stylistic reasons creates the unintended risk that lawyers will read into the rule un contemplated substantive differences.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><i>Withholding Information</i></p> <p>[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.</p>	<p><i>Withholding Information</i></p> <p>[7] [9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus <u>For example</u>, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to <u>This Rule does not require a lawyer may to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended to override applicable statutory or decisional law requiring that certain information not be disclosed provided to criminal defendants who are clients of the client lawyer. Compare Rule 3.4[1.16(e)] directs compliance with such rules or orders(1) and Comment [9].</u></p>	<p>Comment [9] is based on MR 1.4, cmt. [7]. It clarifies that client disclosures must not violate court orders or other laws limiting or prohibiting client access to certain information or documents. It also cautions that the rule does not override legal requirements to make disclosures to criminal clients. The Commission has included a cross-reference to proposed Rule 1.16 and its comment, which provide similar guidance to lawyers on their obligations to provide clients with the contents of files when the representation is terminated.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.4 Communication Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[10] 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.</p>	<p>Comment [10] has no counterpart in the Model Rule. It was added to clarify that the rule does not override the attorney work product doctrine, which in California, is subject to statutory regulation.</p>

Enclosure 2

Proposed Rule 1.4 [3-500]
Clean Version of Draft 7 (8/5/09)

Rule 1.4 Communication

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which written disclosure¹ or the client's informed consent, as defined in Rule [1.0(e)],² 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;³
 - (4) promptly comply with reasonable requests for information⁴;
 - (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,⁵ which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client;⁶ and

¹ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 12-1-0 to include the phrase, "written disclosure or" in subparagraph (a)(1). See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.6C.

² **RRC Action:** At the 7/24-25/09 meeting, restoration of the Model Rule's reference to 1.0(e) was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.6.

³ **RRC Action:** At the 7/24-25/09 meeting, paragraph (a)(3) was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.8.

⁴ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 7-6-0 to restore the Model Rule language. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.9A.

⁵ **RRC Action:** At the 7/24-25/09 meeting, substituting "about significant developments relating to the representation" for "as required by paragraph (a)(3)" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 10A.

⁶ **RRC Action:** At the 7/24-25/09 meeting, a motion to delete paragraph (a)(5) was not seconded. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.10C.

Drafters' Note/Recommendation: At the same meeting, the chair directed the drafters to include a comment to address concerns raised at the meeting that certain documents in the lawyer's possession should not be provided to the client, e.g., addresses of victims or witnesses in a criminal action. See proposed Rule 1.16(e)(1), Draft 6.1 (9/28/08) & Comment [9]. The drafters believe that Comment [8], below, which is based on MR 1.4, cmt. [7], already addresses the issue and do not propose any further comment.

- (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:
 - (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.

Comment

[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in a criminal⁷ abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in, and the advantages and disadvantages of,⁸ alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.⁹

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client

⁷ **RRC Action:** At the 7/24-25/09 meeting, substitution of "a criminal abstract" for "an abstract" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 12.c.

⁸ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 8-5-0 to insert the phrase, "and the advantages and disadvantages of," in the next to last sentence of Comment [1]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 12B.

⁹ **RRC Action:** At the 7/24-25/09 meeting, the RRC defeated by 5-6-1 vote a motion to restore the second and third sentences of MR 1.4, cmt. [4]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 14A.

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

[3] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.¹⁰

[4] As used in paragraph (c), "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.

[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.

[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 no 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.

[8] A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13]. The lawyer may

¹⁰ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 9-4-0 to retain the first sentence of MR 1.4, cmt. [5]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 15A.

At the same meeting, no motion was made to implement the Consultant's suggestion to retain the next to last sentence of MR 1.4, cmt. [4] ("the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.") See *id.*, at ¶. 15B.

arrange a system of limited or occasional reporting with the client when many routine matters are involved.

[9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.¹¹ This Rule does not¹² require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is not intended¹³ to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule [1.16(e)(1) and Comment [9]].¹⁴

[10] 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.

¹¹ **Drafters' Note:** At the 7/24-25/09 meeting, a motion to delete the third sentence of Comment [8] was not seconded. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16A.

¹² **RRC Action:** At the 7/24-25/09 meeting, substitution of "does not" for "is not intended to" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16B.

¹³ **RRC Action:** At the 7/24-25/09 meeting, retention of the phrase "is not intended to" in this instance was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16B.

¹⁴ **Drafters' Note:** Rule 1.16(e)(1) and Comment [9], provide respectively:

(1) ***Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property.*** "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and (Emphasis added).

[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with Rule [1.15].

Enclosure 3

Proposed Rule 1.4 [3-500]

Redline Version of Draft 7 (8/5/09), compared to Draft 6.1 (6/19/07)

Rule 1.4 Communication

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which written disclosure¹ or the client's informed consent, as defined in Rule [1.0(e)].² 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;³
 - (4) promptly comply with reasonable ~~client~~ requests for information⁴ ~~necessary to keep the client reasonably informed as required by paragraph (a)(3);~~
 - (5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed ~~as required by paragraph (a)(3)~~ about significant developments relating to the representation,⁵ which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client;⁶ and
 - (6) consult with the client about any relevant limitation on the lawyer's conduct

¹ RRC Action: At the 7/24-25/09 meeting, the RRC voted 12-1-0 to include the phrase, "written disclosure or" in subparagraph (a)(1). See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.6C.

² RRC Action: At the 7/24-25/09 meeting, restoration of the Model Rule's reference to 1.0(e) was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.6.

³ RRC Action: At the 7/24-25/09 meeting, paragraph (a)(3) was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.8.

⁴ RRC Action: At the 7/24-25/09 meeting, the RRC voted 7-6-0 to restore the Model Rule language. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.9A.

⁵ RRC Action: At the 7/24-25/09 meeting, substituting "about significant developments relating to the representation" for "as required by paragraph (a)(3)" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 10A.

⁶ RRC Action: At the 7/24-25/09 meeting, a motion to delete paragraph (a)(5) was not seconded. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶.10C.

Drafters' Note/Recommendation: At the same meeting, the chair directed the drafters to include a comment to address concerns raised at the meeting that certain documents in the lawyer's possession should not be provided to the client, e.g., addresses of victims or witnesses in a criminal action. See proposed Rule 1.16(e)(1), Draft 6.1 (9/28/08) & Comment [9]. The drafters believe that Comment [8], below, which is based on MR 1.4, cmt. [7], already addresses the issue and do not propose any further comment.

RRC – Rule 1.4 [3-500 & 3-510]
Rule Draft 7 (8/5/09) – COMPARED TO Post -PCD [#6.1] (6/19/07)
Post – July 24-25, 2009 Meeting

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:
 - (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.

Comment

[1] Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in ~~an~~ [a criminal](#)⁷ abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in [and the advantages and disadvantages of](#),⁸ alternative dispute resolution processes. Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.⁹

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph

⁷ **RRC Action:** [At the 7/24-25/09 meeting, substitution of "a criminal abstract" for "an abstract" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 12.c.](#)

⁸ **RRC Action:** [At the 7/24-25/09 meeting, the RRC voted 8-5-0 to insert the phrase, "and the advantages and disadvantages of," in the next to last sentence of Comment \[1\]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 12B.](#)

⁹ **RRC Action:** [At the 7/24-25/09 meeting, the RRC defeated by 5-6-1 vote a motion to restore the second and third sentences of MR 1.4, cmt. \[4\]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 14A.](#)

RRC – Rule 1.4 [3-500 & 3-510]
Rule Draft 7 (8/5/09) – COMPARED TO Post -PCD [#6.1] (6/19/07)
Post – July 24-25, 2009 Meeting

(a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

[3] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.¹⁰

[34] As used in paragraph (c), "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.

[45] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.

[56] 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 no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)].

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

[78] A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. See Rule [1.14]. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule [1.13]. The lawyer may arrange a system of limited or occasional reporting with the client when many routine matters are involved.

[89] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate

¹⁰ RRC Action: At the 7/24-25/09 meeting, the RRC voted 9-4-0 to retain the first sentence of MR 1.4, cmt. [5]. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 15A.

At the same meeting, no motion was made to implement the Consultant's suggestion to retain the next to last sentence of MR 1.4, cmt. [4] ("the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.") See id., at ¶. 15B.

RRC – Rule 1.4 [3-500 & 3-510]
Rule Draft 7 (8/5/09) – COMPARED TO Post -PCD [#6.1] (6/19/07)
Post – July 24-25, 2009 Meeting

communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.¹¹ This Rule ~~is not intended to~~does not¹² require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is ~~also~~-not intended¹³ to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the lawyer. Compare Rule [1.16(e)(1), ~~and comment Comment —~~].[9].¹⁴

[910] 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.

¹¹ Drafters' Note: At the 7/24-25/09 meeting, a motion to delete the third sentence of Comment [8] was not seconded. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16A.

¹² RRC Action: At the 7/24-25/09 meeting, substitution of "does not" for "is not intended to" was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16B.

¹³ RRC Action: At the 7/24-25/09 meeting, retention of the phrase "is not intended to" in this instance was deemed approved. See 7/24-25/09 KEM Meeting Notes, IV.A., at ¶. 16B.

¹⁴ Drafters' Note: Rule 1.16(e)(1) and Comment [9], provide respectively:

(1) **Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property.** "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and (Emphasis added).

[9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with Rule [1.15].

**RRC – Rule 1.4 [3-500]
E-mails, etc. – REV (8/24/2009)**

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August 13, 2009 Difuntorum 10-Day Ballot E-Memo to RRC: 43

August 15, 2009 Kehr E-mail to KEM re “informed consent”:..... 44

August 15, 2009 KEM E-mail to Kehr re “informed consent”:..... 44

10-Day Ballot E-mails:..... 44

*August 15, 2009 Kehr E-mail to KEM re “informed consent,” cc Drafters, Chair, Difuntorum &
 McCurdy:..... 44*

August 23, 2009 Sapiro E-mail to RRC List:..... 44

August 13, 2009 Difuntorum 10-Day Ballot E-Memo to RRC:

Proposed Rule 1.4 [3-500] is being distributed for your consideration. The revisions adopted at the Commission's July 24 & 25, 2009 meeting have been implemented and approval of the revised rule is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be adopted subject to further public comment when the Commission's entire rules are distributed.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a cover sheet, a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 1.4, Draft 7 (8/5/09), is provided as Enclosure 2. A redline version comparing the proposed rule to Draft 6.1 (6/19/07), the draft considered at the July 24 & 25, 2009 meeting, is provided as Enclosure 3.

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, August 25, 2009, proposed Rule 1.4 [3-500] will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

August 15, 2009 Kehr E-mail to KEM re "informed consent":

Kevin: is paragraph (a)(1) of Rule 1.4 correct in saying that there are Rules that require a lawyer to obtain the client's "informed consent", or have we in each location changed this to: "informed written consent"?

August 15, 2009 KEM E-mail to Kehr re "informed consent":

At least for Rule 1.6, it is "informed consent," no requirement of written.

10-Day Ballot E-mails:

August 15, 2009 Kehr E-mail to KEM re "informed consent," cc Drafters, Chair, Difuntorum & McCurdy:

* * *

I have no further comment on Rule 1.4 and vote to approve it.

August 23, 2009 Sapiro E-mail to RRC List:

Although I agree that the draft rule accurately reflects our votes, there are two issues that I request be discussed at our next meeting. In order to keep it on our agenda for that discussion, I reluctantly vote "no."

First, in regard to paragraph (a)(2), I think the wording is unnecessarily awkward. The phrase ". . . by which to accomplish the client's objectives . . ." can be shortened and, I think, made less awkward if we change it to ". . . the means of accomplishing the client's objectives . . ."

Second, in Comment [9], the new next to last sentence does not quite cover a situation that I believe I raised in connection with another rule and that I should have raised here. Even if there

**RRC – Rule 1.4 [3-500]
E-mails, etc. – REV (8/24/2009)**

is no protective order, in some criminal cases the production of evidence by the prosecution may include information to which the defendant ought not to have access. For example, in a prosecution for rape, evidentiary documents often include the name, address, and cell phone number of the victim. If that information is disclosed to the rapist, the victim can be victimized again. Similarly, disclosure of the contact information of a complaining witness in an armed robbery can lead to the murder of the complaining witness. However, that type of information is not always disclosed subject to a protective order or protective stipulation. Nevertheless, our rule or its comment should permit the lawyer not to disclose such information when such disclosure could be harmful to the complaining witness. Unfortunately, I do not have enough experience in criminal litigation to be able to suggest appropriate wording. Perhaps someone, like Harry, who has more familiarity with the details can suggest an appropriate addition.