



**THE STATE BAR
OF CALIFORNIA**

OFFICE OF PROFESSIONAL COMPETENCE,
PLANNING, AND DEVELOPMENT

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DATE: September 22, 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, 3-510]

Proposed Rule 1.4 [3-500, 3-510] is being distributed for your consideration. The revisions adopted at the Commission's September 11, 2009 meeting have been implemented and approval of parts of the rule submission is being sought through a 10-day ballot procedure. At the meeting, the rule itself was approved but the Chair indicated that the Introduction and the Dashboard would be handled by a 10-day ballot.

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 input received on the Commission's comprehensive Final Report.

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 8 (9/14/09), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. A draft public commenter chart is provided as Enclosure 4.

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 Friday, October 2, 2009, proposed Rule 1.4 [3-500, 3-510] 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 [RPC 3-500, 3-510]
(Comparison Chart Showing Changes to Model Rule 1.4)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4* Communication

September 2009

(Draft rule revised following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.4 tracks 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 promptly comply with reasonable client requests for information.

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. As to civil matters, retention of current rule 3-510 conforms proposed Rule 1.4 to Bus. & Prof. Code § 6103.5. The Commission determined that retaining these specific provisions will enhance public protection by clearly delineating a lawyer's duty when presented with offers to settle.

* Proposed Rule 1.4, Draft 8 (9/14/09).

<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 addition of "the State Bar Act" emphasizes that a lawyer also has duties under that Act.</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 <u>are to be accomplished 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>
<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 status of the matter</u> representation;</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</p>

* Proposed Rule 1.4, Draft 8 (9/14/07). 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>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>(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</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</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</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>permitted by the Rules of Professional Conduct or other law.</p>	<p>permitted by the these Rules of Professional Conduct or other law.</p>	<p>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>Paragraph (b) is identical to Model Rule 1.4(b).</p>
	<p>(c) <u>A lawyer shall promptly communicate to the lawyer's client:</u></p> <p>(1) <u>all terms and conditions of any offer made to the client in a criminal matter;</u> <u>and</u></p> <p>(2) <u>all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.</u></p>	<p>Paragraph (c) has no counterpart in the Model Rule. The Commission included in this draft rule (as subparagraphs (c)(1) and (2)), the 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]. With respect to written offers of settlement in civil matters, paragraph (c) conforms the Rule to Bus. & Prof. Code § 6103.5.</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>[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>[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</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</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>

<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>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>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>[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 a criminal 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, 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>

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	<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><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</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</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>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>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><u>[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.</u></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><u>[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. As used in this Rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.</u></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><u>The second sentence has been added to clarify that although juvenile proceedings are not technically considered "criminal matters," the same duty of communication as in criminal cases is imposed on lawyers in juvenile proceedings.</u></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>[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>[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</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</p>	<p>Comment [8] is based on identical to 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>

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<p>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>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><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 <u>or withholding</u> 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 defendants in criminal cases 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]. <u>The phrase, "or withholding" has been added to clarify that under some circumstances, a lawyer may be obligated to withhold certain information from the client and not only delay its transmission. #</u> <u>The Rule also</u> 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 [RPC 3-500, 3-510]
Clean Version of Draft 8 (9/14/09)

RULE 1.4 Communication

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which written disclosure or the client's informed consent, as defined in Rule 1.0(e), is required by these Rules or the State Bar Act;
 - (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) keep the client reasonably informed about significant developments relating to the representation;
 - (4) promptly comply with reasonable requests for information;
 - (5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed about significant developments relating to the representation, which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and
 - (6) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall promptly communicate to the lawyer's client:
- (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 criminal 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, 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.

[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.

[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.

[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. As used in this Rule, "criminal matters" includes all legal proceedings where violations of criminal laws are alleged, and liberty interests are involved, including juvenile proceedings.

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

[9] In some circumstances, a lawyer may be justified in delaying or withholding 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. This Rule does not 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 intended to override applicable statutory or decisional law requiring that certain information not be provided to defendants in criminal cases who are clients of the lawyer. Compare Rule [1.16(e) (1) and Comment [9]].

[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.

Enclosure 3

Proposed Rule 1.4 [RPC 3-500, 3-510]
Draft "Dashboard"

Proposed Rule 1.4 [RPC 3-500, 3-510] “Communication”

(Draft #8, 9/14/09)

Summary: Proposed Rule 1.4 sets forth a lawyer’s duties to keep a client informed of significant developments in the representation, including offers of settlement. It largely tracks Model Rule 1.4 but retains concepts found in current California rules 3-500 and 3-510, as well as Bus. & Prof. Code §§ 6068(m) and 6103.5.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 3-500, 3-510

Statute

Bus. & Prof. Code §§ 6068(m) and 6103.5.

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

Enclosure 4

Proposed Rule 1.4 [RPC 3-500, 3-510]
(Public Commenter Chart)

**Rule 1.4 Communication.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Judge, Michael	D	Public Defender, Los Angeles County, California; Council of Chief Defenders; & California Public Defenders' Association		Similar to the concerns expressed about proposed Rules 1.1, 5.1 and 5.2, the L.A. Public Defender maintains that, by expanding the obligation for client communication, this rule would provide apparent authority to deputy public defenders to override decisions of the Chief Defender, particularly where the deputy believes his/her workload is excessive.	The Commission believes that the concerns Mr. Judge expressed on behalf of the organizations he represents are best addressed in Rules 5.1 and 5.2, which address the interactions between supervisory and subordinate lawyers. The Commission has made changes to both of those rules in response to concerns expressed by Mr. Judge and other representatives of the public defender community, and has been advised that the changes have assuaged their concerns.
6	Langford, Carol M.	M			Rule 1.4(a)(3) should require that disclosure be made promptly.	Commission did not make the requested revision. Subparagraph (a)(3) requires that a lawyer "keep the client reasonably informed about significant developments relating to the representation." Included within the concept of reasonably is the requirement of reasonable promptness.
2	Liederman, Peter H.	M			Delete Comment [2] as it is not helpful guidance.	Commission disagreed and did not make the requested revision. The proposed definition of "significant development" has no counterpart in the Model Rule but does appear not only in current rule 3-500, but also in Bus. & Prof. Code § 6068(m). State Bar Hotline staff noted that inquiries concerning the meaning of "significant development"

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.4 Communication.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>are common. The Commission recognizes it is nearly impossible within the confines of a rule to demarcate the dividing line between “significant” and non-significant” developments but, as is often done by the ABA in the Model Rules, has attempted to identify examples at the ends of the continuum. Contrary to the public comment, this does provide valuable guidance to the profession on what constitutes a “significant development.”</p> <p>In addition, the next-to-last sentence of Comment [2], which was added at the request of representatives of the ADR community, notes that communicating to the client about the availability of ADR might, under some circumstances, be required under the Rule.</p>
2	Liederman, Peter H.	M			Delete the first 2 sentences of Comment [3] as superfluous.	Commission disagreed and did not make the requested revision. The first sentence of Comment [3] note that the lawyer may comply with the duty to provide the client significant documents electronically, a point that is not expressly stated in the Rule. The second sentence states a lawyer and client may agree that the client assume the cost of copying the documents. Again, this is not expressly stated in the Rule.
1	Los Angeles County Bar Association	M			Comment [2] of the proposed Rule & Comment [3] to the Model Rule imply that the directive in paragraph 1.4(a)(2) is not mandatory.	Commission disagreed and made no change in response. It is not clear what the L.A. County Bar Association (“LACBA”) intended by its comment. The Commission has not recommended adoption of Model Rule 1.4, cmt. [3]. Further, Comment [2]

**Rule 1.4 Communication.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						attempts to define “significant development,” a term not found in the Model Rule but which is a key term in both current rule 3-500 and Bus. & Prof. Code § 6068(m). The only mention of subparagraph (a)(2) in Comment [2] is in relation to ADR. That sentence provides: “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, alternative dispute resolution processes.” The sentence merely recognizes that, “depending upon the circumstances,” paragraph (a)(2), which requires a lawyer to “reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation,” may require a lawyer to discuss ADR alternatives with the client. However, ADR is not always appropriate and paragraph (a)(2) does not require the lawyer to discuss it with the client.
1	Los Angeles County Bar Association	M			Revise 1.4(a)(1) to require lawyers to “reasonably” inform a client.	Commission disagreed and did not make the requested revision. The Commission believes that adding “reasonably” to subparagraph (a)(1) would unnecessarily dilute the provision.
1	Los Angeles County Bar Association	M			Change “the lawyer’s client” to “the client” in Rule 1.4(c).	Commission disagreed and did not make the requested revision. The term used, “the lawyer’s client,” tracks the language of Bus. & Prof. Code § 6103.5, which refers to “the member’s client.”

**Rule 1.4 Communication.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Los Angeles County Bar Association	M			Proposes that a reference to section 6068(m) and (n) of the Business & Professions Code be added to Comment [1] along with the statement that the rule is not intended to change the obligations stated in those sections.	Instead of revising Comment [1] as requested, the Commission deleted the Comment . With regard to section 6068(m), the Commission believes that the duty of communication is expressed differently than in proposed Rule 1.4, but the most that could be said is that the Rule adds additional requirements to the statute. The Commission therefore does not perceive a conflict with the statute and believes that the policy of Rule 1.4 is correct and that adopting it is consistent with its charge to avoid unnecessary differences with national standards.
1	Los Angeles County Bar Association	M			Modify Comment [4] to provide that: "In a class action, as used throughout this Rule 1.4, 'client' means all the named representatives of a class subject to court modification."	Commission disagreed and did not make the requested revision. The Commission recognizes that a court can require greater or lesser notice to a client, but it cannot excuse a lawyer from the lawyer's duty to communicate with the client. The lawyer still must notify the client of the court's order.
1	Los Angeles County Bar Association	M			Move the last sentence of Comment [6] into the rule as it states an exception to the rule	Commission disagreed and did not make the requested revision. Rather than being an "exception" that should appear in the Rule itself, the sentence provides an interpretation of the Rule, in effect recognizing a client's right to pre-authorize a lawyer to accept settlement offers on the client's behalf so long as there are no changes in the circumstances that require the lawyer to communicate with the client.

**Rule 1.4 Communication.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Diego County Bar Association	A			Support as drafted.	No action needed.
4	United States Department of Justice, Professional Responsibility Advisory Office (DOJ Professional Responsibility Office)	M			<p>Rule may be confusing and may impose conflicting requirements on DOJ lawyers. Therefore, the DOJ requested that a new Comment [8] be added to address the special circumstance of lawyers who represent governmental entities. The Comment would provide:</p> <p>[8] Notwithstanding the foregoing comments [4] through [7], when a lawyer is employed by and representing a governmental entity or the public, the lawyer will be in compliance with paragraph (c) if the lawyer acts in accordance with the rules, regulations and guidelines set forth by the employing governmental entity for the communication, acceptance, and rejection of settlement or plea offers.</p>	<p>Commission disagreed and did not make the requested revision. The concerns of the government are adequately addressed by Comment [6], which provides in pertinent part:</p> <p>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>