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August 6, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

Below are my comments on Rule 3-500:

1. Paragraph (a) (2) which requires the lawyer to "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation" runs counter to Supreme Court cases holding that a lawyer has implied authority to bind the client on procedural or tactical matters. "The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action .. . .`In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.' " (*Linsk v. Linsk* (1969) 70 Cal.2d 272, 276-277.)

The court stated in *Blanton v. Womancare Inc*. (1985) 38 Cal. 3d 396, 404:

> Considerations of procedural efficiency require, for example, that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions as whether to call a particular witness, and the court and opposing counsel must be able to rely upon the decisions he makes, even when the client voices opposition in open court. (*Nahhas v. Pacific Greyhound Lines, Inc*. (1961) 192 Cal. App. 2d 145, 146 [13 Cal. Rptr. 299].) In such tactical matters, it may be said that the attorney's authority is implied in law, as a necessary incident to the function he is engaged to perform. (See 1 Witkin, Cal. Procedure (2d ed. 1970) Attorneys, § 112, p. 123; Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession (1979) 128 U.Pa. L.Rev. 41, 63.

On the other hand, an attorney has no implied authority to enter into agreements or stipulations that impair the client's substantive rights. *Blanton v. Womancare, Inc*., supra, 38 Cal.3d at 404.

In litigation there are a thousands of "lawyer-driven" decisions that should not require the client's input or consent, including deciding which witnesses to call at trial, when to object, whether to grant extensions of time to opposing counsel, whether to answer a complaint or to demurrer, etc. Paragraph (a) (2) would require the lawyer to consult with the client on these types of issues.

Of concern also is the fact that Paragraph (a)(2) would create a new "standard of care" that runs counter to the above case law, and frankly, the way lawyers practice law. A lawyer who fails to consult with the client on litigation strategy --i.e., how to accomplish the client's objectives in the representation--would be exposed unfairly to a lawsuit for malpractice.

I would suggest language along the following lines that is consistent with the case law:

> "A lawyer shall....
>
> (2) reasonably consult with the client regarding decisions that affect the client's substantive rights in the representation."

2. Paragraph (a) (5) goes too far in limiting the client's access to documents in that it can be read to mean that the client is only entitled access to documents that are (1) "significant" and (2) are necessary to keep the client informed about "significant developments" relating to the representation. The client should be entitled to review the entire file and not just those documents that are "significant" or relate to "significant developments" in the representation (subject of course to other limitations like protective orders, work product, trade secrets, addresses of witnesses in criminal cases, etc.)

I suggest removing the "significant" language, so that Paragraph (a)(5) would read:

> A lawyer shall: ...
>
> "(5) promptly comply with reasonable client requests for access to documents in the client's file, which the lawyer may satisfy...."

3. Comment [2] can easily be read to mean that the lawyer must pay for the costs of copying since it states that the lawyer and client can agree that the client will assume the cost of copying and that the lawyer's obligation to comply with the rule applies regardless of the client's failure to pay fees--i.e., suggesting that the "default" position is one where the lawyer pays the costs of copying. I suggest we avoid these practical issues of copying costs by deleting the second and third sentences of Comment [2]. As a practical matter, if no one wants to pay the costs of copying the documents, the obvious solution is to invite the client to view the files in the lawyer's office or to send the client electronic copies --if they are available in such format (recognizing that the entire profession is quickly going paperless).

4. Comment [3] reads like an exception that should be in the black letter (if at all). The words "some circumstances" and "would react imprudently to an immediate communication" are incredibly vague. I think it makes sense to delete the first two sentences.