RRC2 – Rule 3-510 [1.4]
Post-Agenda E-mails, etc. – Revised (August 10, 2015)
Kornberg (Lead), Brown & Langford

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POST JUNE 26, 2015 AGENDA MAILING:

June 14, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:

I have the following comments and drafting suggestions on this proposed Rule:

1) This proposal would require a lawyer to communicate to the client all settlement offers in a civil matter without regard to materiality. To the contrary, current rule 3-510 is connected to the materiality element of current rule 3-500 by way of a Discussion sentence. Thus, the current rule 3-510 is not intended to require a lawyer to communicate a settlement offer in a civil matter that is not a significant development. The first Commission's Comment [6] provided an example, which is an offer that the client already has rejected, unless there has been a change in the circumstances. I am not aware of any demonstration that the current rule is deficient, and I consider the proposed expansion on this point to be unnecessarily rigid. It also would be a civil threat to lawyers b/c it might serve as a basis for a claim of fiduciary breach when a lawyer has failed to communicate a settlement offer that was not a significant development. I recommend adhering to the current rule in this respect. I have additional thoughts about the proposed absolute requirement, and about the proposal to remove "written" from what now is 3-510(A)(2), below at ¶4).

2) The argument in favor of this expansion of current rule 3-510 is contained in ¶8.3 on p. 7 of the Drafting Team Report and Recommendation. This cites Lewis v. State Bar but the quoted language does not come from Lewis (a case that does not involve a settlement, but where the fiduciary duty to disclose was involved b/c a lawyer who was acting as a general partner (not as a lawyer) hid information about the limited partnership from his limited partners). The quoted language instead comes from In the Matter of Yagman, 3 Cal. State Bar Ct. Rptr. 788, 1997 Calif. Op. LEXIS 8 (1997). The quoted language is part of a paragraph that continues with the point I made in my preceding paragraph:

However, we are not concerned with and do not address the scope [of the duty to disclose settlement offers] or extent of that duty because, for disciplinary purposes, in this context, it has been "defined" by rule 3-500. Rule 3-500 provides that an attorney "shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." 1997 Calif. Op. LEXIS at *15 (italics added).

3) The proposed combination into a single paragraph of what currently are paragraphs 3-510(A)(1) and (2) has two aspects:

> a. Unlike the current rule, it would use the word "settlement" with respect to criminal matters. I don't know enough about criminal practice to be certain of this, but I expect that a "settlement offer" is narrower than an "offer" in a criminal matter. In any event, wouldn't the change imply an intent to alter the duties of criminal defense lawyers? Is this a situation in which what is not broken doesn't need repair?
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> b. The combination of what were separate subparagraphs would remove the word "amounts" from the disclosure required in civil matters. If we were starting fresh, I might be inclined to think that the disclosure obligation with or without "amounts" would be the same but, given the long history of our Rules having that word, I would not want to create any uncertainty about the meaning of the recommended change. Again, I don't think the current rule needs fixing.

c. For these reasons, I would endorse maintaining the current (A)(1) and (2) language (still saving my thoughts on "written").

4) The limitation to written settlement offers in what currently is (A)(2) would be eliminated by the proposed joining of (A)(1) and(2). The discussion draft of proposed Rule amendments dated August 1986 that was issued by an earlier version of this Commission, I think as part of the public comment process, provides the only explanation that I know of for the limitation to written offers in civil matters. It says: "The proposed rule would treat oral offers in civil matters differently from such offers made in criminal matters as a result of the realities of negotiations common in civil cases: where offers and counter offers are made in a continuing negotiating process, it is untenable to require counsel to contact his or her client after each such offer or counter offer. The proposed amendments to the rule also recognize that lawyers in civil matters are often given authority to negotiate for a settlement within a specified range. The proposed rule makes clear, however that counsel in a civil matter is required to convey any written offer to his client, as does present rule 5-105. Thus, if opposing counsel and his or her client seek to insure that an offer will be transmitted to the client, the offer may be made in writing." This explanation seems entirely correct to me, and I therefore believe that civil and criminal offers should be treated separately and that the treatment of the former should be limited to written offers.

5) The definition of "client" in what I think would be paragraph (c)(ii) does not quite work. The reason is that this definition is specific to settlements. This is likely to lead to confusion over the meaning and application of the paragraph in the balance of the Rule (does its repeated reference to settlements mean that other Rule 1,4 communications always must be with the client and my not be through a client's representative or agent? Lawyers commonly and properly communicate with clients through others, such as family members (sometimes b/c of language skills or the client's unavailability), accountants, business managers, and others. And of course it is possible to communicate with an organizational client only through its agents. This is unremarkable so as long as the lawyer reasonably believes that: (i) the representative has the authority to communicate on behalf of the client; and (ii) the representative is reliable. I would have no objection to the addition of a definition broad enough to cover all Rule 1.4 communications, but I don't think this is needed. Note that neither MR 1.0 nor the first Commission's Rule 1.0.1 included a definition of "client".

6) I ask that the Commission consider the adoption of a Comment along the lines of the second paragraph of the Discussion to current rule 3-510 if it retains "written", as I hope it will. That paragraph currently states: "Any oral offers of settlement made to the client in a civil matter should also be communicated if they are significant for purposes of rule 3-500." The reference to rule 3-500 would not be needed if both are combined in Rule 1.4. Also, the word "should" would be better stated as "must". I suggest: "Any oral settlement offer made to the client in a civil matter must be communicated if it is a significant development." This intentionally retains the passive voice because the lawyer need not communicate the offer if someone else has done so. I consider this an important clarification that should assure that paragraph (c) cannot be read as a limitation on the duty to communicate under paragraph (a).

7) I do not recommend that we retain the first paragraph of the current 3-510 Discussion. It is part of the Commission's August 1986 explanation for the difference in the drafting of (A)(1) and (2), but it merely repeats (A)(1). It therefore is surplusage that can be dropped in light of the Court's concern about the length of the Comments.

POST AUGUST 14, 2015 AGENDA MAILING:

August 10, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

There is a practical problem is having a disciplinary rule that requires lawyers to communicate all verbal settlement offers in civil cases. It is not always clear when a verbal communication between opposing counsel regarding settlement constitutes an offer of settlement for purposes of the rule. There is often sharp disagreement whether a verbal communication was intended or could be perceived to be a settlement offer. That is why the rule in civil cases has been limited to written offers so there is no confusion or debate over the intent and meaning of the communication. This is all the more important in California since the State Bar takes the position that even "nonbinding" written offers must be communicated under current rule 3-510 even if there is not an offer in the contract sense. *Matter of Yagman* (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 795. Protection for the client is achieved by requiring communication of all written settlement offers under rule 3-510 and all verbal offers that constitute a significant development under Rule 3-500.

Requiring lawyers to communicate the terms and conditions of a plea offer in criminal matters is justified by the Sixth Amendment right to effective assistance of counsel. *Missouri v. Frye* (2012) 132 S.Ct. 1399, 1408.

August 10, 2015 Kornberg Email to Tuft, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

I do not see any practical problem in the proposed rule, as in my experience a settlement offer is not difficult to identify. The communication to clients required in Rule 3-500, and in the case law on fiduciary duties, seem to establish that any settlement discussions would constitute a significant development. I do appreciate and respect your very perceptive and experienced opinion on this point but I do not agree with your distinction treating written settlement offers differently than verbal offers in objecting to our proposed rule revision. In my 35 years of practice it has been the policy and procedure in my firm to communicate any and all verbal or written settlement discussions and offers to our clients. It is my belief that our charge is to revise these Rules, where necessary and appropriate, to protect and serve the best interests of our clients while respecting and clarifying our fiduciary duties and responsibilities. Based on the Supreme Courts elaboration of our fiduciary duty regarding communication, failing to communicate verbal offers in my view is below the standard of care, inconsistent with case law, violates Rule 3-500, and would disregard the client's right to be fully informed. I do not see any serious potential harm or an unreasonable burden placed on our profession by the proposed revision as settlement discussions seem to be one of the most important aspects of any case that my clients are most interested to hear about. Thank you for your input.