RRC2 – Rule 3-500 [1.4]
E-mails, etc. – Revised (September 21, 2015)
Harris (Lead), Clinch, Kehr

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September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 4-200 [1.5] was received and is attached. Please consider these comments prior to the September meeting.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

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A. Rule 3-500: Communication

Please see OCTC's June 4, 2015 Comment on this rule.

June 4, 2015 OCTC Memo to Commission:

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B. Rule 3-500 Communication

1. Rule 3-500 does not need to state that the duties imposed by the rule do not affect the work product privilege. The Rules of Professional Conduct are disciplinary rules that neither establish nor limit evidentiary privileges.

2. Rule 3-500 should not permit an attorney to respond to a client's request for copies of documents by providing the client mere access to the documents. The duty to provide documents exists for the protection of the client. Clients, not attorneys, should determine whether they want or need physical copies of documents.
   Revising this rule to permit attorneys to only grant a client access to documents would also be inconsistent with Business and Professions Code section 6068(n). Section 6068(n) requires attorneys "to provide copies to client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt."

3. Rule 3-500 should clarify whether providing the client with electronic copies of documents complies with the rule and that the decision of whether an electronic copy is sufficient should be made by the client.

4. Rule 3-500 should clarify that where the law prohibits the disclosure of documents or information to the client, the attorney cannot provide that information. For example, Penal Code section 1054.2 prohibits an attorney from disclosing to the defendant, members of the defendant's family, or anyone else the address or telephone number of the victim or witnesses whose names and addresses are protected under Penal Code section 1054.1. A failure to disclose information to a client pursuant to this statute or any other law prohibiting disclosure should not result in discipline.

September 16, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I offer the following comments to Draft 4.5 of Rule 1.4 [3-500]

1. Paragraph (a) The "subject to" clause is overly broad and appears to be a "tail wagging the dog." The rule should track MR 1.4 in affirmatively stating the duty of communication followed by any applicable limitations or exceptions. I understand the statutory limitation issue (e.g. Penal Code §1054.1), but I question whether a lawyer could enter into a non-disclosure agreement that limits the lawyer's duty of communication without the client's consent. I also question whether a protective order prohibiting or limiting the lawyer's duty of communication would necessarily be enforceable. Lawyers would have an obligation to challenge an unreasonable order that precluded the lawyer from effectively communicating with their clients. In short, the "subject to" provision should be more narrow and should go at the end of the rule and not at the beginning.

2. Paragraph (a)(2) Has the Commission made a decision on the use of the "active" v. the "passive" voice? I think the Model Rule wording is less awkward.

3. Paragraph (a)(5) There is too much micro-management in this provision of the rule. I recommend we avoid the "significant" v. "certain" debate and the "access" v. "copies" issue by refining the duty along the following lines:

   (5) Promptly comply with the client's request for documents that are necessary to keep the client reasonably informed about client's matter.

4. Paragraphs (4) and (5) I would combine these paragraphs to avoid redundancy. Here is one way to do it:

   > (4) Promptly comply with the clients' reasonable request for information, include requests for documents, that are necessary to keep the client reasonably informed about the client's matter.

5. Paragraph (c) This is another instance of micro-management that is not necessary to include in the rule. If there is sufficient interest in including this provision, it should be draft more narrowly. Here is my suggestion:

   > (c) This rule shall not prohibit a lawyer from withholding certain documents and other information from a client if the lawyer reasonably believes that transmission of the documents or information to the client is reasonably certain to result in imminent harm to the client to others.

6. Comment [1] I do not understand the first sentence or why it is necessary. The comment should simply state: "A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (see Bus. & Prof. Code §6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

7. Comment [3] Does this comment mean that a client who will likely react violently to certain information under paragraph (c) can simply fire the lawyer and obtain the information?

8. Comment [4] This comment suggests that lawyers may withhold work product from a client under relevant statutory and decisional law. The issue of who is entitled to attorney work product is much more complicated. We should avoid venturing into this area by deleting this comment.

September 18, 2015 Difuntorum Email to Charles Murray, cc Mohr:

First, thank you for covering the Commission's meetings in LA. Your contributions as an OCTC liaison are a great asset to the Commission's deliberative process. Second, I seem to recall that during the discussion of Rule 3-500 at the August meeting you said something about checking with other Enforcement staff about intake's experience with client complaints for failure to provide copies. I believe you were going to seek clarification on whether the complaints received typically involve client requests for copies during representation or at termination of the lawyer-client relationship. If it is the latter, then that would be more of a Rule 3-700 issue but if it is the former, then that would be informative for the Commission's consideration of Rule 3-500. Rule 3-500 is back on the agenda for the Commission's upcoming meeting on September 25 & 26, 2015 so if you have any follow-up input that would be welcomed and appreciated. I am copying Commission Consultant Prof. Mohr so that he is in the loop. Thanks.

September 19, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft & Lee:

I don't know whether this will be more or less confusing, but I'm going to interlineate my comments into Mark's message.

1. Paragraph (a) The "subject to" clause is overly broad and appears to be a "tail wagging the dog." The rule should track MR 1.4 in affirmatively stating the duty of communication followed by any applicable limitations or exceptions. I understand the statutory limitation issue (e.g. Penal Code §1054.1), but I question whether a lawyer could enter into a non-disclosure agreement that limits the lawyer's duty of communication without the client's consent. I also question whether a protective order prohibiting or limiting the lawyer's duty of communication would necessarily be enforceable. Lawyers would have an obligation to challenge an unreasonable order that precluded the lawyer from effectively communicating with their clients. In short, the "subject to" provision should be more narrow and should go at the end of the rule and not at the beginning.
I would keep the "subject to" where it is as I think placing it in a separate paragraph would break up a thought, but the meaning of the Rule would not be different whichever way the Commission decides to handle this. I am more concerned about Mark's second sentence. Isn't a lawyer's right to enter into an agreement that limits the lawyer's ability to communicate with the client a Rule 1.2 issue? I also don't see Mark's third sentence concern a reason to edit Rule 1.4 b/c a lawyer's duty to communicate would not be "subject to" an invalid order.

2. Paragraph (a)(2) Has the Commission made a decision on the use of the "active" v. the "passive" voice? I think the Model Rule wording is less awkward.
I'm fine with what Lee and Nanci did here (I was less involved with this Rule than with others due to a scheduling conflict).

3. Paragraph (a)(5) There is too much micro-management in this provision of the rule. I recommend we avoid the "significant" v. "certain" debate and the "access" v. "copies" issue by refining the duty along the following lines:

   (5) Promptly comply with the client's request for documents that are necessary to keep the client reasonably informed about client's matter.
   I'm going to leave this for the Commission's discussion.

4. Paragraphs (4) and (5) I would combine these paragraphs to avoid redundancy. Here is one way to do it:

   > (4) Promptly comply with the clients' reasonable request for information, include requests for documents, that are necessary to keep the client reasonably informed about the client's matter.

   I like Mark's suggestion (except that "include" should be "including"), but this will depend on what the Commission decides to do on Mark's item 3.

5. Paragraph (c) This is another instance of micro-management that is not necessary to include in the rule. If there is sufficient interest in including this provision, it should be draft more narrowly. Here is my suggestion:

   > (c) This rule shall not prohibit a lawyer from withholding certain documents and other information from a client if the lawyer reasonably believes that transmission of the documents or information to the client is reasonably certain to result in imminent harm to the client to others.

   There seem to be two suggested narrowings:

   One is to remove "that the client would be likely to react in a way"; I don't favor that change as I see the client's possible reaction as the heart of the concern expressed by the proposed paragraph.

   The second is to change "may cause imminent harm" to "reasonably certain to result in imminent harm"; I support Mark's suggestion that the mere possibility of resulting harm is too lax a standard for delaying the transmission of information to a client. A shorter alternative would be to substitute "would" so that the phrase would read: "… if the lawyer reasonably believes that the client would react in a way …."

6. Comment [1] I do not understand the first sentence or why it is necessary. The comment should simply state: "A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (see Bus. & Prof. Code §6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.
   This seems to me to be an improvement, and I would vote to accept it except that "rule" should be capitalized.

7. Comment [3] Does this comment mean that a client who will likely react violently to certain information under paragraph (c) can simply fire the lawyer and obtain the information?
   This is a fair question, but should it be raised when we get to Rule 1.16?

8. Comment [4] This comment suggests that lawyers may withhold work product from a client under relevant statutory and decisional law. The issue of who is entitled to attorney work product is much more complicated. We should avoid venturing into this area by deleting this comment.
   Comment [4] comes directly from the third paragraph of the *Discussion* to current rule 3-500 and has not to my knowledge caused any problem. It only says that Rule 1.4 has to be read with the work product doctrine and that we are not getting into how to do that.