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 SPECIAL COVERAGE

PROPOSED RULES OF PROFESSIONAL CONDUCT
PROPOSED RULE 1.4.1

Communication of settlement offers

 By Jason Fellner
 and Tarah Powell-Chen

Proposed Rule of Professional Conduct Rule 1.4.1 narrows the types of settlement offers that a lawyer is required to promptly communicate to clients in criminal matters, but maintains the mandatory communication of all written settlement offers to a client in civil matters. The immediate takeaway is: always communicate settlement offers to clients to avoid potential violations of this proposed rule.

Proposed Rule 1.4.1 is set to replace Rule 3-510 by preserving and keeping intact the majority of the current rule requiring lawyers to promptly communicate settlement offers in a criminal matter, and requiring a lawyer to communicate written settlement offers in all other matters. However, the proposed Rule 1.4.1(b) also defines the term “client” as “a person who possesses the authority to accept an offer or settlement or plea, or in a class action, all the named representatives of the class.”

Rule 1.4.1(a) (1) clarifies and narrows Rule 3-510(A) (1)’s requirements for communicating settlement offers in a criminal matter. Specifically, Rule 1.4.1(a) (1) states that a lawyer must communicate all plea bargains or other dispositive offers made to the client in a criminal case. This revision specifies types of proposed settlement offers that must be communicated to a client in a criminal matter, contrasting the current rule that simply compels a lawyer to communicate any offer made to a client. This revision may serve as a slight perimeter of discretion for lawyers to abstain from communicating every offer that is proposed, such as unacceptable or irrelevant deals.

Even so, the ultimate authority of the client’s decision making power is time-

honored. While the ABA’s model rules do not have a specific rule on a lawyer’s duty to communicate settlement offers, the comments of ABA model rule 1.4 echo the near-absolute authority of the client to make decisions, noting that absent exigent circumstances, a lawyer must communicate settlement offers even where the offer appears unacceptable.

Rule 1.4.1(a) (2) remains unchanged from Rule 3-510(A) (2), which requires lawyers to communicate all amounts, terms, and conditions of any written settlement offer to a client. The proposed rule notes that the term “written” refers to electronic sound, symbol, or process attached or associated with a writing and executed by a person with the intent to sign the writing. A comment to the proposed rule reiterates that even an oral offer in a civil matter must be communicated to a client if it is a “significant development” in the case. This term may be used to relieve a lawyer from the obligation of conveying insignificant matter, but the ambiguity of this term also leaves a lawyer vulnerable to misinterpretations and incomplete disclosure. For this reason, a lawyer should communicate all offers to settle in a civil matter to protect the client.

Rule 1.4.1(b) also remains unchanged from Rule 3-510(B). As referenced above, this rule sets forth the definition of “client” and illustrates the authoritative power of acceptance that the client unilaterally possesses. It also ensures that a properly authorized representative may accept or reject the settlement offer; this can be useful in protecting a client in a case involving a minor or conservatorship. It can even be helpful in determining the scope of a lawyer’s implied authority to accept an offer. It is easy to imagine a circumstance in which a client’s consent for a lawyer to accept or reject a settlement offer leads a lawyer

to believe that this rule is met. However, the clear definition of “client” under the proposed rule, as well as California Business and Professional Code Section 6103.5(a) reiterate the standard. That statute provides “[A] ‘client’ includes any person employing a member of the State Bar who possesses the authority to accept an offer of settlement.” In other words, even if a lawyer is given the authority to take a position on a settlement offer this authority cannot replace the obligation to communicate the offer to the actual client.

Proposed Rule 1.4.1 provides an ethical requirement for lawyers to communicate all written offers to a client. As a measure of good practice, even when the offer is not in writing, it is best to communicate those terms in writing to the client. The level of diligence in communication that this rule mandates serves to protect both clients and attorneys. For that reason, lawyers should be familiar with the revised rule. Keeping a client involved in significant developments, particularly in writing, will reduce the chances of disciplinary complaints, potential legal malpractice, and break of fiduciary claims.

Jason Fellner, a certified specialist in legal malpractice law by the California State Bar, is a shareholder and **Tarah Powell-Chen** is a law clerk at Murphy Pearson Bradley & Feeney, P.C.



FELLNER

POWELL-CHEN