

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]

Sent: Tuesday, May 11, 2004 7:49 AM

To: Ethics: Rules Revision Commision

Cc: Rules Revision Commision

Subject: Re: [rrc] Revisions to Rule 3-600 - WP and PDF versions

Greetings:

I've attached copies of Stan's draft in WP and PDF. I've also attached versions in Word, to which I've added headers and descriptive name footers. I've not touched the substance. There should be five files total attached.

Kevin

Lamport, Stanley W. wrote:

1. Attached is a clean and redlined revised draft of rule 3-600 reflecting the changes the Commission discussed on May 8. Please let me know if you have any comments or changes to the revisions or the rest of the rule. At some point I will figure out how to send this out in pdf, but for now I am sure the Kevin will save the day for those who are having any problem opening these documents in WordPerfect.

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Rule 3-600. Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is or may be a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(C) If a member representing an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the member may take actions permitted in paragraph (B). Unless it reasonably appears to the member that it is not necessary in the best lawful interest of the organization to do so, the member shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law. The member may take such other actions as appear to the member to be in the best lawful interest of the organization including among others urging reconsideration of the matter while explaining its likely consequences to the organization.

(D) In taking any action pursuant to paragraphs (B) or (C), the member shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).

(E) If, despite the member's actions in accordance with paragraph (B) or (C), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(F) A member who reasonably believes that he or she has been discharged because of the member's actions taken pursuant to paragraph (B) or (C) and who has not informed the highest internal authority that can act on behalf of the organization of the circumstances shall so inform such authority unless the member reasonably believes that it is not necessary in the best interest of the organization to do so.

(G) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member acting on behalf of an organization shall explain the identity of the member's client, when the member knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the member is dealing. In such circumstances, the member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest.

(H) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to a dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

[1] Rule 3-600 is intended to apply to all forms of legal entities including corporations, limited liability companies, partnerships, and incorporated and unincorporated associations.

[2] Rule 3-600 is intended to require members to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the member is representing the constituent individually, when the member does not intend to create such a relationship. At the same time, Rule 3-600 is not intended to prohibit members from representing both an organization and a constituent of an organization in the same matter, so long as the member has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(C)(1) and (C)(2). Rule 3-600 is also not intended to prohibit members from representing both an organization and a constituent of an organization in separate matters, so long as the member has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.)

[3] When constituents of an organization make decisions for it, ordinarily a member must accept those decisions even if their utility or prudence is doubtful. At the same time, a member has a duty to inform a client of significant developments related to the representation under Rule 3-500 and Business and Professions Code section 6068, subdivision (m). Paragraphs (B) and (C) address the application of the duty to inform a client in the context of the representation of an organization.

[4] The difference between paragraph (B) and paragraph (C) turns on whether the violation of the legal duty to the organization or the violation of law is likely to result in substantial injury to the organization. When the violation is likely to result in substantial injury to the organization, the member must inform

higher authority in the organization unless the member reasonably believes that it is not necessary in the best interest of the organization to do so.

[5] References to the best interest of the organization in Rule 3-600 are not intended to require a member to exercise judgment for the organization or to take action on behalf of the organization independently of the direction the member receives from the constituent(s) overseeing the engagement. In determining the best interests of the organization, members should consider the extent to which the organization should be informed of the circumstances and the direction the member has received from the organization client.

[6] In determining how to proceed under paragraphs (B) and (C) members should give due consideration to the seriousness of the violation and its consequences, the responsibility of the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

[7] In circumstances governed by paragraph (C), ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the member to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the member's advice, the member may reasonably conclude that the best interest of the organization does not require the matter be referred to higher authority. If the constituent persists in conduct contrary to the member's advice, it will be necessary for the member to refer the matter to a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the member has not communicated with the constituent.

[8] Paragraph (E) is intended to address a member's duty to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client under Rule 3-700(A)(2) when the member or the organization terminates the member's representation.

[9] Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Rule 3-600. Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member ~~acting on behalf of~~ **representing** an organization knows that ~~a person or entity acts~~ **an officer, employee or other person associated with the organization is engaged in action** or intends to act or refuses to act in a manner that is or may be a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, ~~the member shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).~~ Subject to Business and Professions Code section 6068, subdivision (e); the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

- (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
- (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the circumstances, referral to the highest internal authority that can act on behalf of the organization as determined by applicable law.

(C) If a member ~~acting on behalf of~~ **representing** an organization knows that ~~a person or entity acts~~ **an officer, employee or other person associated with the organization is engaged in action** or intends to act or refuses to act in a manner that is likely to, result in substantial injury to the organization, the member may take actions permitted in paragraph (B). Unless ~~the member~~ **it** reasonably believes **appears to the member** that it is not necessary in the best lawful interest of the organization to do so, ~~subject to the member's duty to protect confidential information as provided in Business and Professions Code section 6068, subdivision (e);~~ the member shall refer the matter to higher authority in the organization, including, if warranted by the seriousness of the circumstances, to the highest internal authority that can act on behalf of the organization as determined by applicable law. **The member may take such other actions as appear to the member to be in the best lawful interest of the organization including among others urging reconsideration of the matter while explaining its likely consequences to the organization.**

(D) In taking any action pursuant to paragraphs (B) or (C), the member shall not violate his or her duty of protecting confidential information as provided in Business and Professions Code section 6068, subdivision (e).

(E) (D) If, despite the member's actions in accordance with paragraph (B) or (C), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization or is likely to result in substantial injury to the organization, the member's

response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

~~(E)~~

(F) A member who reasonably believes that he or she has been discharged because of the member's actions taken pursuant to paragraph (B) or (C) and who has not informed the highest internal authority that can act on behalf of the organization of the circumstances shall so inform such authority unless the member reasonably believes that it is not necessary in the best interest of the organization to do so.

~~(F)~~

(G) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member acting on behalf of an organization shall explain the identity of the member's client, when the member knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the member is dealing. In such circumstances, the member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest.

~~(G)~~

(H) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to a dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is intended to apply to all forms of legal entities including corporations, limited liability companies, partnerships, and incorporated and unincorporated associations.

Rule 3-600 is intended to require members to be cognizant of their role when representing an organization and to refrain from conduct that would lead a constituent to reasonably believe that the member is representing the constituent individually, when the member does not intend to create such a relationship. At the same time, Rule 3-600 is not intended to prohibit members from representing both an organization and a constituent of an organization in the same matter, so long as the member has addressed the potential or actual conflicts of interest that may arise from such dual representation pursuant to Rule 3-310(C)(1) and (C)(2). Rule 3-600 is also not intended to prohibit members from representing both an organization and a constituent of an organization in separate matters, so long as the member has addressed the conflicts of interest that may arise. (See State Bar Formal Opn. 2003-163.)

When constituents of an organization make decisions for it, ordinarily a member must accept those decisions even if their utility or prudence is doubtful. At the same time, a member has a duty to inform a client of significant developments related to the representation under Rule 3-500

and Business and Professions Code section 6068, subdivision (m). Paragraphs (B) and (C) address the application of the duty to inform a client in the context of the representation of an organization.

The difference between paragraph (B) and paragraph (C) turns on whether the violation of the legal duty to the organization or the violation of law is likely to result in substantial injury to the organization. When the violation is likely to result in substantial injury to the organization, the member must inform higher authority in the organization unless the member reasonably believes that it is not necessary in the best interest of the organization to do so.

References to the best interest of the organization in Rule 3-600 are not intended to require a member to exercise judgment for the organization or to take action on behalf of the organization independently of the direction the member receives from the constituent(s) overseeing the engagement. In determining the best interests of the organization, members should consider the extent to which the organization should be informed of the circumstances and the direction the member has received from the organization client.

In determining how to proceed under paragraphs (B) and (C) members should give due consideration to the seriousness of the violation and its consequences, the responsibility of the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

In circumstances governed by paragraph (C), ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the member to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the member's advice, the member may reasonably conclude that the best interest of the organization does not require the matter be referred to higher authority. If the constituent persists in conduct contrary to the member's advice, it will be necessary for the member to refer the matter to a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the member has not communicated with the constituent.

Paragraph (E) is intended to address a member's duty to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client under Rule 3-700(A)(2) when the member or the organization terminates the member's representation.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

-----Original Message-----

From: Melchior, Kurt W. [mailto:KMelchior@Nossaman.com]
Sent: Thursday, May 27, 2004 11:59 AM
To: McCurdy, Lauren; Anthonie Voogd (E-mail); Hollins, Audrey; Edward P. George Jr. (E-mail); Ellen Peck (E-mail); Harry Sondheim (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Karen Betzner; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail) (E-mail); Kevin Mohr (Work) (E-mail); Linda Q. Foy (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Difuntorum, Randall; Raul L. Martinez (E-mail); Stan Lampport (E-mail); Yen, Mary
Subject: Rule 3-600 addition

Let me take a moment at this early point before we get into a flurry of messages about the next meeting, to revive my proposal for an amendment to Rule 3-600 which I mentioned in preparation for the last meeting but we did not reach. (Rule 3-600 seems a logical place to discuss this item -- but it could be a part of 1-500 or a stand alone proposition.)

I propose that we adopt an amendment or rule which, to follow the language of 1-500, with new material in caps, will state that "A member shall not be a party to or participate in offering, REQUESTING or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement INVOLVES OR CONTEMPLATES THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY A PARTY WHICH IS NOT THAT MEMBER'S CLIENT."

I have explained my reasons earlier: Government attorneys are increasingly demanding waiver of ac privilege as a condition of plea bargaining and of settlement of enforcement cases. The target has no real choice but to accede. That's not how the privilege was intended.

Since I said that, the courts have held -- correctly, in my view -- that such waiver is a voluntary disclosure which waives the privilege against the world. See McKesson, below. That may or may not be good social policy; but as long as the courts and the legislature strongly back the privilege, I think that we can do our part by making the privilege more vital. There have been no significant problems with 1-500 to my knowledge: this seems a good thing to do.

Here's the McKesson case; DISCLOSURE TO GOVERNMENT UNDER PROTECTIVE AGREEMENT WAIVES AC PRIVILEGE AND WORK PRODUCT PROTECTION
McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229. Similar parsing of cases as Oxy: though cpn had ample motive to cooperate with DOJ and SEC in disclosing internal investigation by counsel (no prosecution v. it, at least yet), this was not "common interest" sharing. The disclosure, while no doubt helpful to cpn and to government, was to adverse parties, and party cannot prefer one adversary to another in selectively disclosing privileged material. Both privileges were waived by disclosure to govt.

-----Original Message-----

From: McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]
Sent: Wednesday, May 26, 2004 3:21 PM
To: Anthonie Voogd (E-mail); Audrey Hollins (E-mail); Edward P. George Jr. (E-mail); Ellen Peck (E-mail); Harry Sondheim (E-mail); Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail); JoElla Julien (E-mail); Karen Betzner; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Home#2) (E-mail) (E-mail); Kevin Mohr (Work) (E-mail); Melchior, Kurt W.; Lauren McCurdy; Linda Q. Foy (E-mail); Mark L. Tuft (E-mail); Paul W. Vapnek (E-mail); Randall Difuntorum (E-mail); Raul L. Martinez (E-mail); Stan Lamport (E-mail); Yen, Mary
Subject: RRC July 9th Meeting Assignments

Commission Members:

This message attaches the assignments and proposed agenda for your July 9, 2004 meeting, along with a copy of Kevin Mohr's notes for the May meeting and materials relating to rules 2-200 and 3-600. These materials have been sent to each of you by regular mail today. The deadline for receipt of assignments is Wednesday, June 9th. Please review the assignment document carefully as there are three assignments for "all members."

Thanks.

Lauren

<<7-9-04 Meeting Assignments & Cover Memo 5-26-04.pdf>> <<RRC - 05-07-04 KEM Meeting Notes - DFT2.pdf>> <<[rrc] Revisions to Rule 3-600>> <<[rrc] Revisions to Rule 2-200>>