

McCurdy, Lauren

From: Melchior, Kurt W. [KMelchior@Nossaman.com]
Sent: Thursday, February 05, 2004 10:18 AM
To: McCurdy, Lauren; Soria, Felicia; RRC E-List Group (E-mail)
Subject: Rule 3-600 Discussion for 2/20 meeting

-I missed the last meeting. So, in preparation for my assignment to provide further discussion about Rule 3-600, which was discussed there, I read the minutes of that meeting and also Kevin's field notes. I came away with the feeling that you debated but did not resolve the two most critical issues: how broad is the reach of the lawyer's right or duty to spot misconduct in the organization; and once such misconduct is spotted, is the lawyer's right (and duty?) to report limited to internal channels, or may the lawyer go outside if internal reports do not produce action?

I confirmed with Kevin that my understanding was correct, and thus the agenda for this month's meeting really should be to speak further about (and perhaps to resolve) those two issues. To me, they are interrelated in that I can see a broader reach for the right or duty to ferret out and report if the matter stays within the organization than if it can also go outside. I would also urge you to read the two panel discussions in the last two months' California Lawyer: they well display a changing landscape for this field, in that corporations (though not as yet other "organizations" covered by our rule) are under great pressure to waive attorney client privilege in order to position themselves in troubled situations being investigated by the government. Does that mean that we are (increasingly, perhaps) writing on an academic slate while the real world pressures move past us?

To provide further focus for the "real" topic -- the first one of the scope of the reporting rights and duties -- I repeat below an e mail from Kevin which states the points better than I can and which also copies pertinent prior writing which passed between us. (My second point about outside secular trends is what it is, and if you are interested, we can discuss it on the basis of what I have just stated.)

Here's Kevin's e mail:

Kurt:

As we just discussed on the phone, I thought I'd put a few thoughts down on paper.

1. As I mentioned in my 1/28/04 e-mail, I still don't think any further drafting needs to be done at this time. I think the Commission needs to slog through the words and phrases of 3-600 and 1.13 and make decisions on which language to use. Before the Commission can get to the meatier drafting issues, however, it has to wrestle with the policy issue of whether the rule should be drafted to encompass a broad/relaxed trigger for lawyer action, which action will be restricted to within the organization (the current California approach, i.e., "in a manner") OR a narrower trigger (client conduct is in a matter related to the representation), but with the option to go outside the corporation. The Commission has to give the drafting team some guidance on this issue before it can tackle the drafting, particularly at lines 17-27 and 34 of the working draft I prepared for the 12/12/04.

2. Perhaps you can tee up the issue for the members to discuss in an e-mail exchange before the meeting at least partly; I don't think it can be completely resolved that way, but at least some concerns, etc. can be identified for further exploration at the meeting.

3. Here are the two ways the issue has been described so far in writing, by you and me:

a. KEM's description (from the cover memo on the chart I prepped for the 12/12 meeting):

Rule 3-600 is an apt subject for this kind of micro-dissection for a number of reasons: (1) It is my understanding it was based on rule 1.13, so the language is similar if not identical; (2) the Commission's charge includes studying the ABA rules and adopting them if feasible; (3) the SEC rules promulgated pursuant to the Sarbanes-Oxley Act, as well as the ABA's Corporate Responsibility Task Force's rule 1.13 require consideration of the changes those rules have incorporated, e.g., consistency & public protection issues; (4) as discussed in columns 6, 8, 10, 13 & 15, below, the Commission's approach so far is to relax the trigger for lawyer action to require a violation of law or substantial injury to the organization (compare the ABA rule which requires a both a violation of law and substantial injury) and to broaden the situations which might trigger lawyer action (i.e., if lawyer learns of information during the representation as opposed to limiting response to only those situations where information is related to the representation), but to limit the lawyer's allowed response (i.e.,

reporting UP-THE-LADDER vs. reporting OUTSIDE). Thus, there is a need for careful consideration of the language chosen to achieve the foregoing approach. See 11/03/03 KEM Cover Memo, item 4.b.

In addition, you should also consult rows 6, 8, 10, 13 & 15 of the Chart for further comments on this.

b. Kurt's description of the issue in his 11/28/03 e-mail to the Commission:

13-14. What Kevin calls the "more relaxed standard" is actually the more stringent one -- what is "relaxed" is the quantum of assurance that the suspect act may be harmful to the client org. And as Kevin elegantly points out, since our (3-600) protocol would require the lawyer to stay inside the org. in his or her whistleblowing activities, I would want the right or duty to upstream such information not to be unduly curtailed. So I vote for the 3-600 version -- quite aside from the minor point that "which reasonably might be imputed" (1.13) is said better and more elegantly by 3-600 ("reasonably imputable").

I think a presentation of the foregoing issue might get some good discussion going before the meeting. We shall see.

See you on the 20th,

Kevin

McCurdy, Lauren

From: Melchior, Kurt W. [KMelchior@Nossaman.com]
Sent: Friday, February 06, 2004 11:53 AM
To: CommissionerJ2@aol.com
Cc: hbsondheim@earthlink.net; kabetzner@yahoo.com; lfoy@hrice.com; epgeorge@ix.netcom.com; slamport@ccnlaw.com; martinerz@ldbb.com; kmelchior@nossmn.com; pecklaw@prodigy.net; justice.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; mtuft@cwclaw.com; pwvapnek@townsend.com; avoogd@technip.com; Difuntorum, Randall; McCurdy, Lauren
Subject: RE: [Rules Commission] Rule 3-600 Discussion for 2/20 meeting

In a way, yes. There are issues of the breadth of the attorney's duty to report -- i.e., whether only for what comes up within the scope of that attorney's engagement or anything he or she may learn, even incidentally. I don't think that **not** going up the ladder is anyone's intention. And there is the question whether, in addition to up the ladder, the attorney may or must report to the authorities if up the ladder doesn't produce results (or not the results the attorney thinks should happen). I'm not aware of any sentiment for not reporting at all.

And of course, once we resolve these biggies we will have fun with fine points of drafting; but I guess not this month.

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

From: CommissionerJ2@aol.com [mailto:CommissionerJ2@aol.com]
Sent: Thursday, February 05, 2004 1:52 PM
To: Melchior, Kurt W.
Cc: hbsondheim@earthlink.net; kabetzner@yahoo.com; lfoy@hrice.com; epgeorge@ix.netcom.com; slamport@ccnlaw.com; martinerz@ldbb.com; kmelchior@nossmn.com; pecklaw@prodigy.net; justice.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; mtuft@cwclaw.com; pwvapnek@townsend.com; avoogd@technip.com; randall.difuntorum@calsb.org
Subject: Re: [Rules Commission] Rule 3-600 Discussion for 2/20 meeting

...so am I to understand that the primary issue here is the choices that the attorney has, *i.e.* a) up the ladder; b) outside reporting; and c) not reporting at all?

JoElla

MEMORANDUM

To: Rule 3-600 Drafting Committee (Kurt Melchior, Linda Foy & Tony Voogd)
From: Kevin Mohr
Date: November 3, 2003
Re: Comparison Chart of Rule 3-600 – REVISED (11/03/2003)
Based on Commission discussions at
Cc: RRC Members, State Bar Staff

I've revised the comparison chart, attached, to reflect decisions reached by the Commission over the last two meetings. Some comments:

1. **Comments & updates** I've added comments & updates of where we stand to the fifth column. That column now has three things in it:
 - a. The language of AB 363's Rule 3-600 (02/2002 Version).
 - b. Comments by Commission members and me.
 - c. Explanation of how the Commission has voted over the last two meetings and directions that have been given to the drafting committee.
2. **Row Numbers**. I've added a column (first) to include row numbers for ease of cross-reference. If you want to add a row, please number the row manually (e.g., "23a") to avoid confusing cross-references already included in comment column.
 - a. Row numbers should be helpful given that I've broken each paragraph of 3-600 down into its component parts, so there are now many more rows than before. See item #4, below.
3. **Language changes** I have not changed the language in the 3-600 column. Instead, I have noted any changes the Commission has voted in the fifth column.
4. **Parsing of language for 3-600**.
 - a. I'm not sure, but I think it was Jerry Sapiro who requested that I break down the language of 3-600 into more rows to track the procedure the Commission began following at the 10/25/03 session of the last meeting. At the meeting, the members were comparing 3-600's language word-by-word and phrase-by-phrase to the MR 1.13's language. I have tried to anticipate how the Commission will consider the language at the next meeting.
 - b. Rule 3-600 is an apt subject for this kind of micro-dissection for a number of reasons: (1) it is my understanding it was based on rule 1.13, so the language is similar if not identical; (2) the Commission's charge includes studying the ABA rules and adopting them if feasible; (3) the SEC rules promulgated pursuant to the Sarbanes-Oxley Act, as well as the ABA's Corporate Responsibility Task Force's rule 1.13 require consideration of the changes those rules have incorporated, e.g., consistency & public protection issues; (4) as discussed in columns 6, 8, 10, 13 & 15, below, the Commission's approach so far is to **relax the trigger for lawyer action** to require a violation of law or substantial injury to the organization (compare the ABA rule which requires a both a violation of law and substantial injury) and to broaden the situations which might trigger lawyer action (i.e., if lawyer learns of information during the representation as opposed to limiting response to only those situations where information is related to the representation), **but to limit the lawyer's allowed response** (i.e., reporting UP-THE-LADDER **vs.** reporting OUTSIDE). Thus, there is a need for careful consideration of the language chosen to achieve the foregoing approach.

If you have any questions, please do not hesitate to ask.

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
1.	<p>Rule 3-600: Organization As Client</p> <p>(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.</p>	<p>Rule 1.13: Organization As Client</p> <p>(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.</p>	<p>Rule 1.13: Organization As Client</p> <p>(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.</p>	<p>Rule 3-600: Organization As Client</p> <p>AB 363 para (A) was identical to Cal. Rule 3-600. Prior to 9/5/2003 RRC meeting, Kurt Melchior wrote: "I think ours is better, even with the instruction that we adhere as closely to the ABA as possible." 3. At 9/5/2003 RRC meeting, RRC voted 6 to 3 to retain the California para. (A) in its entirety. 4. In addition, at the 9/5/2003 meeting, a suggestion was made to put into the Discussion a short explanation of the difference between the two approaches. 5. Finally, at the 9/5/2003 meeting, RRC voted 8 to 2 to start with the MR 1.13 language in amending RPC 3-600 and that variations due to actual substantive differences be identified. The motion carried by a vote of 8 yes, 2 no and no abstentions.</p>
2.				
3.	<p>(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as</p>	<p>(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the</p>	<p>(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the</p>	<p>AB 363 para (B) provided:</p> <p>(B) If a member acting on behalf of an organization knows that, in the course of representing a non-governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization acts or intends or refuses to act in a manner that (i) is or</p>

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	<p>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:</p>	<p>organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:</p>	<p>organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:</p> <ol style="list-style-type: none"> (1) asking for reconsideration of the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and (3) referring <p>Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.</p>	<p>may be a violation of law reasonably imputable to the organization, or in a member which (ii) is likely to result in substantial injury to the organization, then the member shall not violate his or her duty of protecting all 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:</p> <p>Prior to 9/5/2003 Meeting, Kurt Melchior wrote re AB 363's para. (B): "I disagree with the "non-governmental" segregation approach. I hope eventually to get to the point where I can show that government agencies can be well served by a reasonable current version of 3-600 without all the extra complications and words, which in the end offer very little – see later."</p> <p>Prior to 9/5/2003 Meeting, Mr. Melchior also wrote re ABA Task Force's para. (B): "I am already on record that ours is crisper. While I think that the deleted portion above is wordy and more like an essay about good conduct than a law-like rule, the thought behind the deletion disturbs me, since the deleted material is very</p>

State Bar of California Rules Revision Commission -- Comparison of Cal. Rule 3-600 to Model Rule 1.13

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4.				<p>good guidance. And much of the new material is a less taut and meaningful version of what now exists in the left adjacent column under (1), (2) and (3)."</p> <p>4. At the 10/25/03 session of the two-day October 2003 RRC meeting, RRC addressed specifics of language of paragraph (B). Some of the results are reflected in the rows that follow.</p>
5.		<p><u>KEM Note (11/01/03):</u> In the following rows, I have attempted to parse out the language in paragraph (B) of Cal. Rule 3-600 (column 1) and the Ethics 2000 version of MR 1.13 (column 2) to identify the language issues the Commission will likely be addressing, as per the procedure during the Commission's 10/25/03 Meeting. I have not tried to do the same for the ABA Task Force's version of MR 1.13 (column 3) as the discussion during the 10/25/03 Meeting suggests it is not an approach that the Commission will be taking. I have left the full versions of the respective paragraphs (B) in the previous row for ease of reading and reference.</p> <p>(B) if a member</p>		<p>1. At 10/25/2003 Meeting, RRC agreed to address the member vs. lawyer issue at a later time.</p> <p>2. Note that at the same meeting, the same issue was addressed with respect to proposed Cal. Rule 1-310X (based on MR 5.4). KEM will keep track of the language that the RRC needs to revisit at some point in the future.</p>
6.	<p>acting on behalf of an organization</p>	<p>for an organization</p>		<p>1. At the 10/25/2003 Meeting, RRC voted 7 to 0 in favor of broad language for when an organization's lawyer's obligations are triggered. All agreed that the 1.13 language, if not entirely satisfactory, is broader than the 3-600 language.</p> <p>2. Subcommittee was directed to come up with language that captures the concept that the rule applies regardless of whether the information,</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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				<p>that raised concerns with the lawyer was learned within the scope of the representation.</p> <p>3. One member wanted express clarification in the rule that the scope of representation is not relevant here. Another member suggested that can be accomplished in the Discussion rather than in the rule itself.</p> <p>4. See also Comments at Rows # 10 & 13, below.</p>
7.	knows	knows		<p>1. At 10/25/03 Meeting, RRC voted 7 to 0 to keep "knows".</p> <p>2. No difference between the two rules. Generally, there is an aversion to the "knows or should have known" standard that the ABA Task Force originally proposed but eventually withdrew.</p>
8.	that an actual or apparent agent of the organization	that an officer, employee or other person associated with the organization		<p>1. Per consensus at 9/5/2003 Meeting, the general approach is to use the ABA language unless there is a substantive reason for keeping the 3-600 language.</p> <p>2. At 10/25/03 meeting, the consensus appeared to be to use the ABA language, as the "actual or apparent agent" language was confusing.</p> <p>3. Nevertheless, drafting committee should elaborate in the Discussion upon "other person associated with the organization" to avoid expanding the lawyer's duties unreasonably. The point here is that at a minimum, the person associated with the organization must have "ostensible authority" and that concept needs to</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments: Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
9.	acts or intends or refuses to act	is engaged in action, intends to act or refuses to act		be addressed somewhere in the rule. Prior to the 9/5/2003 meeting, Kurt Melchior wrote re section (C) of the AB 363 version of 3-600: "What's this 'apparent agent' stuff? Strikes me as a loose and ill-defined invitation for mischief"
10.	in a manner	in a matter related to the representation		1. At the 10/25/03 meeting, RRC voted unanimously to keep the California language but to amend it as follows: "acts or intends to act or refuses to act" 1. At the 10/25/03 meeting, RRC voted 7 to 0 to keep the 3-600 "in a manner" language. 2. KEM Note: Again, the idea here is that the information that triggers a lawyer's action under (B) should not be limited by the scope of representation, i.e., the RRC leans more toward "information learned during the representation" vs. "information relating to the representation" as triggering lawyer action. The latter kind of information would limit lawyer action depending on the scope of the representation.
11.	that is or may be	that is		3. 4. See KEM Note , below, in reference to language re 6068(b) in 3-600(B). [Rows ## 15 & 16] To be determined at next meeting
12.		a violation of a legal obligation to the organization, or		To be determined at next meeting

State Bar of California Rules Revision Commission - Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 - 2/2002)
13.	a violation of law reasonably imputable to the organization.	a violation of law which reasonably might be imputed to the organization.		<p>1. To be determined at next meeting</p> <p>2. <u>Note:</u> Language in rows 13 & 14 should be considered together.</p> <p>3. <u>KEM Note:</u> Although no vote was taken on this language, the view of the members present during the 10/25/03 discussion of 3-600 was that the kinds of conduct that trigger a lawyer's duty to take action should be broader than it is in 1.13, because the RRC anticipates that it will restrict what the lawyer will be able to do with the information of misconduct (i.e., can go up the ladder WITHIN the organization, but may NOT report OUTSIDE the organization).</p> <p>4. In other words, Rule 3-600 is written in the disjunctive; 1.13 in the conjunctive. Rule 1.13 requires not only that there be a violation of law, but also that it is likely to result in substantial injury to the organization. Rule 3-600 relaxes the trigger substantially by requiring that the constituent act in a manner that is EITHER a violation of law OR is likely to result in substantial injury to the organization. Those present would favor the disjunctive approach of present 3-600.</p> <p>5. <u>KEM Note:</u> This more relaxed conduct standard for triggering lawyer action, together with the lack of a scope of representation limitation on the information the lawyer receives (discussed above in relation to the "acting on behalf of language"),</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
14.	or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e).	and is likely to result in substantial injury to the organization,	[Row #6] & "in a manner" language. [Row #10], appears to be the preferred approach to remedying the "blind eye" problem apparent in Enron et al. To be determined at next meeting	1. To be determined at next meeting 2. KEM Note: Although the language of the Ethics 2000 MR 1.13 is not so absolute as is CR 3-600, it does state that: "Any measures taken shall be designed to minimize . . . the risk of revealing information relating to the representation to persons outside the organization." [Rows 26 & 27] "Information relating to the representation" is the ABA's term of art for "confidential client information," which includes secrets, as well as information from confidential client communications. See MR 1.6(a) & cmts. 1-3. 3. KEM Question: AB 1101 added 6068(e)(2) and renumbered former 6068(e) as 6068(e)(1). As the reference is to the prohibition under current 6068(e), should the reference be changed to 6068(e)(1)?
15.				
16.	Subject to Business and Professions Code section 6068, subdivision (e).			1. To be determined at next meeting 2. See KEM Question , directly above.

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
17.	KEM Note (11/01/03): The language in the following rows raises the issue of whether the duty to report up-the-ladder within the corporate entity should be permissive (as it currently is under CR 3-600 or mandatory (as contemplated by the Sarbanes-Oxley Act.) Here, the Commission may want to consider the language used by the ABA's Corp. Resp. Task Force, which does not so much appear to mandate up-the-ladder reporting as to strongly encourage it: "Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority that can act on behalf of the organization as determined by applicable law."			
18.	the member may take such actions	the lawyer shall proceed		
19.	as appear to the member to be	as is reasonably necessary in		
20.	in the best lawful interest of the organization.	the best interest of the organization.		
21.		In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences.		
22.		the scope and nature of the lawyer's representation.		
23.		the responsibility in the organization and the apparent motivation of the person involved.		
24.		the policies of the organization concerning such matters		
25.		and any other relevant considerations.		
26.		Any measures taken shall be designed to minimize disruption of the organization and		
27.		the risk of revealing information relating to the representation to persons outside the organization.		1. See KEM Note, above, re 3-600(B)'s explicit reference to B&P Code § 6068(e) [Row #15]
28.	Such actions may include among others:	Such measures may include among others:		

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
29.	(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or	(1) asking for reconsideration of the matter;	Deleted	<ol style="list-style-type: none"> 1. To be determined at next meeting 2. AB 363, para. (B)(1) provided: <ul style="list-style-type: none"> (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
30.		(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and	Deleted	<ol style="list-style-type: none"> 3. Prior to the 9/5/03 Meeting, Kurt Melchior wrote the following with respect to 1.13(b)(1)-(3), which were struck by the ABA Task Force: "while I think that the deleted portion above is wordy and more like an essay about good conduct than a law-like rule, the thought behind the deletion disturbs me, since the deleted material is very good guidance. And much of the new material is a less taut and meaningful version of what now exists in the left adjacent column under (1), (2) and (3)." <ol style="list-style-type: none"> 1. To be determined at next meeting 2. Prior to the 9/5/03 Meeting, Kurt Melchior wrote the following: "[Same comment as above in Row #29] but this seems a little over the top – a rule saying you MAY suggest a 2d opinion??"

State Bar of California Rules Revision Commission -- Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 - 2/2002)
31.	(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.	(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in on behalf of the organization as determined by applicable law.	Deleted	<p>1. To be determined at next meeting</p> <p>2. AB 363, para. (B)(2) provided:</p> <p>(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.</p> <p>3. See Melchior comment in Row #29.</p>
32.				<p>1. AB 363, para. (C), directed at governmental organizations only, provided:</p> <p>(C) If, in the course of representing a governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, (ii) is likely to result in substantial injury to the organization, (iii) constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud or other violation of law, (iv) involves the agent's willful misuse of public funds or willful breach of fiduciary duty, or (v) involves the agent's willful omission to perform his or her official duty, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)
				<p>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:</p> <p>(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; and</p> <p>(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.</p> <p>2. Prior to the 9/5/03 Meeting, Mr. Melchior wrote: "item iii and iv puzzle me, and seem to allow the lawyer to run rampant over the people who run the organization. Is the lawyer the entity's or its members' superego? And what does this add, given the restriction that the lawyer may not violate 6068(e) – while (e) is on the books? [KEM Note: I believe the language in (iii) & (iv) was taken from the Whistleblower statute]"</p>
33.				<p>1. AB 363 para. (D), also directed solely at governmental</p>

State Bar of California Rules Revision Commission - Comparison of Cal. Rule 3-600 to Model Rule 1.13

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				<p>organizations, provided:</p> <p>(D) <u>Provided the member has taken action as described in subparagraphs (C)(1) and (2) without the matter being resolved, or, if the highest internal authority that can act on behalf of the organization is an agent whose conduct is described in paragraph (C), then the member would act consistently with his or her duty of protecting any confidential information as provided in Business and Professions Code section 6068, subdivision (e) by referring the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter if:</u></p> <p><u>(1) the referral is warranted by the seriousness of the circumstances and not otherwise prohibited by law; and</u></p> <p><u>(2) the agent's act or refusal to act constitutes the use of the organization's official authority or influence to commit a crime or fraud, or a willful misuse of public funds or a willful breach of fiduciary duty.</u></p> <p><u>A member representing a governmental organization shall not be subject to discipline under these rules for making a referral under this</u></p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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34.	<p>(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and 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.</p>	<p>(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.</p> <p><u>I like our version better: "right and duty to resign" is much clearer and stronger than "may resign"</u></p>	<p>(c) <u>Except as provided in paragraph (d),</u> if, (1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may, <u>resign in accordance with Rule 1-16, reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent</u></p>	<p>paragraph if the member has acted in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in this paragraph.</p> <p>2. Prior to the 9/5/03 Meeting, Mr. Melchior wrote: "This is a sort of stream of consciousness screed. I don't feel that I can give the energy to pull it apart and dissect each part of it. All of it seems unnecessary."</p>
			<p>1. AB 363, para. (E), provided: (E) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of (C) or (D), the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's described in paragraph (B), (C) or (D), then the member's response is limited to the member's right and, where appropriate, duty to resign in accordance with rule 3-700 <u>or to act as otherwise authorized by law.</u></p> <p>2. With respect to the ABA Task Force's rule 1.13(c) [currently the ABA Model Rule, as voted by the House of Delegates in August 2003], prior to the 9/5/03 meeting, Mr. Melchior wrote: "This is of</p>	

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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35.	KEM Note (11/01/03): In the following rows, I have attempted to parse out the language in paragraph (C) of Cal. Rule 3-600 (column 1) and the Ethics 2000 version of MR 1.13 (column 2) to identify the language issues the Commission will likely be addressing, as per the procedure during the Commission's 10/25/03 Meeting. I have not tried to do the same for the ABA Task Force's version of MR 1.13 (column 3) as the discussion during the 10/25/03 Meeting suggests it is not an approach that the Commission will be taking. I have left the full versions of the respective paragraphs (C) in the previous row for ease of reading and reference.		the lawyer reasonably believes necessary to prevent substantial injury to the organization.	course the whistle blower or noisy withdrawal license. I oppose it.
36.	(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law	(C) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law		1. To be determined at next meeting 2. KEM Note: The language of 3-600 and 1.13 is identical, except for commas.
37.				1. To be determined at next meeting 2. KEM Note: The language of 3-600 and 1.13 is identical, except for the "clearly."
38.	and is likely to result in substantial injury to the organization,	and is likely to result in substantial injury to the organization,		1. To be determined at next meeting 2. KEM Note: The language of 3-600 and 1.13 is identical.
39.	the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.	the lawyer may resign in accordance with Rule 1.16.		1. To be determined at next meeting 2. Prior to the 9/5/03 Meeting, Mr. Melchior wrote: "I like our version better: 'right and duty to resign' is much clearer and stronger than 'may resign'." KEM Note: ABA Task Force's 1.13(d) has no counterpart in California, nor will it likely have one, as it would be relevant only if California were to adopt a reporting out or "noisy withdrawal" provision.
40.			(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.	

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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41.			<p>(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.</p>	<p>1. KEM Note: ABA Task Force's 1.13(e) has no counterpart in California. Nevertheless, if California were to adopt a mandatory up-the-ladder provision, then a modified version of (e) may be desired.</p>
42.	<p>(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. 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 if that is or becomes adverse to the constituent.</p>	<p>(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.</p>	<p>(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.</p>	<p>1. AB 363, para. (F), provided: (D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. 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 if that is or becomes adverse to the constituent.</p> <p>2. Note that para. (F) of AB 363 is identical to para. (D) of 3-600.</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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43.	KEM Note (11/01/03): In the following rows, I have attempted to parse out the language in paragraph (D) of Cal. Rule 3-600 (column 1) and the Ethics 2000 version of MR 1.13 (column 2) to identify the language issues the Commission will likely be addressing, as per the procedure during the Commission's 10/25/03 Meeting. I have not tried to do the same for the ABA Task Force's version of MR 1.13 (column 3) as the discussion during the 10/25/03 Meeting suggests it is not an approach that the Commission will be taking. I have left the full versions of the respective paragraphs (D) in the previous row for ease of reading and reference.			
44.	(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts.	(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client		1. To be determined at next meeting. 2. Only difference is use of member (vs. lawyer) in 3-600).
45.				1. To be determined at next meeting. Note that depending upon how the RRC resolves the language used above in Row #6, this language may have to be changed. 2. KEM Question: Is the use of "or becomes" in 3-600 intended to create a continuing duty?
46.	whenever it is or becomes apparent	when it is apparent		1. To be determined at next meeting. 2. KEM Question: As previously noted, there is a general aversion to the "knows or should know" standard, at least with respect to knowledge that triggers the lawyer's action in reporting up-the-ladder. Does the situation involving a constituent who may be unaware of whom the lawyer represents warrant the application of the standard here?
47.		the lawyer knows or reasonably should know		1. To be determined at next meeting. 2. KEM Note: the main difference is that 3-600 appears to require the lawyer not to mislead even where there is a potential conflict ("or may become")
48.	that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing.	that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.		1. To be determined at next meeting. 2. KEM Note: the main difference is that 3-600 appears to require the lawyer not to mislead even where there is a potential conflict ("or may become")

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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49.	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 if that is or becomes adverse to the constituent.			1. To be determined at next meeting. 2. KEM Note: The second sentence of 3-600(D) has no counterpart in the ABA's Model Rules. 3. See KEM Note re MR 4.3 in Row #85, below.
50.	(E) 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 the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the individual or constituent who is to be represented, or by the shareholder(s) or organization members.	(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.	(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.	1. ABA 363, para. (G), identical to 3-600(E), provided: (E) 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 the 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. 2. KEM Note: Para. (g) of the ABA Task Force's rule 1.13 is identical to para. (e) of the Ethics 2000 version.
51.	KEM Note (11/01/03): In the following rows, I have attempted to parse out the language in paragraph (E) of Cal. Rule 3-600 (column 1) and the Ethics 2000 version of MR 1.13 (column 2) to identify the language issues the Commission will likely be addressing, as per the procedure during the Commission's 10/25/03 Meeting. I have not tried to do the same for the ABA Task Force's version of MR 1.13 (column 3) as the discussion during the 10/25/03 Meeting suggests it is not an approach that the Commission will be taking. I have left the full versions of the respective paragraphs (E) in the previous row for ease of reading and reference.			
52.	(E) 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.	(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.		1. To be determined at next meeting. 2. Only difference in the first sentence of para (e) of is the reference to rule 3-310 (conflicts) instead of MR 1.7 (conflicts involving present clients).

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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53.	If the organization's consent to the 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.	If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.		1. To be determined at next meeting. 2. The differences between 3-600 and 1.13 are bolded.
54.	DISCUSSION Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.	COMMENTS [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.	COMMENTS [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.	DISCUSSION <u>Organization as an entity.</u> Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership. 1. No counterpart in AB 363. 2. Prior to 9/5/2003 Meeting, Kurt Melchior wrote re cmt. 1 to 1.13: "Too wordy – why is any of this necessary??"
55.				
56.				
57.		[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to	[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to	1. No counterpart in AB 363. 2. Prior to 9/5/2003 Meeting, Kurt Melchior wrote re cmt. 2 to 1.13: "This one REALLY strikes me as unnecessary."

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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58.		<p>investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.</p>	<p>investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.</p>
	<p>[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking</p>	<p>[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise Paragraph (b) makes clear, however, that when the lawyer knows facts that would lead a reasonable lawyer under the circumstances to conclude that the organization may be likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law in such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to</p>	<p>1. No counterpart in AB 363. 2. Prior to 9/5/2003 Meeting, Kurt Melchior wrote re cmt. 3 to 1.13: "I see this entire material as a treatise or textbook, not a rule. I think the writers lost their way and treated us to a professorial exegesis, not a regulation."</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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		<p>review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.</p>	<p>the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The lawyer's obligation to proceed as is reasonably necessary in the best interest of the organization is determined by the conclusions that a reasonable lawyer would, under the circumstances, draw from the facts known. The terms</p>	

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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59.			<p><u>"reasonable" and "reasonably" imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large volume of information that the lawyer has insufficient time fully to comprehend. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under Paragraph (b).</u></p>	<p>1. No counterpart in AB 363. Prior to 9/5/2003 Meeting, Kurt Melchior wrote re cmt. 4 to the ABA Task Force's 1.13: "I can't believe the logorrhea which is taking place here. And I thought the [old comment 4] was over the top!"</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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60.			<p>circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by 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 lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.</p>
		<p>(4) The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the</p>	<p>(5) Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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61.		<p>independent directors of a corporation.</p> <p>[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.</p>	<p>can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.</p> <p>[5][6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 4-6, 1.8, 1.16, 3.3 or 4.1. <u>Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a</u></p>	<p>1. No counterpart in AB 363. 2. Prior to 9/5/2003 Meeting, Kurt Melchior wrote re cmt. 6 to the ABA Task Force's 1.13: "Isn't all this repetitive? This is supposed to be a reasonably clear effort to provide guidance to the profession? What on earth is going on here?"</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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62.			<p>crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) can also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.</p>	
63.			<p><u>[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.</u></p> <p><u>[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these Paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal, and what the lawyer</u></p>	

State Bar of California Rules Revision Commission -- Comparison of Cal. Rule 3-600 to Model Rule 1.13

Row No.	Cal. Rule 3-600	ABA Model Rule 1.13 (Ethics 2000)	ABA Model Rule 1.13 (Corp. Resp. Task Force)	Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 - 2/2002)
64.	<p>[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.</p>	<p>[6] [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.</p>	<p>1. With respect to Comment 6 to rule 1.13, prior to the 9/5/03 Meeting, Kurt Melchior wrote: "My note says, "nice text; but are we writing a treatise?" ARE WE?"</p> <p>2. The AB 363 comment analogous to the ABA comments provided.</p> <p><u>Governmental organization as client</u> <u>Paragraph (A) does not identify with specificity who the client is when a member represents a governmental organization. Depending upon the circumstances, members may represent a variety of governmental organizations whose power and jurisdiction may originate from different enabling legal authority. Generally, a constituent body or official of the governmental organization will be part of such governmental organization and not an independent client of the member representing the parent governmental organization, even if the constituent body or official has authority to exercise exclusive power within the governmental organization over any particular subject or subjects. (See Ward v. Superior Court (County of Los Angeles) (1977) 70 Cal.App.3d 231, 38 Cal. Rptr. 532; Civil Service Commission v. Superior Court (County of San Diego) (1984) 163</u></p>	<p>reasonably believes to be the basis for his or her discharge or withdrawal.</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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				<p>Cal.App.3d 70, [209 Cal.Rptr. 159].)</p> <p><u>On the other hand, when a member represents a state agency, the client generally will be the agency itself, but under certain circumstances, it may also be a branch of government, such as the executive branch, or the government as a whole. Rule 3-600 also contemplates that in some instances, the highest internal authority that can act on behalf of the governmental organization may be the government branch, department or official with constitutional or statutory oversight authority of the organization.</u></p> <p>3. With respect to the foregoing AB 363 comment, prior to the 9/5/03 Meeting, Kurt Melchior wrote:</p> <p>"This seems as good a place as any to make my point, since I find the part I have italicized obscure beyond any acceptable level. My view is that for guidance about institutional duties etc., a governmental organization is, like any other organization, except where case law may provide otherwise as, eg., in the Civil Service Commission case where two parts of the same government played separate and at least formally non-identical roles.</p> <p>I think that we can say much of that in an appropriate official comment. Beyond that, my personal view is that</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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				<p>it is probably a sound development in the law that any given government – federal, state, local – should for many purposes not be considered a monolith; that for instance, working for Fish & Game in defending an environmental matter should not prevent a firm from suing CalTrans in a PI case, and so on through many variations. I'm not ready to propose where such lines should be drawn, but it would be good if they were.</p> <p>Apart from that, the Cindy Ossias situation could be solved quite easily if we said somewhere – a Comment might do, but maybe in the reg. – that "up the line" can mean to the top executive of the part of government involved, and to the legislative authority which functions as the equivalent of the Board of Directors; but only in extreme situations, or the government would fall apart under the impact of rumors and grievances."</p>

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65.	<p>[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.</p>	<p>[7][10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.</p>	<p>1. With respect to Comment 7 to rule 1.13, prior to the 9/5/03 Meeting, Kurt Melchior wrote: "The first part disagree utterly with the idea that the lawyer may suggest independent representation. Violates the express holding of <u>Eliatt</u>, for one thing. I could go on."</p> <p>2. KEM Note: New to the Model Rules with Ethics 2000 was the second sentence of rule 4.3. The rule in its entirety provides:</p> <p>Rule 4.3: Dealing With Unrepresented Person</p> <p>In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.</p>	<p>Comments, Current Status of RRC Draft & Proposed Cal. Rule 3-600 (AB 363 – 2/2002)</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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66.		<p>{8} Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.</p>	<p>{8} [11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.</p>	
67.	<p>Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.</p>	<p>{9} Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.</p>	<p>{9} [12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.</p>	<p>1. The analogous AB 363 comment was identical to current rule 3-600, except that it contained a heading: <i>Multiple Representation</i>. Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.</p> <p>2. With respect to these comments, prior to the 9/5/03 Meeting, Kurt Melchior wrote: "This is too affirmative/positive. The situation is more complex. Our rule is better."</p>
68.		<p>{10} Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.</p>	<p>{40} [13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.</p>	

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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69.		<p>[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.</p>	<p>[11] [14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.</p>	
70.	<p>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</p>			<p><u>institutional relationships and loyalties.</u> Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, and it is not 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</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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71.	(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.			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.
72.				<p><u>Members as employees and independent contractors.</u> Rule 3-600 applies equally to a member who provides legal services to the organization as an independent contractor as it does to a member who provides legal services to the organization as a full-time or part-time employee of the organization.</p> <p>1. Prior to the 9/5/03 meeting, Kurt Melchior wrote: "I think this is unnecessary – the rule already says as much."</p> <p><u>Remediation under paragraphs (B) and (C).</u> Both paragraph (B) and (C) refer to "an act or refusal to act of an actual or apparent agent of the organization." The language "act or refusal to act" is intended to include the concept of "remediation," that is, an act or refusal to act by an agent of an organization may include past conduct. While reconsideration of the matter may no longer be possible, a member still may urge the agent acting on behalf of the organization to mitigate or remedy the effects of the past actions where such refusal amounts to further violations of law or additional prospective injury to the organizational client. Neither paragraph</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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				<p>(B) or (C) is intended to authorize the member to disclose confidential information of past conduct outside of the organization.</p> <p>1. Prior to the 9/5/03 Meeting, Kurt Melchior wrote: "I have no quarrel with the statement as such; but I wonder whether it is not too extensive and ruminatory for an Official Comment – thus, not needed."</p>
73.				<p><u>Permissive nature of rule 3-600. Rule 3-600 is not intended to create a duty on the part of the member to take any action that is permitted under paragraphs (B), (C) or (D). (See rule 1-100(A)).</u></p>
74.				<p><u>Employment actions. Rule 3-600 is not intended to limit a member's rights when bringing or defending an employment action. In particular, rule 3-600 is not intended to abrogate the law established by the California Supreme Court's decision in General Dynamics v. Superior Court (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1]. (See also Santa Clara County Counsel Attorneys Ass'n v. Woodside (1994) 7 Cal.4th 525. [28 Cal.Rptr.2d 617]; Jameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839]; Solin v. O'Melveny & Myers, LLP (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456]; Fox Searchlight Pictures, Inc. v. Paladino (2001) 89</u></p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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75.				<p>Cal.App.4th 294 [106 Cal.Rptr.2d 906.]</p> <p><u>Public nature of some governmental information.</u> Rule 3-600 is not intended to supersede the duty of a member who represents a governmental organization to publicly use or disclose information as may be required or allowed by law or by the administrative or business practices of the governmental organization the member represents. See, e.g., Government Code sections 6250-6277 (California Public Records Act); Government Code sections 54950-54962 (The Brown Act); Government Code sections 81000-91014 (The Political Reform Act of 1974); Government Code section 11120-11132 (the Bagley-Keene Open Meeting Act). Paragraph (C)'s requirement that a "member shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068, subdivision (e)" would not, for example, preclude a member representing a governmental organization from disclosing information where authorized by law, or from providing the organization with legal advice in public where governing law otherwise permits such conduct.</p>
76.				<p><u>Response to misconduct by a governmental client.</u> Under rule 3-600, members representing governmental organizations have several options they</p>

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77.				<p>may pursue when confronted with official misconduct. The particular remedial action they may take will depend on the kind of misconduct they encounter. Subparagraphs (C)(i) to (v) provide for a relatively broad range of misconduct that permits a member representing a governmental organization to pursue the corrective action set out in subparagraphs (C)(1) and (2). The types of misconduct that permit a member to avail himself or herself of the remedies provided in paragraph (D) however, fall within a narrower ambit. Under paragraph (D), a member may only report criminal or fraudulent misconduct, or a willful misuse of public funds or a willful breach of fiduciary duty to another governmental agency or official.</p>
				<p><u>Paragraph (D): referrals within government.</u> Paragraph (D) recognizes that the member has a duty to protect the confidential information of the organization. Nevertheless, paragraph (D) is not intended to limit a member to referring a matter only within the particular governmental organization that the member represents. As noted in paragraph 5 of this Discussion, the client generally will be the governmental organization itself. Rule 3-600, however, also recognizes that a member representing a governmental organization may represent any of a variety of governmental entities, including a political subdivision, branch, bureau, or</p>

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				<p>instrumentality of a local, state, federal, or other government. The reference to "organization" in paragraph (A) includes any such governmental client. Because of this wide variety of governmental entities a member may represent, Rule 3-600 does not specify precisely how a member should report misconduct by a government employee when the member learns of conduct as described in paragraph (D). Paragraph (D) thus provides only that the government agency or official to whom the member may report could be the law enforcement agency charged with responsibility over the matter, or it could be any other governmental agency or official charged with overseeing or regulating the matter. In determining how to identify a governmental agency or official charged with overseeing or regulating the matter, the member should be guided by: (1) any statute, ordinance, or other law or regulation enacted by the entity, or by any entity of superior authority, that identifies the person, board, or agency to which such a referral should be made; (2) applicable case law; and (3) the principle that such referrals should be made within the government, and not publicly, in a way reasonably designed to avoid violating Business and Professions Code section 6068, subdivision (e). Depending upon the circumstances, the law enforcement agency charged with responsibility over the matter could be, for example, a city prosecutor, district</p>

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78.				<p>attorney, attorney general or United States attorney.</p> <p><u>Exhaustion requirement and exception when reporting governmental client misconduct.</u> Subparagraphs (C)(1) and (2) set forth actions that the member must pursue as a prerequisite to availing himself or herself of the reporting options contained in paragraph (D). Paragraph (D) recognizes, however, that action under paragraph (C)(2) may be futile. <u>Consequently, if the action, refusal to act, or willful omission of duty involves the highest internal authority that can act on behalf of the organization, the member may take steps under Paragraph (D) without first pursuing the remedy provided in subparagraph (C)(2).</u></p>
79.				<p><u>“Safe Harbor” when reporting governmental client misconduct:</u> Paragraph (D) contemplates that, in the event the highest authority within the governmental entity is responsible for the action, refusal to act, or willful omission of duty, the member may believe that referral of the matter to the law enforcement agency charged with responsibility over the matter, or to any other agency or official with regulatory or oversight authority is necessary. Under those circumstances, the member should make the referral accordingly. However, if the member has difficulty in determining which law enforcement agency, or oversight agency or official, has</p>

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80.				<p>responsibility, paragraph (D) provides a safe harbor for a member who acts in good faith both to determine the propriety of making a referral and to identify a proper agency or official to whom to make a referral in the face of such uncertainty.</p>
				<p><u>Option to withdraw from representation when a client organization is engaged in misconduct. Paragraph (E) sets forth the limits on a member's response after he or she has exhausted the actions permitted under paragraphs (B), (C), or (D).</u> Generally, these limits also apply to a member who represents a governmental organization. For example, if the law enforcement agency and governmental agency or official with oversight authority over the matter as described in subparagraph (D) has determined that the agent of the governmental organization accused of misconduct has acted properly, then the member is limited to resigning in accordance with rule 3-700, even where the member believes that the law enforcement agency oversight agency or official's determination is erroneous. In some circumstances, however, a member representing a governmental organization may take action in accordance with applicable law. For example, a city charter may give the city attorney a right to act independently of the city council or other city officers in specified matters.</p>

State Bar of California Rules Revision Commission – Comparison of Cal. Rule 3-600 to Model Rule 1.13

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81.				<p><u>Elected officials</u>. Paragraph (F) applies even if the employee is a <u>publicly elected official</u> or is appointed by an <u>elected official</u>.</p>

MEMORANDUM

TO: Members of the Commission
FROM: Linda Foy and Jerry Sapiro
DATE: February 20, 2004 Meeting (Los Angeles)
RE: Agenda Item II.G: Further Revised Rule 1-500

In connection with the Commission's continuing consideration of Rule 1-500, we set forth below

- (1) current Rule 1-500;
- (2) ABA Model Rule 5.6;
- (3) Proposed revision based upon review and discussion at the Commission's December 12, 2003 meeting.

The proposed revision reflects the majority vote of the Commission members (i) to remove subparagraph (B) from the current Rule, with discussion whether subparagraph (B) should be a separate Rule of Professional Conduct; (ii) to harmonize or otherwise address the relationship of the Rule to the Supreme Court's decision in *Howard v. Babcock*; (iii) to conform the format and substance of the rule as closely as possible to ABA Model Rule 5.6; and (iv) to retain the concept that the Rule's prohibition on agreements restricting the practice of law should extend to agreements "in connection with the settlement of a lawsuit or otherwise."

I. Current Rule of Professional Conduct 1-500

Rule 1-500. Agreements Restricting a Member's Practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

(1) Is a part of an employment, shareholders', or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or

(2) Requires payments to a member upon the member's retirement from the practice of law; or

(3) Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.

Paragraph (A) permits a restrictive covenant in a law corporation, partnership, or employment agreement. The law corporation shareholder, partner, or associate may agree not to have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law. (Amended by order of Supreme Court, operative September 14, 1992.)

II. ABA Model Rule 5.6

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment:

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17

III. Proposed New Rule 1-500

Rule 1-500. Restrictions on a Member's Right to Practice

A member shall not offer or enter into:

(A) a partnership, shareholder, operating, employment or other similar type of agreement that restricts the right of a member to practice after termination of the relationship; or

(B) any other agreement, whether in connection with the settlement of a lawsuit or otherwise, that restricts a member's right to practice.

Notwithstanding subparagraph (A) of this rule or unless otherwise proscribed by law, a member may offer or enter into an agreement that provides for forfeiture of compensation to be paid after termination of membership in or employment by a law firm if the member competes with that law firm after termination, provided that:

1. The member's eligibility for receipt of such compensation is conditioned on minimum age and length of service requirements; and
2. The compensation will be paid from future firm revenues, not from compensation already earned by the member, the member's share in the equity of the firm, the member's share of the firm's net profits, or the member's vested interest in a retirement plan.

Discussion:

Subparagraph (A) does not prohibit a restrictive covenant in a law corporation, partnership or employment agreement that provides that a member who is a law corporation shareholder, partner or associate shall not have a separate practice during the existence of the relationship; however, upon termination of the relationship (whether voluntary or involuntary), the member is free to practice law without any contractual restriction except in the case of retirement from the active practice of law or as further noted below.

The exception for certain agreements relating to compensation to be paid after termination of membership in or employment by a law firm does not apply to all agreements in connection with any withdrawal from a firm but is intended to apply to bona fide retirement agreements. Authorities interpreting the analogous "retirement benefits" exception under Model Rule 5.6 have identified the factors enumerated in subparagraphs 1 and 2 of as essential attributes of such retirement agreements. See, e.g., *Neuman v. Akman*, 715 A.2d at 136-37 (D.C. Dist. 1998) (lifetime payments to former partners who satisfy age and tenure requirements qualify as true retirement benefits); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum & Walker, P.L.C.*,

supra, 599 N.W.2d at 682 [(Iowa 1999)] (policy of distributing benefits after "ten years of service and sixty years of age or twenty-five years of service ... clearly qualifies as a retirement plan"); *Miller v. Foulston, Siefkin, Powers & Eberhardt*, supra, 246 Kan. at 458, 790 P.2d 404 (payments made to former partners who satisfy age, longevity or disability requirements "[f]it squarely within the exception of [the ethics rule]"). Significantly, these authorities have applied the retirement benefits exception to circumstances involving less than full retirement, thereby implicitly rejecting the notion that public policy requires the complete cessation of practice in order to qualify under the exception to rule. See also *Neuman v. Atkman*, 715 A.2d at 136 (retirement benefits come "entirely from firm profits that post-date the withdrawal of the partner"); Virginia State Bar Standing Committee on Legal Ethics Opn. No. 880 (1987) (distinguishing "compensation already earned" from benefits funded "by the employer or partnership or third parties" that qualify under retirement benefits exception); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601-02 (Iowa 1990) (payments of former partner's equity holdings do not qualify as retirement benefit); *Pettingell v. Morrison, Mahoney & Miller*, 426 Mass. 253, 257-58, 687 N.E.2d 1237 (1997) (distribution of acquired capital does not constitute retirement benefit); *Cohen v. Lord, Day & Lord*, supra, 75 N.Y.2d at 100, 551 N.Y.S.2d 157, 550 N.E.2d 410 (retirement benefits exception does not authorize forfeiture of partner's uncollected share of net profits).

While Rule 1-500 bars agreements restricting an attorney's right to practice law after withdrawal from a law firm, the Supreme Court has held that the Rule does not *per se* prohibit a law partnership agreement that provides for reasonable payment by a withdrawing partner who continues to practice law in competition with his or her former partners in a specified geographical area after withdrawal. See *Howard v. Babcock*, 6 Cal. 4th 409, 425 (1994). The Court's rationale for permitting such agreements is that "an agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice." *Id.* at 419. However, the toll exacted must not be so high that it unreasonably restricts the practice of law. *Id.*, at 419 & 425. See depublished decision, *Howard v. Babcock*, 47 Cal. Rptr. 650 (1995). See also *Haight, Brown & Bonesteel v. Sup. Ct.*, 234 Cal. App. 3d 963, 969-71 (1991) (Rule 1-500 does not prohibit agreement providing for withdrawing partner to compensate former partners if withdrawing partner chooses to represent clients previously represented by firm); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (1995) (partnership agreement reducing withdrawing partner's share of fees if such partner competes with law firm not considered unlawful toll on competition). But see *Champion v. Superior Court*, 201 Cal. App. 3rd 777 (1988) (forfeiture of future fees for cases taken by withdrawn partner unconscionable under former Rule 2-107).

In addition, Rule 1-500 does not prohibit agreements otherwise authorized by Business and Professions Code sections 6092.5(i) or 6093 (governing agreements

regarding conditions of practice, entered into between respondents and disciplinary agency in lieu of disciplinary proceedings or in connection with probation) or in connection with the sale of a law practice as authorized by Business & Professions Code sections 16602 *et seq.* (governing agreements not to compete in connection with dissolution of or dissociation from partnership); *see also* Los Angeles Bar Ass'n Form. Opn. 480 (1995) (partnership agreement that does not survive analysis under Business and Professions Code section 16600 *et seq.* may violate Rule 1-500).

IV. Sub-Committee Revisions and Recommendation

A. *Deletion of current subsection (B)*. The sub-committee stands by its earlier recommendation that subsection (B) of the current Rule 1-500 be eliminated from the rule. Subsection (B) (barring agreements that preclude the reporting of a violation of the Rules of Professional Conduct) does not address “agreements restricting a member’s practice” addressed by both subsection (A) and ABA Model Rule 5.6 and is intended to protect different interests from both of those other provisions.

According to the Rule Amendment History of Rule 1-500, current subsection (B) was intended to be similar to Business and Professions Code section 6090.5 (prohibiting settlements of professional misconduct claims against an attorney that prohibit the client from filing of a State Bar complaint concerning the underlying conduct) but broader, by applying to State Bar complaints concerning any violation of the Rules of Professional Conduct, not merely those implicating actions for professional misconduct. However, it is not obvious that the current subsection (B) is broader in application than Bus. & Prof. Code section 6090.5. Arguably, the prohibition of settlements that prevent the reporting of “professional misconduct” would encompass settlements preventing the reporting of any violation of the Rules (following the logic that a violation of the Rules of Professional Conduct is “professional misconduct”) and to the extent that it would not, it isn’t clear what more is covered. The sub-committee sees no benefit in creating a new Rule of Professional Conduct that is essentially duplicative of a disciplinary provision of the State Bar Act: Business & Professions Code section 6090.5 provides that the specified conduct is cause for suspension, disbarment or other discipline, while Proposed New Rule 1-510 provides that a member shall not engage in the specified conduct (and, as proposed, does not even reference section 6090.5). For that reason, the sub-committee recommends deleting subsection (B).

At its December 12, 2003 meeting, the Commission voted unanimously to delete or move current subparagraph (B) from the rule; there was no specific vote on whether subparagraph should be omitted from the Rules, incorporated into the rule or discussion section of another rule, or embodied as a separate, new rule. The sub-committee stands by its earlier recommendation that subparagraph (B) be omitted from the Rules but that Business & Professions Code section 6090.5 be referenced in the Discussion section of proposed new Rule 1-120, with which there subject matter fit (the proposed Rule 1-120 is entitled “Assisting, Soliciting or Inducing Violation and Reporting Professional Conduct” (emphasis added) and the proposed newly added subsection (B) addresses a member’s right to report violations of the Rules to the State Bar). Thus, the proposed Rule 1-120 provides that a member may, but need not, report a violation of the Rules or of the State Bar Act unless precluded by duties to the client, etc. The reference to section 6090.5 in the discussion section that we propose here would summarize the provision that a member cannot agree or seek agreement that any professional misconduct or terms of any settlement, etc.

B. Harmonizing Rule 1-500 with Howard v. Babcock. The Discussion notes that the Supreme Court has interpreted Rule 1-500 not to prohibit an agreement that requires a member who is leaving a practice and intends to compete with his or her former partners to make a reasonable payment in connection with the separation, on the rationale that such a requirement does not restrict the departing partner's practice of law but attaches an economic consequence to the partner's "unrestricted choice to pursue a particular kind of practice" (and other authorities have identified similar exceptions). The sub-committee does not recommend either attempting through the revised rule to abrogate *Babcock* and the other authorities cited in the Discussion, or expressly endorsing the *Babcock* rationale.

C. Conform format and substance to MR 5.6. The majority of the Commission voted to conform the revised Rule 1-500 as closely as possible to Model Rule 5.6, as reflected in the current revision.

D. Retain prohibition on agreements that restrict a member's right to practice law "whether in connection with the settlement of a lawsuit or otherwise." The Commission voted (with one abstention) to retain this language, which is broader than the prohibition in Model Rule 5.6 (barring agreements in which a restriction on the right to practice "is part of the settlement of a client controversy." The current revision reflects this decision.

E. Possible exception for protective orders restricting future patent prosecution engagements. Kevin Mohr has advised the sub-committee of a recent decision issued by a magistrate in the Northern District of California approving a protective order that restricts the ability of the lawyers participating in a patent infringement action (who viewed confidential information of the other side) from engaging in patent prosecution or advising regarding competitive decision-making for their respective clients for a period of two years following trial. *Chan v. Intuit, Inc.*, 218 F.R.D. 659 (N.D. Cal 2003) (holding, however, that a restriction on "assisting, supervising or providing counsel to anyone in connection with" the prosecution of a patent or the scope of claims of a patent does not constitute patent prosecution or competitive decision-making and should be stricken from protective order).

The decision does not address the question whether such a protective order conflicts with Rule 1-500 in its current form and in its proposed revised form. The sub-committee raises for discussion by the full Commission whether the rule should be amended to include an exception for such agreements and orders. Incorporating an exception that merely recites the fact the restriction is contained in a court order or is otherwise "authorized by law" begs the question whether the restriction should be a permissible limitation on a member's practice. A further question is why such an exception should be permitted to restrict a patent lawyers' ability to engage in patent

prosecution and competitive decision-making when it is not more broadly applied to any lawyer who becomes privy to confidential, competitively sensitive information of the other side in the course of litigation.

ANTHONIE M. VOOGD

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INTER-OFFICE MEMORANDUM

TO: THE MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: NEW RULE -RECORDING TIME
DATE: 02-05-04

The following is a revised draft of the subject rule.

Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in whole or in part upon the time expended by the member or where the client requests the maintenance of such records. Such records shall briefly describe the particular services provided for each time period recorded and copies of such records shall be provided to the client promptly upon request.

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January 6, 2004

Randall Difuntorum
State Bar of California
180 Howard Street
San Francisco CA 94105

Dear Randy,

I would like to suggest along with the suggestion of Tony Voogd and Ellen Peck that there be a New Rule - Recording Time that the Revision Commission consider that the rules provide "Guidance to Attorneys with Respect to Billing Clients- Block Billing and Incremental Time." I have written an article, which is still in draft, on this subject which sets forth my views in this regard.

I particularly call to your attention in my article the reference to the article by Bion Gregory, which I quote on page 21. (I am enclosing the full article by him) I strongly believe that if the bar does not endeavor to improve the ethics of its members the legislature will take over and provide harsh rules of conduct. We do not want this to happen. We can take note of what happened last year when the legislature passed laws with regard to ADR perhaps because the ADR community and ADR providers did not police itself.

There is nothing more important and more obvious to the public than how lawyers bill clients. The ABA has said that a major factor to the low image of lawyers is the billing practices of some lawyers. Yet there is no guidance in the Rules to help practitioners with respect to their billing practices. See also in this regard my reference to the studies made by the ABA which show that the "greatest number of complaints arise around lawyers' fees."

Please keep me advised when the Commission will discuss this issue and the other subject dear to my heart that is advocating a Rule requiring an attorney to discuss ADR with the client. I do not remember if I sent to you another article that I have written on this subject which will be published by the ABA Professional Lawyer.

May I wish you and your dear ones a year of peace of mind.

Sincerely yours,



Gerald F. Phillips

President's Message

How to Protect Our Profession From Regulation

Blon Gregory

Tim Aspinwall's article in this edition of the Sacramento Lawyer presents an interesting discussion of some ethical dilemmas.

Lawyers need to understand that our profession presents more difficult ethical questions than any other learned profession. Our profession provides more abundant opportunity than any other to stretch one's self and grow ethically. Our profession indeed offers endless personal challenges that test our moral mettle.

Both individuals and organizations tend towards mission drift, responding to external forces, unless they maintain clarity of purpose and check from time to time whether actions are in line with a noble purpose. A lawyer must have a strong sense of personal purpose and ethics or the other ethical systems that must be navigated will exercise gravitational force.

The tradition of a learned profession is that self-interest is restrained to some degree to the service of the ideals of the profession, which, in our case, is justice. The culture and ethics of the profession are also important. What role does justice play in the definition of its mission? What is the current role of money with respect to the mission?

Recent corporate wrongdoing has resulted in the loss of millions of dollars from retirement funds and investments. Lawyers, accountants, and auditors allowed the pursuit of profit to trump long-standing professional values. The consequences of this corporate fraud for the accounting profession provide strong lessons for our profession. In the tradition of a learned profession, society and members of a profession form an unwritten social compact, whereby the members of the profession agree to restrain self-interest, and to promote ideals of public service and maintain high standards of performance in the area of the profession's responsibility. In return, society allows the profession substantial autonomy to regulate itself through peer review. The accounting profession lost sight of the social compact in its excessive emphasis on profit, and the public, recognizing the breach of the social compact, called on Congress to end the profession's autonomy and federalize the regulation of the profession. We must not travel the same path.

The relationship with the client in our profession is more complex than that of any other learned profession. For example, physicians serve physical health and the clergy, spiritual health. These are accepted social goals. As a representative of a client, the lawyer takes on the goals of the client, becoming the alter ego of the client and speaking for the client in all of the forums in our society where decisions are made. In many

cases, the morality of the client's goals is vastly more controversial than the physical or spiritual health of a person.

The profession has historically emphasized the skills necessary to represent the client in adversarial proceedings. We are trained to prevail over hostile adversaries using the coercive power of the courts and government or the economic, social, media or political power of the client. We are the only one of the learned professions that seeks best another person on behalf of the client.

Clients bring to us a wide range of personal, moral development and moral reasoning skills, and we must find a way to help them think through the issues from their perspective. Since we undertake, in behalf of our clients, goals vastly more morally controversial than the goals of the other learned professions, the moral judgment is more complex. In addition, moral discourse, even clothed in a language the client can hear and understand, like analysis of risk or reputation, is a sensitive subject for some clients, and moral courage is required to address it.

We are the only one of the learned professions that deals on a day-to-day basis with the ethical dilemma of hostile adversaries who provide a frequent invitation to join them in improper motives and conduct. What should we do when the adversary uses unethical strategies and tactics, particularly when the client is urging us to join in them? The lawyer must ensure that the client understands why a lawyer should not and cannot join in unethical conduct.

Finding a path to a good and worthy life through these dilemmas is a challenge that stretches the soul. The most critical ethical system is the lawyer's own personal ethics. A lawyer must attend to the development of his or her own moral compass to find an ethical path and stay on it. Most lawyers have made a good living and have lived true to their moral compass. That is the best protection for our profession from those who would seek to impose governmental regulation.

We must not travel the same path as the accounting profession

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**THE RULES OF PROFESSIONAL CONDUCT SHOULD PROVIDE
GUIDANCE TO ATTORNEYS WITH RESPECT TO BILLING CLIENTS**

BY GERALD F. PHILLIPS.

Changes in the economic practice of law and in the legal culture, since the 1970's and the 1980's, have led attorneys to abandon the law as a "profession" and treat it as a "business." Prior to the 1970's most lawyers used time spent for the client only as one factor in determining the amount to bill the client. However, during the 1970's bills to clients increasingly came to be based solely on the number of hours reported by all of the timekeepers (partners, associates, paralegals and clerks). At the same time there was a growing insatiable appetite by the management of law firms to maximize its profits. Law firms, not fully appreciating that the practice of law is a profession, adopted the business mentality taught in the elite business schools to maximize profits, to treat the firm as a business. Billing on an hourly basis, which was started as a tool for law office management was turned into requiring all timekeepers to bill a large minimum number of hours per year. Salary, bonus and growth within the firm began to be largely based on the number of hours billed. The share of each partners in the profits of the firm began to be based in part on the number of hours billed. "During the 1970's and 1980's the system based on both lawyer rates and billable hours worked." However, "during the 1990's those billable hour commitments reached unreasonable high levels in many firms." 1\ In more recent years the use of billable hours has also been increasingly abused as will be described hereafter. Creative devises have been invented to increase the billing statements and thus the profits of the firm. For the public, the consequence has been the erosion of their trust of lawyers

and for the profession, it has meant diminished career satisfaction, and the loss of pride in being a lawyer.

This article will discuss how lawyers, even those who are highly responsible and ethical members of the bar, submit to their clients improper bills. This may be attributed in part to the fact that the California Rules of Professional Conduct, ("Rules") and the ABA Model Rules, ("Model Rules) give little guidance that their conduct is improper. Attorneys defend their action by asserting that there is nothing in the Rules or case law which makes such billing practices improper. The cases, discussed herein, are actual fee disputes in which the author served as an expert witness or as a neutral, when the fee charged was arbitrated. To keep the names of the clients and their attorneys confidential their identity will not be disclosed.

The fact that lawyers are held in very low esteem by the general public is without dispute. The ABA in its Opinion 93-379, although it could not bring itself to completely agree with the above negative evaluation of attorneys, in essence agreed and pointed to the billing practices of attorneys as a major contributing factor responsible for the low reputation of lawyers.

Yet, ironically, lawyers are not generally regarded by the public as particularly ethical. One major contributing factor to the discouraging public opinion of the legal profession appears to be the billing practices of some of its members. 2\

Notwithstanding this harsh denunciation the ABA Model Rules and the California Rules give no guidance to lawyers as to what are proper or improper client billing practices, except that Rule 4-200 of the California Rules does provide that a member of the bar shall not enter into an agreement or charge or collect an illegal or unconscionable fee. The Rule then enumerates eleven factors to be considered in determining the conscionability of a fee. None of the factors deal with

billing practices. Model Rule, 1.5, likewise, only provides that lawyers shall not charge an unreasonable fee.

The legal profession is no longer regarded as it once was a "noble profession," a "high calling." In a recent book, "Lawyer Life: Finding a Life and a Higher Calling in the Practice of Law" 3\ its author, Carl Horn III, quotes Harvard Law Professor Mary Ann Glendon that "the practice is in extremis... on "the edge of chaos " 4\ and Yale Law School Professor Anthony Kronman, who diagnosed the profession as "in danger of losing its soul."5\ He recalled that Sol Linowitz laments in his book, "The Betrayed Profession" that the profession is being transformed "into an increasing unprincipled dollar driven business." 6\ Lisa Lerman wrote that the unethical practices in the legal profession represents "a real crisis in the profession." 7\

Sol Linowitz, former general counsel of Xerox , ambassador and senior partner of the prestigious, law firm, Coudert Brothers, said that the purpose of his book is to offer some suggestions as to how lawyers might rekindle pride in the profession and restore the practice of law to the respected position it once occupied. He asked "where does the responsibility lie for safeguarding the integrity and reputation of the bar? He answered this question, "obviously with the bar associations." Yet he quickly asserted "It is as true in the definition of legal codes as it is in politics that where you stand very often depends on where you sit. And it is difficult for any group of people joined by a professional bond to avoid the temptation of creating a trade association promoting their own interests rather than a professional association dedicated to improving the services they render the public." 8\ All too often when bar members discuss rules of ethics, even those who are members of ethics committees, the comment is made "we do not need more rules to govern the activities of lawyers." When such comments are made one should

question whether they are promoting their own interest that of lawyers rather than protecting the public. Linowitz concluded that a bar association that sees its job as that of a trade association can be only of limited help in repairing and maintaining the reputation of the profession.” 9\ If those given the responsibility to establish rules of ethics do not recognize that their mission is to protect the public the profession will find that the government will step in and regulate the activities of lawyers. This certainly is not to be desired.. Linowitz cautioned that referring to the practice of the law as a business will inevitably lead to the kind of regulation that other businesses suffer. He warned, “if lawyers cannot by themselves reestablish a climate of professionalism, government will set the parameters of behavior.” 10\

It cannot be debated that one of the important reasons why the legal profession is considered in such low esteem is the manner in which lawyers bill their clients. Linowitz agreed:

Attorneys need to recognize that unethical time based billing practices harm not only their clients but also the legal profession, the courts and the public.... Moreover, excessively clever strategies for accumulation of hours and the protraction of litigation for the conscious or unconscious purpose of generating more billable hours have aggravated a widespread cynicism about the legal profession that ultimately calls into question the integrity of the judicial system and weakens faith in the quality of the nation’s justice. 11\

The American Bar Association Section of Litigation in its report, *Public Perception of Lawyers Consumer Research Findings, April 2002*, which examined the public confidence in the courts, the judiciary and the legal profession made some troubling findings and identified some steps that the legal profession could take to improve its standing in American society. The report found that “clients are confused about how lawyers bill for their services” and that “Americans also believe that lawyers do a poor job of policing themselves. Bar associations are not viewed as protectors of the public interest but as clubs to protect lawyers.” The study found

that (80%) of those surveyed opined that the legal profession could do a better job of communicating with clients, and (78%) thought that lawyers should do a better job of explaining their fees to their clients. Over two thirds of the respondents in the survey agreed that "lawyers are more interested in making money than serving the clients." "Lawyers are motivated by greed."

...the greatest number of complaints arise around lawyers' fees.... Lawyers are often not upfront about their fees; and are unwilling to account for their charges or hours.

It concluded that "The image of lawyers is not just a matter of professional or personal pride. It affects the public's belief in our system, and ultimately, their faith in our democracy."^{12\}

The ABA itself, commissioned, in August 2002, a study on billable hours which it characterized "as the most common form of law firm billing." "The reality is that hourly billing survives, indeed it reigns supreme." In a forward to the Commission's report Supreme Court Justice, Stephen G. Breyer asked: "... does the billable hour contribute to or undermine a practitioner's ultimate goal—to provide clients with the best legal services possible? And to the extent billable hours are counterproductive... how, when and to what extent, might it be possible to change billing methods." In the preface, the President of the ABA, Robert E. Hirshon, stated, "It has become increasingly clear that many of the legal profession's woes intersect at the billable hour..." He continued that the commission's task was "to address client's demands for more information about the legal fees charged." The report concluded that the "outright elimination of time billing is not a likely proposition." "No one expects hourly billing to go away. The goal of the Commission is to help lawyers consider alternative billing methods where appropriate," In the discussion of the "Current State of the Profession" the Commission highlighted some of the

problems associated with hourly billing..." Included in its comments are the following:

Aggressive Time Recording

Reputable lawyers do not pad their timesheets. However, high hourly requirements can put subtle pressure on lawyers to be aggressive rather than conservative in recording their time. Under those circumstances, a lawyer may be less likely to carefully evaluate the quality of the time spent. Hourly billing tends to lead to simple quantitative recordings of time without qualitative judgments being applied....The recording of hours for hourly billing tends to focus the lawyer on mechanical functions rather than on accomplishments or substantive progress.

The Commission announced a Model Law Firm Policy which all firms would be well advised to adopt.

... because the billable hour system remains a significant staple of the firm's pricing system, it is important to set forth policies pertaining to that system as it applies to the firm's lawyers.

1. Integrity

Above all else, it is an absolute requirement and condition of continued employment that lawyers be scrupulously honest in recording time.

That means that lawyers must carefully keep track of the nature and amount of time spent on individual matters....

2. Prompt Recording of Time

Consistent with point 1 above, the only way to ensure integrity and accuracy is to keep careful records and to record and submit time on a daily basis....

3. Provide Meaningful Detail.

In recording and describing time, lawyers should put themselves in the position of the client receiving the bill, and ask "does this give me the detail I need to evaluate the quality and quantity of the services provided.... 13\

Incorporating these thoughts into the Rules would be a major step in preserving the hourly billing system. Until we discover or begin to understand another method of billing we must work to protect the hourly billing system and dedicate ourselves to correcting some of the ills of

the present billing process. The ABA report concluded that if we don't, the use of the billable hour system will "diminish our profession"

Although clients believe that lawyers should do a better job of explaining their fees to their clients and could do a better job of policing and regulating themselves the Rules do very little, if anything, to reinforce the need for lawyers to explain fees or to guide lawyers as to what is proper in billing fees.

One very important reason for meaningful Rules concerning billing procedures is to help curb what Professor William Ross referred to as the "perfect crime".

The billing procedures used by most firms practically invite attorneys to commit the 'perfect crime.' The padding of bills is almost impossible to prove since there is no objective way to measure, except within very broad limits, the amount of time that one needs to spend on any particular task. 14\

Professor Ross, one of the foremost commentators on time based hourly billing observed that "most attorneys probably try to achieve honesty in billing, and that most excessive billing results from ignorance or insensitivity about ethical issues rather than deliberate deception." 15\ Another reason advanced is that there is nothing in the Rules which makes certain practices unethical. Lawyers, as great advocates, utilize their talent to convince themselves that what they are doing is perfectly proper.

THE RULES DO NOT GIVE ATTORNEYS THE NEEDED GUIDANCE WITH RESPECT TO BILLING

California's Rules of Professional Conduct Rule 4-200, Fees for Legal Services provides:

"(A) A member shall not enter into an agreement for, charge, or collect an

illegal or unconscionable fee.

(B) Unconscionability of a fee agreement shall be determined on the basis of all of the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events...

The provision sets forth the factors to be considered, where appropriate, in determining the conscionability of a fee. None of those eleven factors relate to how an attorney may bill. Little assistance is, likewise, given to attorneys in the Written Fee Contract Section 6148 (a) of the Business and Professions Code with respect to billing statements, which states:

“(1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs.

The Arbitration Advisory 98-03 issued by the Committee on Mandatory Fee Arbitration under the heading, “Determination of a Reasonable Fee.” stated:

Fee agreements are required to be fair and drafted in a manner the clients should reasonably be able to understand [Alderman v. Hamilton (1988) 205 Cal. App.3d 1033,1037]. Attorneys have a professional responsibility to ensure that fee agreements are neither unreasonable nor written in a manner that may discourage clients from asserting any rights they may have against their attorney [Los Angeles Co. Bar Assn. Ethics, Op. No. 489...]

Rule 1-100 in describing its “Purpose and Function” states that the Rules are intended

to protect the public and to promote respect and confidence in the legal profession. The Rule, however, does little to accomplish this goal.

THE RULES SHOULD ADDRESS THE MORE INFAMOUS PRACTICES BY WHICH ATTORNEYS INFLATE THEIR BILLS

A. BLOCK BILLING

There are many practices by which attorneys improperly increase the time they bill for the alleged services rendered. These include block billing, excessive incremental billing formulas, ineffective or overstaffing, charging for overhead, excessive hours for revisions, rounding up the time billed, vague billing entries, billing for overhead and for excessive research not properly identified. This article will only discuss the first two practices.

One of the most infamous practices that give rise to the disrespect of lawyers is the practice of block billing, assigning one time charge to multiple tasks. Rather than indicating the time spent on each task, on a daily basis, attorneys group various functions performed in one day and submit one time charge. This practice enables attorneys to conceal the actual time spent on specific tasks. The very purpose of hourly billing is to advise the client of the actual time spent to perform the tasks billed and for the client to be able to understand the bill rendered. Through block billing we are returning to the time when attorneys unilaterally determined what in their judgment would be a reasonable fee. It is asserted by many responsible attorneys, who block bill regularly, that the Rules do not bar block billing. Few, if any attorneys, believe block billing is

improper. Some attorneys do not engage in block billing because they believe it does not create a good attorney\client relationship.

In a recent case in which the author was an expert witness the billing statements of the senior partner in the firm's suit for fees show that he continually billed in blocks of time. One such example is the following;

11\15\98 HWC: Review materials- Prep for client meeting- Ltr to Special Master
on outstanding issues-Tel conf with Long. 3.50 hr.

It is obvious that it is impossible because of block-billing for the client to understand the bill and to determine how long HWC spent that day to review the vague and meaningless entry "review materials", how much time he spent to "prep for client meeting", how long he spent to prepare the letter and how long was the phone call. In three prior billing statements, all of which were block billed, the partner also billed for "prep for client meeting". Thus how long it took to prepare for that one meeting cannot be discerned.

Professor Ross opined generally on block billing ,

A bill should always specify how much time was spent by each attorney on each day on each specific task. Courts in numerous cases involving the award of attorney fees have complained about bills that have intermingled hourly charges and thus precluded the discernment of specific tasks. 16\

The Committee on Mandatory Fee Arbitration in its Arbitration Advisory 03-01, January 29, 2003, "Detecting Attorney Bill Padding" stated that block billing "is not a favored practice.. and many courts specifically prohibit block billing." It further stated, "[t]his is almost never allowed by federal courts. The practice hides accountability and may increase time by 10% to 30%." Many attorneys engage in this practice even though it is universally disapproved. This

practice allows a timekeeper to conceal the time spent on each task and prevents the determination of whether individual tasks were performed within a reasonable period of time because it is impossible to separate the various tasks lumped together in one entry. In addition with block billing, a lawyer may include in a claim for compensation in a large time entry small, minor tasks not truly compensable by the client if the tasks were reported individually. It also enables the attorney to round up their time.

In one case an attorney did not bill in its billing statements to the client in any increments from a half hour (0.50 of an hour) to the next hour. It is not realistic that the time spent between a half hour and one hour was never less than the full hour. This would indicate rounding up to the full hour after a half hour. The study of the billing statements in that case also indicate that the senior partner billed 82% of the time, when he billed two or more hours, for the hour plus at times a half hour. Strangely no incremental times were recorded between a half hour and a full hour. This would indicate bill padding 17\

In another recent fee dispute one of the associates in a firm, which was suing for its fees, billed 18 hours in one day. One cannot perform 18 hours of billable work in one day. Some attorneys if they are on trial and must prepare for the next day or are in the midst of an important merger, which is about to close can be called upon to work long hours. However, in that fee dispute the bill did not indicate any such reason for 18 hours. The billing statement for the day was more than one page. She repeatedly indicated "review memorandum" (17 times) she also charged for "organize transaction documents", "telephone conferences" (5 times) and for the unbillable time "instructions to legal assistant regarding delivery of signature pages." The general

rule of thumb for billing hours is that a lawyer must spend three hours in the office for every two that is billable. The reason for the ratio is that clients are billed only for the time actually spent. Incredulously this lawyer must have spent more than 24 hours that day in the office. On the prior day this same associate billed 12 hours. She also repeatedly billed 7.25 hrs. 8.50 hrs. 8.75 hrs. 9.00 hrs., 9.50 hrs., 9.75 hrs. and 10.75 hrs. On each of the days that she billed those huge hours there does not appear in the billing statements any reason why it was necessary to bill that many hours in one day.

It is most shocking that in a recent book, on billing, the authors advocated that bills should be billed in paragraphs indicating the work performed without indicating the amount of time for each task. It recommended only to show the total amount billed for the indicated period and not to indicate who performed what services. The authors defined block billing, as the construction of a bill without paragraphs, which is "a visual means of projecting effort." In one example the authors showed a statement for \$4,500 in one block for the period 3\16\ 03 to 10\09\03 with no indication of the time spent on any task. Among the items billed were charges for "copied documents," "printed inventory," "printed documents," "went to the bank," and "prepared check." How long these tasks took is not shown. These are not a permissible charges to be made by the lawyer. 18\

Many large corporate clients, especially insurance companies, provide in the retention letter with law firms, that are about to represent the company, that "the invoices should be itemized. No block billing is allowed." "Each task must be given a separate entry." Thus large clients prevent their attorneys from block billing. However, individual clients or smaller clients

with little leverage cannot protect themselves from this nefarious practice. If clients with leverage are able to dictate billing terms and prohibit block billing why should law firms representing smaller clients be permitted to block bill? The way to prevent this unfairness is to provide in the Rules that if an attorney is billing on an hourly basis the billing statement must indicate the time for each task. The claim that it is too difficult for the lawyer to indicate the time for each task is belied by the fact that many firms do not block bill and indicate for each task the time expended. Likewise, firms at times are prohibited by a retainer agreement from block billing and indicate the time for each task. Firms also will not block bill when they know that the court will not order attorney fees where the fees requested were blocked billed.

Elena S. Boisvert, president of LCM, a legal auditing firm wrote: "If the profession is charging for time, the client has a right to know how much time is spent on each task. Failing to provide the time spent on each task can mask billing abuses such as excessive time or churning of hours. In *United Steelworkers of America, v. Phelps Dodge Corporation*, for example, the court disallowed sixty percent of blocked entries, noting that 'such entries made it difficult to determine the amount of time allocated to compensable tasks.'" 19\

B. ABUSE OF INCREMENTAL BILLING

Most law firms bill on an hourly basis in tenth of an hour (6 minutes) or in increments of 12 minutes and so advise the client in the retainer agreement. Some firms bill on the basis of a quarter of an hour, some advising the client and some do not. Insurance companies often limit what their lawyers may bill to increments of six minutes. Judge Ralph G. Pagter, *In re Tom Carter Enterprises.*, wrote, "professional persons who charge their clients fees in excess of \$80.00 per hour, based upon time spent, cannot in all honesty and reasonableness, charge the

clients for increments in excess of one-tenth of an hour.” 20\ There is nothing in the Rules which would make such conduct improper.

Lawyers who advise their clients in the retainer that the firm bills on a quarter hour basis assert that the client consented to those billing when they executed the retainer. There is nothing in Rule 4-200 which addresses whether charging on such a basis produces an illegal or unconscionable fee and no California cases have opined on this question. However, Professor Ross in his book, “Honest Hours” opined:

Attorneys are able to fulfill most of their ethical obligations toward their client to the extent that clients consent to specific billing practices...

Accordingly, an attorney should explain her billing practices to her client before undertaking the client’s representation. 21\

The ABA Formal Opinion 93-379 discusses that it is incumbent on lawyers to “make disclosure of the basis for the fee” but also to give “a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges is actually being billed.” Furthermore, the Opinion refers to Model Rule 1.45 (b) (although the opinion was rendered prior to the present Model Rules, the new Rules are the same.) “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.” The language in and comments to the Model Rules, quoted above, give some guidance to lawyers about billing but the Model Rules are not applicable to attorneys in California.

The egregious use of an incremental billing formula, in the three cases discussed below, go far beyond the issue as to whether billing on a quarter hour basis is proper even if consented to by the client. The following cases are but a few examples, in which the author has been

involved, which demonstrate how unprincipled attorneys have abused the practice of hourly billing and have made a mockery of billing statements supposedly designed to advise the client as to the actual time spent by the attorney.

CASE "A"

In this dispute, in which the client objected to a large fee submitted by the attorney and requested that the controversy be arbitrated, each of the timekeepers in the firm billed on a 0.25 hour basis and yet there was nothing in the retainer agreement advising the client that the attorney would bill on a quarterly hour basis. Certainly a client would not expect that the lawyer would bill 0.25 hour for each task and would bill that time for short phone calls taking less than three minutes and even for uncompleted calls or reading copies of short letters. As the court noted in *In Re Tom Carter Enterprises*, "[v]ery few telephone calls last more than one-tenth of an hour, and it rarely takes more than one-tenth of an hour to read an incoming letter or write a short outgoing letter." 22\ Billing a quarter of an hour for an uncompleted call is dishonest. Certainly such an abuse of quarter hour billing cannot be condoned.

CASE "B"

The senior partner in another case, in which the author was retained to be an expert witness, did not block-bill but in its place charged 0.25 hour separately for each task which he set forth in separate lines. For example on one day he billed separately 33 entries and represented that each task took 0.25 hour. Thus he billed a total 8.25 hours for that day and charged \$2,681.25. The billing statements reveal that each of the items were to "review correspondence" (e-mail or copies of letters sent to him, most of which were from others in the firm.) A study of the actual correspondence reveals that most were but a few lines some were a voice message.

The use of the word correspondence may be misleading. In each case it was but one letter, an e-mail not a group of letters which could constitute correspondence. If we assume that each of the 33 entries took five minutes, which would be a very conservative, he should have billed 165 minutes or 2.75 hours. At the rate of \$325 per hour he would have billed \$893.75 not the \$2,681.25 he billed. He argued that he billed in accordance with the retainer agreement which he asserted permitted him to bill a minimum of 0.25hour for each task, reading each letter, and that there is nothing in the Rules which prohibits such billing. The contract only states, "[o]ur services are billed in quarter-hour increments." Not a word as to what that means. Since the law firm wrote the retainer it bears the burden of clearly explaining what is meant by "our services are billed on a quarter hour increments" and that he so advised the client before the client executed the retainer. This is especially true since the attorney has a fiduciary duty of explaining to the client how the firm will bill. This language certainly did not mean that the attorney could bill for reading each letter 0.25 hour. This manner of billing was the attorney's modus operandi for in the months of June, July and August he billed in excess of 85% of the bills for a quarter of an hour. It is very strange that the billing statements do not show the normal array of time where there would be approximately the same number of statements showing a quarter hour, a half hour and a full hour. He, likewise, billed 0.25 hour for "Instruction to legal assistant regarding attorney...." How long does it take to instruct the secretary? Others in the firm blocked bill so it is impossible to determine from the statements if the entire firm billed on this basis and that the huge hours, 18 or 12 hours was the result of billing on a quarter hour basis.

On another occasion he billed five items on one day. The first item read: "Review correspondence from ... to attorney; conference with ..." 0.50. He thus presumably billed to

review the correspondence 0.25 hour as he always did and the same for the conference. The question must be asked was the conference a face to face meeting or telephone call. The four other items on that day were to "Review correspondence" or "Review Memorandum" for which he billed 0.25 hour for each. Thus he billed 1.00 hour. It would appear that each of the seven attorneys assigned to the case were instructed to send copies to the senior partner of each letter they wrote and that the partner allegedly read each letter for which he charged a 15 minutes. This included a one line letter forwarding a document. Thus if the attorney reviewed three letters he billed 0.25 hour for each letter. Those attorneys who bill on a quarter hour do not charge in this manner.

What then is the meaning and reason for billing in increments of $1\frac{1}{10}$ th, $2\frac{1}{10}$ th or even a quarter of an hour? Attorneys who bill on one of these incremental billing bases assert that to properly compute the time for a phone call the attorney usually reviews in his or her mind why the phone call is to be made what must be discussed and may even look at the file. All of this should be added to the time of the call. But this would not be the case if the lawyer read the copies of the letters sent by others in the firm and if the attorney read 33 letters in one day which he stated took a full day. There would be no billing for the exact minutes. The time will be rounded up in the case of $1\frac{1}{10}$ th of an hour to the next $.10$ th of an hour. The time billed and shown on the billing statement, therefore, will be 0.10hr, (6 minutes) .20 hr (12 minutes) etc. Where the firm bills in $2\frac{1}{10}$ th of an hour the time will be 0.20 hr. (12 minutes) and the next increment will be 0.40 hr. (24 minutes) and then 0.60 hr. (36 minutes). If the firm bills on a quarter hour basis the time segments will be 15 minutes, a half hour, forty five minutes and one hour. Such billing has never meant that the firm will bill 15 minutes for each letter read or phone

call received or made.

William Ross was certainly prophetic when he concluded in his book:

More common and more insidious than "padding" and churning" are more complex practices that ultimately amount to little more than versions of the same abuses. 23\

The practice of this attorney was certainly most creative and is more insidious than block billing.

In the Arbitration Advisory "Detecting Attorney Bill Padding" the Committee on Mandatory Fee Arbitration under the heading "examine the format of the invoices for patterns that suggest padding" wrote: 24\

1. Formula billing: Every single piece of paper gets a time entry as it wends its way past the timekeeper to its destination. It does not take more than a few seconds to read most routine correspondence. If the timekeeper reads a group of documents in a minute or two and then records a minimum time for each document, this may ultimately increase the time by several hours.

CASE "C"

In a third case the retainer statement called for the timekeepers to bill on the basis of 1\10 of an hour. Yet a study of the billing statements show that the attorneys did not bill on that basis. Instead, the statements show that those submitting time billed in increments of 0.20 of an hour, 0.50 of an hour, and a full hour. Another timekeeper billed in increments of a half hour and a full hour. Elayne B. Cothran wrote for the American Bar Association:

When fees are negotiated on hourly rates, , the time charges incurred should represent only the actual time expended and not some undisclosed minimum, recommended, or value- based time charges. 25\

These are but a few examples of how attorneys have billed on the premise that there is nothing in the Rules which says that such a billing practice is improper.

The California Rules should in a comment to the Rule 4-200 provide that billing a minimum incremental amount of time without fully explaining to the client the meaning of the provision would produce an unconscionable fee. It should also provide that incremental billing in excess of 2\10 of an hour, likewise, produces an unconscionable fee.

**THE RULES SHOULD PROHIBIT FEES PRODUCED BY BLOCK BILLING
AND INCREMENTAL MINIMUM TIME IN EXCESS OF 0.20HRS,**

Professor Ross wrote:

The importance of conscience in the context of time-based billing is particularly important since the Rules are so elementary that they offer virtually no guidance about the propriety of specific billing practices. As we shall see, the problem with many attorneys is not that they are unaware that lying is wrong, but rather that they do not regard various forms of creative billing as dishonest, fraudulent, deceitful, or involving misrepresentations.

26\

The infamous practices of block billing can be easily eliminated by having a Rule which so states. Insurance companies ban the use of incremental billing in excess of 0.10 hr. when retaining lawyers. Those with little leverage are not able to do so. Attorneys and even those in the ethics community defend their practice of block billing by asserting that there is nothing in the Rules which prevent such billing. Their other defense is that it is too much trouble to indicate the time for each task. It is also asserted that lawyers do not need further regulation especially as it relates to billing which is within the province of the lawyer. These are not valid reasons not to have a Rule about block-billing. Permitting block billing makes it easier to commit the "perfect crime", as professor Ross has stated. It prevents the detection of the actual time for the tasks reported which were not true and honest. It is impossible to ascertain the true time it took to do the various tasks which the block billing camouflages. It enables the billing of hidden

overhead charges such as secretarial work and other un-billable time. Requiring no block billing will not eradicate the dishonesty of billing but would go a long way to stop a great deal of it.

Billing statements rendered each month by attorneys should build the client\attorney relationship. Unfortunately they are a source of great frustration, irritation and bewilderment to the client. This is largely due to such practices as block billing. 27\

Incremental billing of less than 0.20 hour may be permitted if fully explained but in excess of this should be prohibited. Attorneys who wish to bill on a quarter hour basis assert that it is perfectly acceptable if it is incorporated into the retainer agreement. Once again insurance companies often in their retainer agreements with attorneys forbid this practice. Unsophisticated clients do not understand what affect billing on a quarter hour basis may have on the amount of time billed. Clients who do not have the necessary leverage with the law firm accept such a provision in retainer agreements without questioning its meaning. They do not recognize that billing on such a basis substantially increases the invoices. A formula, such as discussed above in case "B", whereby the attorney charges the minimum incremental for reading each letter, should certainly be barred.

Attorneys should on their own not block bill or use incremental billing in excess of 0.20 but unfortunately many have not found the moral road to eliminate such practices. Doing so would help bond the client and attorney and would lead to more respect by the client for the attorney. 28\

Professor Ross said the real problem "is that many customary billing practices are legal but unethical and that many outside lawyers are so blinded by self interest that they do not perceive any ethical difficulty. 29\

The legal profession which has enjoyed the right of self regulation because it is based on restraint of self interest is on the verge of losing that right and as a result government regulation may be imposed on the profession. Bion Gregory, who was Legislative Counsel to the State Legislature in an article as President of the Sacramento Lawyer Magazine wrote:

The tradition of a learned profession is that self-interest is restrained to some degree in the service of the ideals of the profession, which, in our case, is justice. ... Lawyers, accountants and auditors allowed the pursuit of profit to trump long-standing professional values. The consequences of this corporate fraud for the accounting profession provide strong lessons for our profession.

He continued,

In the tradition of a learned profession, society and members of a profession form an unwritten social compact, whereby the members of the profession agree to restrain self-interest, and to promote ideals of public service and maintain high standards of performance in the area of the professional responsibility. In return, society allows the profession substantial autonomy to regulate through peer review.

He concluded that the accounting profession lost sight of this social compact in its excessive emphasis on profit. As a result the public called upon Congress to end the professional autonomy and to federalize the regulation of the profession. Mr. Gregory called upon the bar not to travel the same path as the accounting profession. 30\

Gerald F. Phillips is a full time mediator and arbitrator with offices in Century City, Los Angeles CA. He recently was named among the "Top 50 Neutrals" in California by the Los Angeles Daily Journal EXTRA. He has served as an expert witness on billing practices, in attorney client fee disputes, and has served as an arbitrator in other cases. He is a member of the Los Angeles County Bar Association Committee on Professional Responsibility & Ethics and the

Ethics Subcommittee of the State Bar ADR Committee. He established, with his wife Francine Phillips and his Daughter Stacy, the Phillips Family Fund at the Dartmouth Ethics Institute Phillips which presently is helping to fund the teaching of "Ethics Across The Curriculum." He has written on billing practices "TIME BANDITS- Attempts by lawyers to pad hours can often be uncovered by a careful examination of billing statements."(Los Angeles Lawyer March 2001; OVERBILLING OF CLIENTS BY LAWYERS IS AN ONGOING PROBLEM, (Corporate House Counsel Weekly BNA 4-25-01; CHECKING THE BILL, House Counsel Sep\Oct. 2001; REVIEWING A LAW FIRM'S BILLING PRACTICES, (The Professional Lawyer, Fall 2001); MORE FRIENDLY BILLING SERVICES, "Century City Lawyer" January 2002; BUILDING A BETTER CLIENT-ATTORNEY RELATIONSHIP THROUGH THE RETAINER AGREEMENT, "Century City Lawyer" August 2002;

1. ABA Commission on Billable Hours August 2002 at page 3.
2. American Bar Association Standing Committee on Ethics and Professional Responsibility . Formal Opinion 93-379, December 6, 1993 at page 2.
2. Carl Horn III, *Lawyerlife- Finding a life and a Higher Calling in the Practice of Law*. Copyright ABA 2002. page 2.
3. Mary Ann Glendon, *A Nation under Lawyers* 3 (1994)
4. Anthony T. Kronman, *The Lost lawyer: Failing Ideals of the Legal Profession* 1-2 (1993)
5. Sol M. Linowitz, *The Betrayed Profession; Lawyering at the End of the Twentieth Century* (1994).
6. Lisa Lerman , *Gross Profits? Questions About Lawyer Billing Practices*, 22 Hofstra L. Rev. 645, 633 (1994)

7. Sol Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, (1994)
- 8\ *Id.* page 139
- 9\ *Id.* page 158
- 10\ *Id.*
- 11\ *Id.*
- 12\ Prepared on Behalf of the Section of Litigation by Leo J. Shapiro & Associates August 8, 2003 for the Annual Meeting 2003.
- 13\ ABA Commission on Billable Hours August 2002
- 14\ William G. Ross, *The Honest Hour The Ethics of Time-Based Billing by Attorneys* Carolina Academic Press (1996) at 2.
- 15\ *Id.* at 5.
- 16\ *Id.* at 65.
- 17\ Gerald F. Phillips, "Reviewing A Law Firm's Billing Practices" *The Professional Lawyer*, Fall 2001 page 2
- 18\ J. Harris Morgan and Jay G. Foonberg ABA Law Practice Management Section (2003) *How to Draft Bills* at page 20-21.
- 19\ 9 NO.1 Prof. Law.1 Cited by Boisvert 1991. C09.254 ([HTTP://WWW.VERSUSLAW.CO](http://www.versuslaw.co) (unpublished opinion.) at page 2.
- 20\ *In Re Tom Carter Enter., Inc.*, 55 B.R. 548, 549, (C.D. Cal. 1985)
- 21\ William G. Ross, *The Honest Hour The Ethics of Time-Based Billing by Attorneys* Carolina Academic Press (1996) at 2.

- 22\ In Re Tom Carter Enter., Inc., 55 B.R. 548, 549, (C.D. Cal. 1985)
- 22\ Arbitration Advisory 03-01 Detecting Attorney Bill Padding published by the Committee on mandatory Fee Arbitration.
- 23\ William G. Ross, *The Honest Hour The Ethics of Time-Based Billing by Attorneys Carolina Academic Press (1996)*
- 24\ Arbitration Advisory 03-01 Detecting Attorney Bill Padding published by the Committee on mandatory Fee Arbitration.
- 25\ Elayne B. Cothran 29-SPG Brief 38
- 26\ William G. Ross, *The Honest Hour The Ethics of Time-Based Billing by Attorneys Carolina Academic Press (1996) at Page 48*
- 27\ Gerald F. Phillips, *Building a Better Client-Attorney Relationship Through the Retainer Agreement*, The Century City Lawyer August 2002 at page 1
28. Gerald F. Phillips, *More Friendly Billing Services* The Century City Lawyer January 2002 at page 12.
- 29\ William G. Ross, *The Honest Hour The Ethics of Time-Based Billing by Attorneys Carolina Academic Press (1996) at Page*
30. Bion Gregary Sacramento Lawyer Magazine Sept\Oct 2003