

McCurdy, Lauren

From: Difuntorum, Randall
Sent: Wednesday, October 28, 2009 11:23 AM
To: 'avoogd@stanfordalumni.org'
Cc: 'linda.foy@jud.ca.gov'; 'hbsondheim@verizon.net'; 'kevin_e_mohr@csi.com'; 'kevinm@wsulaw.edu'; 'kemohr@charter.net'; McCurdy, Lauren; 'martinez@lbbslaw.com'; 'Jerome Sapiro Jr.'; 'Ellen Peck (E-mail)'; 'Karpethics@aol.com'; Lee, Mimi; 'mtuft@cwclaw.com'; 'Vapnek, Paul W.'
Subject: RE: RRC November Assignment for III.K. Class Action Rule; III.L. Time Billing Rule
Attachments: Item IIIH Proposed Honesty in Billing Rule.pdf

Tony: For your convenient reference here is the proposed billing rule previously recommended by Rob Sall (former COPRAC member, former Chair of the State Bar Committee on Mandatory Fee Arbitration). –Randy D.

From: Difuntorum, Randall
Sent: Wednesday, October 28, 2009 11:11 AM
To: avoogd@stanfordalumni.org
Cc: linda.foy@jud.ca.gov; hbsondheim@verizon.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; McCurdy, Lauren; martinez@lbbslaw.com; Jerome Sapiro Jr.; 'Ellen Peck (E-mail)'; 'Karpethics@aol.com'; Lee, Mimi; mtuft@cwclaw.com; Vapnek, Paul W.
Subject: RRC November Assignment for III.K. Class Action Rule; III.L. Time Billing Rule

Tony:

As the lead drafter for the Class Action Rule and Time Billing Rule, I want to let you know what is expected. Selected excerpts from Commission action summaries and Kevin's meeting notes are pasted below. You will see from the excerpts that these topics have been previously discussed, but that finality has not been reached. The concept of a Time Billing Rule should, in part, be reassessed in light the Commission's proposed Rule 1.5 [4-200] (re unconscionable fees, see attached) and proposed Rule 1.15 [4-100] (re trust accounts, see attached). The concept of a Class Action Rule should, in part, be reassessed in light of the comment language (Cmt. [32]) included in proposed Rule 1.7 [3-310] (re conflicts, see attached).

At the November meeting, the Commission will be working on all of the Batch 6 rules that the Board is scheduled to issue for public comment at the Board's January 2010 meeting. Batch 6 is set to be the last batch of rules to be issued for an initial public comment distribution. Any rule proposal, not already finalized, that is expected to be included in the Commission's final comprehensive report to the Board must make the train for Batch 6.

If you and the respective codrafters on a Class Action Rule or a Time Billing Rule are in agreement that the Commission should abandon consideration, then a simple email reporting that recommendation is all that is needed for the November agenda materials. If, on the other hand, the codrafters wish to bring forward a rule to be included in Batch 6, then a revised draft of the rule is needed together with an explanation of why the rule is desirable. The explanation should be consistent with the recent Commission practice of explaining rule amendment proposals to the Board in relation to the ABA Model Rules as representative of a national standard. For the moment, don't worry about Dashboards or comparison charts for a Class Action Rule or Time Billing Rule. The goal is to place a recommendation before the Commission as to whether a Class Action Rule or a Time Billing Rule should be pursued. Hope this helps clear up the assignment. –Randy D.

P.S.

Please include Diane Karpman on your Class Action Rule (Karpethics@aol.com). For the Time Billing Rule, you might want to include Gerald Phillips (gphillips@plllaw.com) as he has written informal comment letters in support of a time billing rule (see attached letter from 2008).

SELECTED ACTION SUMMARY EXCERPTS:

Honesty in Billing/Recording Time - Proposed New Rule – COMMISSION CONSIDERATION HISTORY (2001-2007)

5/2/03 Meeting:

The Commission considered a recommendation for a proposed new rule submitted by Mr. Voogd, in consultation with the Chair. Mr. Voogd's recommendation presented the following discussion draft.

"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 be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request."

The Chair asked for a discussion of whether the concept of this proposal should be pursued? Among the points raised during the discussion were the following:

- (1) As a disciplinary rule, there are interpretation problems that would need to be addressed by further drafting.
- (2) The Commission must determine whether this rule is needed given the legal profession's current industry practices.
- (3) Bus. & Prof. Code §6148(B) obviates the need for this rule.
- (4) The proposed standard of contemporaneous record-keeping would be impossible to meet in actual practice.
- (5) Consideration should be given to a different approach that focuses on the problem of falsified billing practices.
- (6) The proposal includes one component that is not addressed in existing authorities and that is a requirement for maintaining billing records. Rule 4-100 sets a records retention standard for trust account records but there is no comparable standard for billing records.
- (7) In evaluating this proposal, the Commission should review the State Bar Court's interpretation (in the Fonte case) of an attorney's duty to render an appropriate accounting.
- (8) Regarding assumptions about an onerous burden imposed by a contemporaneous record-keeping standard, medical doctors seem to have developed methods for similar documentation practices and this may be model for considering possible changes in law firm culture.
- (9) It is not uncommon to find, in both civil and State Bar matters, that lawyers and their clients have not kept or have destroyed billing records.

Following discussion, it was agreed that Mr. Voogd would consider all of the comments and prepare a revised recommendation. Ms. Peck volunteered to serve as back-up on the assignment.

7/11/03 Meeting:

Mr. Voogd presented his June 23, 2003 memorandum recommending a revised draft of a proposed new rule on "recording time." As set forth in the memorandum, the proposed new rule would be as follows:

"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 upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years."

In addition to Mr. Voogd's memorandum, members were directed to Ms. Peck's June 29, 2003 memorandum offering placement alternatives for rule language addressing "recording time." The alternatives were: (1) a new paragraph (C) in RPC 4-200; (2) a new standard to RPC 4-200 creating a presumptive violation of the rule; (3) a recommendation that the Board refer the matter to the State Bar Committee on Mandatory Fee Arbitration for consideration of an amendment to Bus. & Prof. Code §6148; (4) a recommendation that the Board refer the matter to the Judicial Council for consideration of an amendment to the California Rules of Court Standards for Judicial Administration; and (5) placement in a new "guidance" section to the RPC's. The Chair asked for a general discussion of whether the concept of the proposed new rule should be pursued. Among the points raised during the discussion were the following:

- (1) Although the ABA report and other agenda materials make a compelling case for lawyer accountability issues in billing practices, it is still not clear whether the promulgation of a new RPC is the appropriate response to these issues.
- (2) As a topic, billing procedures seems to fall into the category of law office management rather ethics.
- (3) Assuming this would not be a stand alone rule, including this concept as an unconscionability factor under RPC 4-200 or as discussion text to that rule still seems to be out of place. The concept probably belongs in the Bus. & Prof. Code as part of the written fee agreement statute.
- (4) In one sense, this issue is analogous to the question of 'how long to keep closed client files' because both are real world concerns in the practice of law that do not present an immediate satisfactory answer as a rule of professional conduct proposition.
- (5) The anecdotal and other evidence of abuse should be taken as a given but implementation of a disciplinary standard as a remedy is a serious policy question.
- (6) Bus. & Prof. Code §6148 addresses much of this concern and any new rule text should not be redundant of existing law.
- (7) Billing fraud should be the target not billing practices.
- (8) Billing fraud is covered by moral turpitude and criminal sanctions but clients are in need of protection against lazy and non-existent billing records. Absent clear and precise billing statements and records, how would a client know that they have been defrauded?
- (9) An ethical obligation to generate and maintain billing statements is an appropriate topic for the rules because the concept is similar to the fiduciary trust account record-keeping standards already present in RPC 4-100.
- (10) The PCLM case includes the proposition that billing records can be created after the fact.
- (11) From the public's perspective, it should not be a bid deal to expect contemporaneous billing records from a professional service provider who charges by the hour. If contractors can provide a daily invoice then lawyers should be able to do so as well.

(12) The common practice of documenting billable hours to support court awarded fees is distinguishable from the instant issue because an across-the-board new rule on billing practices would intrude into the contractual relationship negotiated between nearly every attorney and client.

(13) In the legal services arena time records ordinarily are for the benefit of third-party payors rather than indigent clients.

(14) Estimated hours and rounded hours offend the general fiduciary duty of a lawyer to prefer a client's best interest over that of the lawyer's.

(15) From the perspective of State Bar prosecutorial discretion, billing issues are matters that may be diverted to fee arbitration or other civil remedies; however, if RPC 4-200 is changed from unconscionable to unreasonable fees then this could change.

(16) As a prohibition, unconscionability and RPC 4-200 are triggered by a complete failure in the billing relationship between lawyer and client. This is different from a standard intended as a general business practice guideline. Put another way, although charging an unreasonable fee can and should taint enforceability, it should not necessarily implicate discipline.

Following discussion, a consensus vote revealed that the Commission supported the concept of a "recording time" standard as a new component to be placed somewhere in the rules (rule text, discussion text, or Board adopted standard). The codrafters were asked to prepare a further draft and recommendation in accordance with the points raised in the discussion. Mr. Melchior was added as a new codrafter.

9/5/03 Meeting: Matter carried over.

10/24/03 Meeting: Matter carried over.

2/20/04 Meeting:

The Commission considered a February 5, 2004 revised draft of a proposed new rule on recording time. As an alternative to a new rule, it was suggested that a new factor be added to RPC 4-200 regarding factors to consider in determining whether a fee charged is unconscionable. It was also suggested that a records retention period be specified in the proposed new rule. After this brief discussion, the co-drafters were asked to prepare a redraft for the next meeting.

5/7/04 Meeting:

The Commission considered a March 25, 2004 memorandum by Mr. Voogd presenting a revised draft new rule. The Commission discussed possible options for variations on the concept Mr. Voogd's

On a proposal to explore a new rule or rule amendment addressing honesty in billing practices (patterned on current rule 2-400 that requires a civil finding before any disciplinary sanction), the Commission voted 8 yes, 1 no, and 1 abstain.

Among the points raised in the course of the discussion were the following.

(1) The report from the ABA Solo Practice Section includes findings indicating public concerns that lawyers charge too much and are unwilling to account for fees and billing practices.

(2) Feedback offered at the 2004 State Bar Annual Ethics Symposium suggests a level of interest in self-regulating this area.

- (3) It may be possible to address the asserted concerns under RPC 4-200 rather than in a new rule.
- (4) The Commission should seek to establish necessary public protection standards but should not pander to public approbation of lawyers.
- (5) Maintaining public confidence is a valid purpose of the RPCs.
- (6) Micro-managing billing is not an appropriate function of the RPCs. The rocky relations between insurance defense lawyers and insurance companies would likely be exacerbated by billing standards under penalty of State Bar discipline.
- (7) Billing fraud is difficult to prove in a civil matter. A new rule would be helpful.
- (8) Billing fraud is already covered by B&P Code sec. 6106.
- (9) Many excessive and double-billing claims are dependent upon the actual terms of the specific fee agreement at issue and the conduct of the lawyer and client in abiding (or not abiding) by those terms. A one size fits all standard that is successful in imposing certainty in these situations may be difficult to construct.
- (10) Law firm culture could be positively impacted by the State Bar's leadership role in cleaning-up billing practices that are tantamount to fraud. The Legislature has demonstrated an interest in reforming consumer protection in the hiring of lawyers.

8/27-28/04 Meeting:

The Commission considered an 8/1/04 draft suggested by Robert Sall, COPRAC Liaison. Mr. Voogd presented the background of the proposed new rule. The Commission considered a motion to defer any discussion of this proposal until the Commission considers RPC's 4-100 and/or 4-200. This motion passed by a vote of 5 yes, 0 no, and 3 abstain.

SELECTED MEETING NOTES EXCERPTS:

*Kehr
Melchior
Mohr
Snyder
VAPNEK

A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests
[anticipated 1 hour discussion or until completed]
(Materials enclosed.) **[pages 1 – 20]**

Materials prepared for/considered at meeting:

- 9/9/07 Kehr Cover Memo to Randy Difuntorum & Lauren McCurdy, cc Drafters [1]^[1]
- Red-line Comment Draft 8.1 (9/9/07) compared to Draft 7 (8/6/07) [3-19]
- Rule Draft 5 (8/16/2006) (previously approved by RRC)
- 2/26/2007 Memo #2A from Drafters re Advance Waivers
- 2/26/2007 Memo from Drafters re Thrust-upon [Unforeseeable] Conflicts [includes *Gould v. Mitsui & Ass'n Bar of NYC Ethics Op. 2005-05*]
- Proposed Rule 1.7 paragraph re unforeseeable conflicts
- March 15, 2007 Richard Zitrin Memo to Leadership, cc to Randy Difuntorum & KEM (transmitted by Lauren McCurdy on 3/16/07): 51^[2]
- September 5, 2007 Kehr E-mail to Drafters: 74
- September 9, 2007 Kehr E-mail to Staff, cc to Drafters: 75
- September 15, 2007 Kehr E-mail to Vapnek & Drafters: 75
- September 15, 2007 Kehr E-mail to Sondheim & Drafters: 75

- . September 15, 2007 Kehr E-mail to Drafters: 76
- . September 15, 2007 Sondheim E-mail to Kehr, cc to RRC: 76
- . September 15, 2007 Sondheim E-mail to Kehr, cc Difuntorum & KEM: 76
- . September 15, 2007 Kehr E-mail to Sondheim, cc to Difuntorum & KEM: 77
- . September 16, 2007 Sondheim E-mail to Kehr, cc to Difuntorum & KEM: 77
- . September 14, 2007 Difuntorum E-mail to Class Action Drafters & Leadership: 77
- . September 14, 2007 KEM E-mail to Class Action Drafters & Leadership: 78
- . September 14, 2007 Sondheim E-mail to Voogd, Class Action Drafters & Leadership:79
- . September 16, 2007 Karpman E-mail to Sondheim, Class Action Drafters & Leadership:79
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- . September 16, 2007 Sondheim E-mail to Voogd, Drafters & Leadership: 81
- . September 17, 2007 McCurdy E-mail to RRC: 81
- . September 17, 2007 Sondheim E-mail to RRC (including 9/16/07 Voogd E-mail to Class Action Drafters re comment [33]): 82
- . September 17, 2007 Karpman E-mail to Voogd, Class Action Drafters & Leadership: 83
- . September 17, 2007 Voogd E-mail to Karpman, Class Action Drafters & Leadership: 84
- . September 17, 2007 Ira Spiro E-mail to Class Action Drafters & Leadership: 84
- . September 18, 2007 Karpman E-mail to Class Action Drafters & Leadership: 85
- . September 18, 2007 Melchior E-mail to Class Action Drafters & Leadership: 85
- . September 18, 2007 Karpman E-mail to Class Action Drafters & Leadership: 85
- . September 20, 2007 Voogd E-mail to RRC List: 86

- . September 21, 2007 Julien E-mail to RRC: 86
- . September 21, 2007 Tuft E-mail to RRC: 86
- . September 22, 2007 Voogd E-mail to RRC List (transmitted by KEM): 86
- . September 23, 2007 Kehr E-mail to RRC: 87
- . September 23, 2007 Kehr E-mail to KEM: 88
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- . September 23, 2007 Ira Spiro E-mail to RRC List: 90
- . September 24, 2007 Difuntorum E-mail to Rule 1.7 & Class Action Drafters: 90
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 - . The Drafters (revised to incorporate Ira Spiro's Comments): 93
 - . Bob Kehr (revised to incorporate Ira Spiro's Comments): 93
 - . KEM (revised to incorporate Ira Spiro's Comments): 93
- . September 25, 2007 Kehr E-mail to RRC List^[3]

ADVANCE WAIVERS

* * * * *

COMMENT [33]

24. Comment [33]. Three different proposals:^[4]

The Drafters (revised to incorporate Ira Spiro's Comments):

"[33] When a lawyer represents or seeks to represent a plaintiff class of plaintiffs or defendants class in a class-action lawsuit, whether before or after certification of the class, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that ~~[suing the]~~ person in an unrelated matter. Similarly, a lawyer seeking to represent a [a] party opposing [nent in]

class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."

Bob Kehr^[5]

"[33] For purposes of this Rule, a lawyer who represents a plaintiff class or a defendant class in a class-action lawsuit, whether before or after certification of the class, represents the named class representatives. For purposes of this Rule, the lawyer does not, by reason of the representation of a class, represent unnamed members of the class. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect."

KEM (revised to incorporate Ira Spiro's Comments):

"[33] ~~When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."~~

25. **MOTION** (Tony): Adopt last draft that appears on page 31 of the Class Action E-mail compilation (page 91 of 3-310 compilation).

~~"KEM (revised to incorporate Ira Spiro's comments):"~~ – limited to (a) and (c).

Friendly amendment: "For purposes of this Rule ..." [vs. limited to (a) and (c)], i.e., it would now provide:

~~"[33] ~~When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not by reason of such status considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, in that situation the lawyer does not [typically] need to get the consent of such a person before representing a client which who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a [n] party opposing [nent in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so."~~~~

YES: 8 NO: 1 ABSTAIN: 2

- a. Bob: Does not like the proposal.
 - (1) Leaves out the idea that the lawyer *does* represent the named class representative.
 - (2) Also believes that the comment should apply to all paragraphs of the rule.
- b. Stan: Agrees.

26. **MOTION** [to address Bob's concern at ¶.25(a)(1)]: Add in line 367 on page 16 of material to the beginning of comment [33]:

This Rule applies to a lawyer's representation of named class representatives.

YES: 7 NO: 0 ABSTAIN: 3

27. **MOTION:** Add line 370 on page 16 of the Materials (page 14 of Memo):

A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

YES: 8 NO: 0 ABSTAIN: 3

28. **SUMMARY OF COMMENT [33] FOLLOWING PRECEDING VOTES:**

“[33] This Rule applies to a lawyer’s representation of named class representatives. For purposes of ~~paragraphs (a) and (c) of~~ this Rule, an unnamed current or potential member of a plaintiff class or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to get the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

UNFORESEABLE (“THRUST UPON”) CONFLICT ISSUE

* * * * *

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^[1] Bracketed numbers are page numbers in 9/28-29/07 Meeting Materials.

^[2] Numbers refer to page numbers in E-mail Compilation dated 8/20/07.

^[3] This e-mail was circulated too late for inclusion in the e-mail compilation but was considered at the meeting.

^[4] The drafters' and KEM's proposals are found in the e-mail compilation dated 9/24/07, at page 93. Please note that the comments in the compilation were incorrectly numbered “[25],” the number for the analogous ABA comment. The correct number in the RRC's draft is [33].

^[5] From 9/25/07 Kehr E-mail to RRC List.

**RE: Honesty in Billing
8/27-28/04 Commission Meeting
Open Session Item III.H.**

ANTHONIE M. VOOGD

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: HONESTY IN BILLING (III.H.)
DATE: 8-1-04

I have no new ideas. Accordingly, I am indebted to Robert K. Sall for the following suggestion:

(A) A member shall not engage in fraudulent, dishonest or deceptive billing practices.

(B) Where the compensation for legal services payable to a member or a member's Law Firm is based upon an hourly rate or increments of time, the member shall maintain a reasonably accurate method of recording such time, and written records thereof, which shall be made available to the client upon reasonable and timely request.

[Another area of potential abuse regards the billing of costs, which are often passed through to clients with an undisclosed mark-up, creating a secret profit center for the law firm. If the Commission is inclined to address costs in this proposed rule, I believe it would be appropriate to add:]

(C) A member shall not charge costs to a client at an amount in excess of actual cost unless the member has the client's informed written consent.

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August 18, 2008

Lauren McCurdy
State Bar Offices- San Francisco
180 Howard Street
San Francisco, CA 94105

Dear Lauren,

Last year I wrote an article for the ABA Professional Lawyer, "It's Not Hourly Billing, but How It's Abused that Causes the Poor Image of Attorneys." In that article I raised the question whether it is proper for a law firm to bill clients on an hourly basis and at the same time reward the attorneys at the firm if they bill more than the required number of hours in a year. I have been discussing this issue ever since this article was published. I am enclosing a copy of the article.

Recently the law firm Holland & Wright announced that "partners who can't meet billable hour requirements may be fired." Such a pronouncement certainly could encourage partners to pad their bills to clients if they are not able to maintain the billable hour requirement."

I would greatly appreciate learning if the members of the Commission for the Revision of the Rules of Professional Conduct in its many discussions ever discussed this issue and if so what conclusion did it reach. If this has not been discussed is it too late to suggest that the Commission put this issue on its agenda.

Thank you.

Sincerely yours



Gerald F. Phillips

It's Not Hourly Billing, but How It's Abused that Causes the Poor Image of Attorneys

Gerald F. Phillips*

The ABA Section of Litigation, in its 2002 report, "Public Perceptions of Lawyers: Consumer Research Findings," stated:

"Of all of the criticisms that consumers have about their personal experiences with lawyers, the greatest number of complaints arise around lawyers' fees. Consumers say that lawyers . . . are often not up front about their fees; and are unwilling to account for their charges or hours."¹

Professor William Ross, who has devoted himself over many years to commenting on hourly billing, agrees that "[t]he public perception that lawyers overbill their clients has accounted in part for the low esteem with which lawyers are held by much of the general public"²

Professor Ross, who in 1995 surveyed attorneys on the subject of hourly billing,³ is now reporting the fruits of his most recent study.⁴ He conducted a poll of 5,000 attorneys and 251 responded. Two-thirds stated that they had "specific knowledge" of bill padding. This finding is virtually identical to his earlier poll.⁵ He also reported that 54.6% of the respondents (as compared with 40.3% in 1995) admitted that they had sometimes performed unnecessary tasks just to bump up their billable output. In his prior study he estimated that forty percent of lawyers inflate their bills and admitted allowing their personal economic interest to affect their decision to perform work.⁶ Ross defines bill padding as invoicing a client for work never performed or exaggerating the amount of time spent on a matter. Unnecessary work is that which exceeds any marginal utility to the client.⁷ Ross concluded: "With ever increasing compensation and billing pressures, attorneys are finding ways to generate more hours in a way that is not always ethical."⁸ A cottage industry of legal auditors is now available to scrutinize billing statements and to testify in court to the presence of improper billing. This author continually is asked to testify as an expert witness in fee disputes or to serve as a mediator or arbitrator in such disputes.

And the abuse of the billable hour system is not just directed toward clients, as noted by Lawrence Fox in his article "End Billable Hour Goals . . . Now", where he wrote:

What started as an innovation grudgingly accepted by law firms, soon became the gold standard, applied almost universally to this day, despite numerous objections and staunch advocates in favor of alternative billing methods And what started as an effort at simply drawing comparisons, slowly evolved into a method of punishing, at first, associates whose billable hours were below average and then, partners whose low billing hours translated into their being perceived as 'unproductive.'⁹

A cottage industry of legal auditors is now available to scrutinize billing statements

Moreover, in a most provocative and insightful book, "How Lawyers Lose Their Way-A Profession Fails its Creative Minds", Professors Jean Stefancic and Richard Delgado, in answer to their own question "Why are lawyers so unhappy?", opined that the discontent stems in large part from the long hours lawyers are forced to spend in repetitious, boring work in order to satisfy their minimum billable hours requirement, which law firms increasingly use to measure the success of their associates, quantitatively rather than qualitatively. The authors suggest that "[d]ismantling needless regimentation, excessive specialization and the insane pursuit of more and more billable hours in the workplace frees the mind to consider new ideas."¹⁰

And then there is the legal system itself.

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

However, the purpose of this article is not to discuss how extensive improper hourly billing is in the legal profession today or to discuss how improper hourly billing is destroying the reputation of lawyers and our judicial system and the lives of many associates. These condemnations are not debatable. It is this author's view that it is not billing on an hourly basis that is responsible for the ills of our profession, but how the system is corrupted by creative devices used by

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lawyers to attain the excessive minimum number of hours required of them. The focus of this article is how the billable hour system can and should be preserved by law firms by their voluntarily eliminating the required minimum billable time if they bill on an hourly basis or by outlawing such requirements by changing the Model Rules of Professional Conduct and the various comparable state ethical rules. Various devices by which attorneys manipulate and fraudulently bill their clients must, likewise, be prohibited. The evil is the requirement set by law firms that its attorneys bill a large, often unattainable number of hours and not the hourly billing system.

In 2004, the author suggested *"The Rules of Professional Conduct Should Provide Guidance to Attorneys With Respect to Billing Clients"*¹² and now again suggests that such practices such as block billing, and incremental billing in excess of 0.10 hrs, should be made unethical.

TO HELP PRESERVE HOURLY BILLING

We must assume that although certain alternatives to hourly billing may be used in the future, billing by the hour will continue to predominate. So, first, law schools should train their students how to properly use and not abuse hourly billing. The law schools should discuss with their students not only hourly billing, but also the importance of the students devoting themselves to non-billable areas, which include pro bono work, service to the firm, client development, training and professional development. It is problematic to wait until the students have gone to work for a firm for such instruction to begin. The ABA Commission on Billable Hours found that "[w]ith few exceptions, formal training does not appear ongoing or extend beyond orientation."¹³ Alan Greer in his article "Billing, Our Profession's Not So Hidden Sham" in answer to the question, "Why do they (meaning associates) stretch their billable hours?", wrote:

Because we have, in not so subtle ways, let them know that if they don't, they and their high paid associate positions are gone. We have confronted them with a moral and ethical dilemma in their young lives most of them can only solve by buckling under our pressure.

As their very first lesson in the practice of law, we, their mentors and teachers-in-the-law, have taught them how to cheat the same clients whom we have taken an oath to faithfully serve Thus begins a downward spiral of declining professionalism that allows more and more lawyers to mentally justify to themselves less and less ethical conduct in the name of their own personal wants—be they financial or emotional.¹⁴

Second, attorneys should not be graded on their billable hours. Law firms that bill on an hourly basis should not tie

hour, or have any requirement that each attorney bill a minimum number of hours per year. Similarly firms should not give any rewards or bonuses based on the number of hours billed or reduce associates' compensation if they do not bill a certain number of hours. This incentive to the padding of billable hours is the major cause for the abuse of hourly billing. Some have referred to the minimum as a "target" to camouflage the real intent. By eliminating this incentive, attorneys would not be pressured to reach a required number of billable hours, and would more often bill the true time incurred in representing the client.

Third, law firms should represent to their clients, in their retainer agreements/engagement letters, that their firm does not require any minimum number of billable hours for those submitting billing statements. Sophisticated clients understand that billing abuses often are the result of attorneys endeavoring to meet the high minimum number of billable hours set by the firm. In addition, the firm should set forth in its retainer agreement/engagement letter that it will not permit certain abuses to billable hours, discussed in detail in a separate section therein, such as block billing, large incremental units of time, etc. Not requiring any minimum amount of billable time when using hourly billing is a major step that should be taken to "rekindle pride in our profession and restore the practice of law to the respected position it once occupied."¹⁵

[A]ttorneys should not be graded on their billable hours.

Lawrence Fox observed:

Think for a moment, moreover, about what a billable hour reward and punishment system says about where the law firm's real values are. The hiring literature, the firm Web site, the summer associate presentations all may talk about a balanced life. Many firms have enshrined the work-life balance in their mission statement. But the true firm commitment to that concept is found, not in what the firm says, but in what it does. And what it does when it engraves its devotion to high billable hours in a billable hour reward and punishment system is to tell associates that the rhetoric of work-life balance is just so many eloquent but meaningless words.¹⁶

[H]ourly billing certainly has one huge ethical deficit. The client has a very real interest in limiting the client's legal fees; the lawyers get rewarded, at least in the short run, for an increased number of hours. In short, hourly billing is a great incentive for the lawyer to undertake more tasks and to complete them more slowly, perhaps contrary to the interests of the client.

The imposition of specific goals, quotas or requirements for billable hours by law firms only heightens this conflict and . . . they are hard to justify as serving any legitimate client interest.¹⁷

This author agrees with that viewpoint, but will herein

basis where there is a requirement to bill a number of hours is improper and should not be allowed. This requirement not only destroys the image of lawyers but also deprives attorneys of the time to lead a balanced life, do pro bono work or play a part in the firm activities because of the mad drive to meet the fixed number of hours.

Sol Linowitz described what goes on in a large law firm:

The quid pro quo at large firms is dazzling. We attract them, we lure them, we bribe them, and in the process we don't tell them that they're going to be giving up a decent life. They are so busy racking up the hours, it becomes an obsession, not a life.¹⁸

It is this author's opinion that if any connection between billable hours and the compensation of the attorneys at a firm is completely and honestly removed from hourly billing, that billing by the hour would be proper and a fair manner of billing.

Lawrence Fox, in his article "Save Us from Ourselves" suggests:

[T]he firms ought to issue a client bill of rights that says that "... we will judge our associates on their willingness to take on work that must be done, but no one should feel any pressure to bill a particular number of hours and padding of hours by either sloppy recording or undertaking tasks that are not in the best interests of the client will not be tolerated."¹⁹

Bar associations should ask law firms to pledge that they will not bill on the basis of hourly billing if the firm has any minimum number of hours that must be billed by associates and partners. Ethics committees should consider creating new rules that make it unethical for a firm to bill on an hourly rate and at the same time offer a bonus for billing hours in excess of a minimum number of hours.²⁰

Mr. Fox further advocated an idea that should be considered by all general counsel:

Perhaps general counsel will reinforce this message by announcing that they will not hire any firms that have minimum hourly billing requirements.²¹

Professors Jean Stefancic and Richard Delgado endeavor to account for the widespread professional misery reportedly experienced by lawyers today. They first propose that the root cause of lawyers' unhappiness is how law is taught in law schools. They refer to this as "formalism", which they describe as follows.

In law, formalism is connected to the rule of precedent and conservative judging. In legal education, it manifests itself in the teaching of rules and doctrines at the expense of social analysis. . . . In legal practice, it appears in the form of narrow specialization, hierarchical organization of the law firm, the *relentless pursuit of billable hours* . . . (emphasis added)²²

These authors continually make reference to billable hours as one of the causes of the misery of the legal profession. The authors conclude with a chapter entitled "High-Paid Misery" and suggest that:

At first, the practice [of billable hours] was a social good—an attempt to rationalize billing and insure that the attorney was accountable to the client. . . . But it became a tyrant, an elevated form of the factory worker's time card developed in the 1920s and 1930s.²³

Eliminating the requirement of the minimum number of hours that attorneys must bill and correcting the abuses of hourly billing will permit attorneys to live a "balanced life", enabling them to participate in pro bono work, client development, and service to the profession and to their firm.

In an April 10, 2007 article in the Los Angeles Daily Journal, staff writer John Roemer reported that two Stanford Law students wrote to 100 of the nation's premier firms urging that law firms "switch billing systems that charge clients per transaction, not by time spent. If that's impossible, they want associates at least to face lower billable hour expectations and an improved balance work and life."

[T]he root cause of lawyers' unhappiness is **BILL PADDING**
how law is taught in law schools.

The large minimum number of hours set by a law firm is calculated to produce a larger profit for the partners and to assure the profitability of the associates, who receive very high annual salaries. The salaries are set by competition between law firms, based upon a going wage set by a few large firms and followed by the others, to attract the highest quality of associates. The salaries are not fixed by any economical evaluation. It would appear that the trend for higher salaries for associates will continue and that firms will require a minimum of 2400 billable hours to offset the continually rising wages for associates. The high minimum number of hours causes a relentless pursuit by associates to reach this excessive goal and to earn a bonus if they exceed the minimum. The number of required hours is often unattainable without the attorney adding hours through the devices discussed below, which are concealed by block billing.

BILL PADDING IS CONCEALED BY BLOCK-BILLING

Bill padding is achieved by block-billing or lump billing where those billing do not indicate on their bills the time spent on each task inserted in the bills. One total combined time is billed for each day by each associate. By not disclosing the time it took to do each alleged task, those billing are able to add time to the total bill, pad the bill, without concern that their deceit will be detected. Block-billing enables bill padding for it hides the deception being perpetrated. Hourly billing also causes some firms to pursue unnecessary and burdensome discovery, taking many unnecessary depositions and propounding lengthy interrogatories that require many hours to perform. If the firm is charging for time, the client has a right to know how much

time was spent on each task billed. Failing to provide the time spent on each task masks such billing abuses as excessive incremental billing, excessive reviewing and vague description of work allegedly done.

An entry, for which the attorney bills 3.00 hrs, as set forth below, without indicating the time spent on each task, is block-billing and hides the time spent on each task.

1/24/07: Called client, sent letter to opposing counsel, read letter from client, researched law. 3.00hrs

Courts are beginning to rule that they cannot determine if the fee is reasonable if the invoices are block-billed.²⁴

BILL PADDING THROUGH IMPROPER INCREMENTAL BILLING

In most retainer agreements there is a provision that permits the firm to bill in minimum increments. Most often this provision is not adequately explained and clients often don't know what it means. Courts will accept billing a minimum of 0.10 hours, (six minutes) for a phone call, reading a letter or sending an e-mail. This minimum may be billed even though the time actually spent was only three minutes. It is thought that the time billed should be 0.10 hours because it would take a few minutes to prepare for the call. An attorney may not bill any greater minimum than that set forth in the retainer agreement for that would be fraud. However, some attorneys in well respected firms bill 0.20 hours or 0.25 hours, as set forth in their engagement letters. This author has seen attorneys billing a minimum of 0.50 hours. In a recent case, in which the author was an expert witness, an attorney billed consistently to "review correspondence 0.25 hours" with no exact description what he reviewed and why. The attorney billed one hour for reading four e-mails. Each e-mail was but two or three lines. Thus, he defrauded the client, who believes that the lawyer spent one hour reading these e-mails when in fact the time spent was perhaps less than a minute. Attorneys who regularly bill using incremental billing of 0.20 hours or more use such a rate to bill higher fees.

State of California "Arbitration Advisory 03-01" states:

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.²⁵

BILL PADDING THROUGH THE USE OF VAGUE DESCRIPTIONS

The foundation of hourly billing is that the invoices submitted by counsel must tell the client what he or she needs to know in order to understand how the amount billed was calculated.²⁶ Regularly, attorneys hide their bill padding by billing for "reviewing the file" and "research," etc.

John W. Toothman and William Ross in their book, *Legal Fees: Law and Management*, under the heading

"Adequacy of Time Entry Detail & Cryptic Entries" wrote:

A cryptic entry is an entry that is vague, ambiguous, or lacks sufficient detail for the client (or court) to determine what was done, by whom, why, or when. A cryptic entry might, for example, simply say that the lawyer had a "telephone conference" or had a "telephone conference with Dan Smith without giving the subject of the communication. In extreme cases the entry may have no description at all. As a federal court explained, "[e]ntries such as a 'telephone call' and 'review of documents' are not sufficiently specific so as to enable the court to determine whether the hours are duplicative or excessive."²⁷

[E]ntries that fail to identify the subject matter of the documents reviewed or the topic of conversation in a telephone conference [are] unacceptable. (*Wilder v. Bernstein*, 1998 WL 323492 at 6 (S.D.N.Y. 1998))

BILL PADDING THROUGH THE USE OF EXCESSIVE REVIEWING

A keen observer can often spot billing entries for repeated review and revision of an associate's work product. If constant revising was necessary, then the original work probably wasn't first-rate. Firms should not bill for both the original and for excessive time spent making revisions. If the matter was handed first to an inexperienced attorney, the firm is billing the client for training. One practice of attorneys that causes the most client irritation is the repetition, line after line of the billing statement, "reviewing and revising." Whenever one sees an excessive amount of time billed for reviewing, one can take that as a signal for bill padding.

BILL PADDING THROUGH OVERSTAFFING

Clients can easily recognize when reviewing billing statements that the case was overstaffed. In a recent case the firm used five attorneys and ten paralegals. On one brief the names of five attorneys appeared. In another case a partner billed 6.40 hours for a "conference with the defense team." However, none of the other members of the defense team billed for the conference. Rather, they billed large numbers of hours for other work. It was not clear if the attorneys attended the conference but covered that up by billing 10 hours for other work on the case.

THE UNINTENDED RESULTS OF HOURLY BILLING

Billing on an hourly basis in a firm that requires a minimum number of billable hours has many unintended disastrous consequences for its attorneys, for the firm, for our profession and for our community. The ABA Commission on Billable Hours found

The unending drive for billable hours has had a negative effect not only on family and personal relationships, but on the public service role that lawyers traditionally have played in society.²⁸

[A]ttorneys hide their bill padding by billing for "reviewing the file" and "research," etc.

Professors Stefancic and Delgado devote many pages describing the seriously discontented lawyers who they state experience high rates of divorce, burnout, mental illness, and drug and alcohol abuse. One important factor they assert that is responsible for this is the high billable hours required by firms.

The Hon. Stephen G. Breyer, Associate Justice of the United States Supreme Court, in his Forward to the report of the ABA Commission on Billable Hours Report, laments the fact that over "the past four decades it has become increasingly difficult for many lawyers . . . to undertake pro bono work, engage in law reform efforts, even attend bar association meetings." He said, "[t]he villain of this piece is what some call the 'treadmill'- the continuous push to increase billable hours." He asks how can the lawyer partake in such activities "if that lawyer also must produce 2100 or more billable hours each year, say sixty-five or seventy hours in the office each week." He answers his own question: "most cannot, and for this both the profession and the community suffer." He concludes that:

the study made by the ABA "concerns how to create a life within the firm that permits lawyers, particularly younger lawyers, to lead lives in which there is time for family, for career, and for the community. Doing so is difficult. Yet I believe it is a challenge that cannot be declined, lest we abandon the very values that led many of us to choose this honorable profession."²⁹

The then President of the ABA, Robert E. Hirshon, in a preface to the report stated that:

Disaffection with the practice of law is illustrated by a feeling of frustration and isolation on the part of lawyers who, due to time-billing pressures, are not being as well mentored as in the past. Time pressures also result in less willingness on the part of lawyers to be collegial, which only exacerbates work load since it necessitates that everything be put in writing. Not coincidentally, public respect for lawyers has been waning since the 1970's. All of this at a time when lawyers are less interested in climbing the corporate ladder and more interested in life balance.³⁰

MODEL LAW FIRM POLICY REGARDING BILLABLE HOURS

In its report, the Commission on Billable Hours created a "Model Law Firm Policy Regarding Billable Hours", which it referred to as "Hours Expectation/Model "Diet." It cautioned, that to be successful, law firms must develop training programs that should be incorporated into the orientation programs of the firms. It was quick to explain that with respect to expectations as to hours, there should be no hard and fast minimum levels. Law firms should state that they "absolutely reject[] a compensation system tied to billable hours without flexibility and without consideration of other factors, most significantly quality of work as well as

contributions through pro bono work and service to the firm."³¹ It based the number of hours believing that the attorneys are "eager to enjoy the life of the firm, eager to serve the higher ideals of the profession, including through pro bono work, and eager to learn."³² The commission characterized what it produced as a model 'diet' or mix of work that the 'typical associate' should have as a goal. The commission, in its diet, provided a model that provided for 2300 hours of billable and non-billable work.

Billable client work-1900 hours

Pro bono work - 100 hours

Service to the Firm - 100 hours

Client Development- 75 hours

Training and Professional Development - 75 hours

Service to the Profession- 50 hours.³³

The commission said that it chose 1900 billable hours because that is typical at large firms.³⁴ However, it said that it would defer determining the particular level of billable work to each firm, as a "cultural choice."³⁵

The commission stated that the lawyers should, in describing the work performed, give the client the details that the client would need to evaluate the quality and quantity of the services provided. It opined that such entries as "Research" "Legal Research" or "Summary Judgment Brief" would be insufficient.

Engagement letters with clients should commit that the firm has no minimum hourly billing requirement.

CONCLUSION

The State Bar of California Committee on Mandatory Fee Arbitration, in its Arbitration Advisory 03-01, concluded:

"The vast majority of lawyers are honest and their bills are reliable statements of what was done. However, the economic pressure on lawyers and firms is enormous, continuous and irrefutable."³⁶

Professor Lisa Lerman summarized what this pressure can cause.

The central one [problem] is that it appears that for many lawyers in the firm, professional values have been subordinated to financial aspirations. The lawyers are engaged in pervasive deception of clients, pretending to be doing work that they are not doing, pretending to spend more time than they are spending, pretending that work needs to be done which in fact does not need to be done. The delivery of legal services is conceptualized principally as a billing opportunity to be manipulated and expanded."³⁷

Firms that use billable hours as the basis for billing clients should advise their attorneys and clients that the firm does not require any number of billable hours for their associates and partners. The firm would thus eliminate this source of pressure on associates and partners to pad bills. In many firms, associates believe that their becoming a partner

in the future depends on them producing a large number of billable hours. This should dispel any associate believing that the track to partnership is a large number of billable hours and that by padding their billable hours they will carry favor with the partners. The *quality* of an attorney's work should be of paramount importance and not the *quantity*. However, it would be naive to think that with the dramatic rise in salaries and the demand by firms for higher output from associates that many lawyers would not respond by padding their bills, by adding time or by adding tasks to their monthly statements. Assuring the firm's attorneys that there are no number of hours that it requires to be billed would go a long way to eliminate this reason to pad the monthly bills. Padding has become such a common practice that some observers may question whether it is no longer viewed even by the critical eye as cheating the client.³⁸ This is especially true when even the most honest lawyers can find ways to justify ethically dubious practices and reasonable attorneys can differ about what constitutes ethical behavior. Therefore, it is incumbent on the bar associations to make it clear that various billing practices, such as block billing and high incremental units of billing are improper. Those who retain attorneys and are concerned with bill padding and recognize that attorneys have a real incentive to add hours to their bills should ask their attorneys if they reward their associates who bill high billable hours. Firms make it difficult, by requiring large billable hours, for their attorneys to do pro bono work, client development, training and professional development, service to the profession and to engage in law reform efforts or even attend bar association meetings. Engagement letters with clients should commit that the firm has no minimum hourly billing requirement. Furthermore if the firm wants its attorneys to live a balanced life, it must not require excessive billable hours.

It has been stated by many that hand and hand with the minimum number of billable hours required of attorneys, are padded billing statements. It should be the policy of all law firms that it is an absolute requirement of continued employment at the firm that those submitting hourly billings record their time honestly and not permit such abuses as block billing and high incremental billing units to be part of their statements. In order for those recording their billable hours to ensure the integrity and accuracy of the firm's bills, all attorneys must keep careful records of the work done and record and submit time on a daily basis. The firm's timekeepers should be required to submit their time at the end of each day or at the latest, the next morning. Lawyers who violate this rule and attempt to reconstruct their time from memory or notes at the end of the week or month should be dealt with by the firm. Not contemporaneously preparing time statements cheats the firm or the client.

It is important to reiterate in a simple unambiguous engagement letter with the client what was discussed at the

initial meeting with the client. Instead of the retainer agreement bonding the relationship between the attorney and the client such agreements often cause bewilderment to the client. The firm should realize that the client usually is not an attorney and it is fair to presume that the engagement letter may be one of the first legal documents that the client has been asked to sign. I suggest inserting in the engagement letter the following:

During our meeting we advised you as to the billing rate used by each person who will bill on an hourly basis. These rates are set forth []. Although many law firms permit block billing or lump billing, which means that one time charge is assigned to various tasks, this firm will not engage in this practice. Some attorneys believe that this practice is not improper. However, in order to permit you to better understand the billing statement we will not engage in block-billing. Another widely used practice in billing is to use a minimum incremental time unit. As we discussed this means that instead of billing the exact time

for each phone call or reading a short letter which may take but a few minutes the firm may bill 0.10 hrs., which is six minutes. Some firms will use a minimum 0.25hrs, a quarter of an hour. We will endeavor to advise you in our monthly statements what was done in your behalf on a day by day basis. In doing so we will try to describe the

tasks in clear and unambiguous language. A great deal has been written about law firms

requiring its lawyers to bill a number of hours each year and to reward its lawyers for billing above the requirement and to punish them for not reaching their minimum. This we will not do.

As suggested by the title of this article, what is destroying the reputation of the billable hour system is the bill padding and the devices that creative attorneys have developed to enable them to meet the excessively high billable requirements set by some firms. This creates the need for honest people to become dishonest and find various ways to bill more hours than they worked. Professor Lisa Lerman, in discussing the problems of deception, mistrust and abuse that arise from hourly billing suggests that lawyers should follow the example of auto mechanics and provide clients with written estimates.³⁹ This may be practical for certain legal work, such as real estate acquisitions, corporate acquisitions, and uncontested divorces, but completely impractical, for example, for litigation. Some critics of hourly billing have suggested that hourly billing be replaced by a fixed sum negotiated in advance with the client. This is a good example of the grass looking greener on the other side of the fence. A fixed sum has many more problems if used for litigation. In order for a firm to be fairly compensated it would have to fix a large sum, which may turn out to be

It is important that all attorneys be given the time to develop clients.

develop and the litigation runs smoothly with a cooperating adversary. If the fee were fixed at a low sum it could turn out to be disastrous to the firm.

There is no question that the associate who puts in a great number of hours must be compensated. The partners who bill for the services of the associates, review their work, know the quality of their work and the value of their service to the client. If an associate overbills, the partner, who should be required to approve all bills before they are sent to the clients, can eliminate excess hours.

Law firms should encourage each associate to work diligently, but at the same time to do pro bono and community work, and work for the betterment of the firm by taking part in recruiting and mentoring new associates and serving on firm committees. It is important that all attorneys be given the time to develop clients. An expectation of an unreasonable amount of time for an attorney to perform his work effectively prevents them from having a balanced and quality life.

The aforementioned "Public Perception of Lawyers" is very critical of lawyers. Knowing how the public feels about lawyers, what are the Bar, law firms and our law schools going to do to improve the public perception of our profession? This article gives suggestions as to what can and should be done. It is our hope that the suggestions are heeded and that our leaders discuss their validity and act upon them.

Endnotes

1. ABA Section of Litigation, "Public Perceptions of Lawyers: Consumer Research Findings" at 14.
2. WILLIAM G. ROSS, *THE HONEST HOUR- THE ETHICS OF TIME BASED BILLING BY ATTORNEYS*, Carolina Academic Press (1996) at 5.
3. See <http://www.williamgeorgeross.com/surveys.html>.
4. *Id.*
5. *Id.*
6. Nathan Koppel, *Study Suggests Significant Billing Abuses*, The Wall Street Journal Online, May 1, 2007, <http://blogs.wsj.com/law/2007/05/01/study-suggests-significant-billing-abuse/>.
7. *Id.*
8. *d.*
9. Lawrence J. Fox *End Billable Hours Goals . . . Now*, Vol. 17 The Professional Lawyer No. 3 (2006) at p. 1.
10. JEAN STEFANIC AND RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY-A PROFESSION FAILS ITS CREATIVE MINDS* (Duke University Press 2005).
11. SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). Linowitz is a former senior partner of Coudert Brothers, and former general counsel and chairman of the board of Xerox.
12. Gerald F. Phillips, *The Rules of Professional Conduct Should Provide Guidance to Attorneys with Respect to Billing*

Billable Hours Report (2002) at p. 44 - A sole practitioner commented in the blog referred to in note 8, "the 2 day 'orientation' was really "how to bill 2500 a year without breaking a sweat" (Law Blog posted to *Study Suggests Significant Billing Abuse*, May 1, 2007 The Wall Street Journal Online (WSJ com).

14. Alan G. Greer, *Billing, Our Profession's Not So Hidden Shame*, Vol. 13 THE PROFESSIONAL LAWYER No. 2 (2002) at p. 19.
15. LINOWITZ, *supra* note 11 at p.xii.
16. Lawrence J. Fox, *End Billable Hours . . . Now*, 17 The Professional Lawyer #3 (2006) at p.5.
17. *Id.* at 4.
18. LINOWITZ, *supra* note 11.
19. Lawrence J. Fox, *Save Us from Ourselves*, 50 RUTGERS L. REVIEW 2189, 2196 (1998).
20. It has been suggested in a blob by "Big Law Cumberland Grad," in the article referring to the recent survey conducted by Ross, see note 5, "when choosing legal counsel, clients should ask about a firm's billable requirement... choose a firm with a low billable numbers... and you will be more likely to get quality, efficient, creative work product... In addition, state courts and bar associations should step in to create ethical rules addressing this incentive for firms that keep their billable requirements below 1500 might help.
21. Fox, *supra* note 19 at p.2196.
22. *HOW LAWYERS LOSE THEIR WAY*, *supra* note 10 at 48.
23. *Id.* at 80.
24. *See* *Abbott v. Village of Winthrop Harbor*, 1999 WL 675292 at 3 (N.D. Ill) (the court reduced the fee request by more than \$61,000 on account of block billing); *Brown v. Smythe*, 1993 WL 481543, at 5-6 (E.D. Pa.) (the court wrote: "the problem with this aggregate form of billing is that the court has no way of determining how much time was spent on each task and, thus, the Court is unable to ascertain the reasonableness of the hours charged."); *In re Leonard Jet Co.* 103 B.R. 706, 713 (Bankr. D. Md. (1998) (the court explained that block-billing is disfavored for two reasons. First it "permits an applicant to claim compensation for rather minor tasks which, if reported individually would not be compensable." Second, "it prevents the Court from determining whether individual tasks were expeditiously performed within a reasonable period of time because it is impossible to separate into components the services which have been lumped together."); and *In re S.T.N Enterprises, Inc.*, 70 B.R..at 836 (the court said it "would disallow compensation altogether for any entry that aggregates individual services.") *Also see* U.S. Bankruptcy Court for the District of Delaware Local Rule 2016-2 (d)(vii) (expressly prohibiting "lumped" time entries).
25. The State of California Mandatory Advisories, Arbitration Advisory 03-01 Detecting Attorney-Bill Padding January.29, 2003.
26. ABA Formal Ethics Opinion 93-379 at 5.
27. JOHN W. TOOTHMAN and WILLIAM G. ROSS, *LEGAL FEES: LAW AND MANAGEMENT*, Carolina Academic Press (2003) at p.49.
28. ABA Commission on Billable Hours, *supra* note 13, at ix.
29. *Id.* at vii
30. *Id.* at ix

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April 16, 2003 Voogd Memo to RRC:

The following draft of a proposed new rule is submitted for consideration by the Commission agreeably with Harry's invitation of some time ago:

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 be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request.

Keeping accurate track of time expended is a fundamental professional obligation where the fee is founded upon time expended. Even where the fee is not time based, the obligation of the member to account for work performed on behalf of the client arises out of the fiduciary duty owed the client. Moreover, it provides a means for the client to insure that the employment is being pursued diligently by the member.

The proposed rule does not impose a substantial burden upon members. Most lawyers maintain such records as a matter of course. Regrettably, many lawyers don't keep such records to the detriment of their clients.

The proposed rule will protect the reasonable interests of the public.

April 26, 2003 Sondheim E-mail to Voogd & KEM, cc Difuntorum:

Tony and Kevin--

I am in the process of reviewing the materials disseminated to date for our next Commission meeting. The following question occurred to me regarding the suggestion that attorneys keep track of their time when working, in whole or in part, on an hourly basis:

Are you aware of any other jurisdiction or relevant source (ABA, ALI, etc.) that currently has a comparable rule?

April 29, 2003 KEM E-mail to Sondheim, cc Voogd & Difuntorum:

Harry:

I haven't found any other rule (although I admit I haven't done an exhaustive search), but I did find some information that may be of interest in guiding the Commission in crafting a rule if it decides to go forward.

1. First, there is the ABA Ad Hoc Billable Hour Committee's Report, issued in August 2002 at the ABA's Annual Meeting. I've attached a copy of it. It is downloadable at:

<http://www.abanet.org/buslaw/billable/toolkit/bhcomplete.pdf>

The Committee's home page is at:

<http://www.abanet.org/buslaw/billable/toolkit/talk.html>

2. Second, the Report proposes a Model Law Firm Policy for billable hours. I've converted it to WP and attached it as well. While it is probably more than what California would ever put in a rule, it does provide some guidance on implementing a rule and/or policy that should assure an accurate recording of time.
3. I've attached a First Circuit case applying Mass. law I've found that arguably holds a lawyer has a duty to keep accurate time/billing records. *Sears Roebuck v. Goldstone*, 128 F.3d 10 (1st Cir. 1997). What it actually speaks to is that a lawyer has a burden to prove the fees earned. See page 8 of the attached case (keynotes 6 & 7). The court also held the lawyer had violated MA's consumer protection statute in that his conduct was "unfair and deceptive." See pages 9-10 of attached. In the case, the lawyer had taken over the practice of a deceased collections attorney and claimed about \$1 million in fees from Sears, though his documentation was insufficient. Granted, it did not involve hourly rates, but the language re burden of proving fee is relevant.
4. *Matthew v. State Bar*, 49 Cal.3d 784, 781 P.2d 952, 263 Cal.Rptr. 660 (1989) involved a lawyer who did not keep time records in three separate matters and was suspended for 60 days for not returning unearned fees.
5. See also Rest (3d), Law Governing Lawyers § 42 re burden of lawyer in collecting fees.

In terms of priority given the short time to the meeting, the first document you will want to look at is the WP version of the Model Law Firm Policy.

ABA Model Law Firm Policy Regarding Billable Hours

THE MODEL LAW FIRM POLICY REGARDING BILLABLE HOURS

ABA Ad Hoc Committee on Billable Hours
August 2003

A significant portion of the firm's work for paying clients is priced pursuant to the billable hours system. The firm is open to and pursues alternative pricing arrangements with its clients, because we it is important to develop varied approaches to pricing that enhance the overall goals of the profession, beyond mere profitability considerations. Nevertheless, because the billable hour system remains significant staple of the firm's pricing system, it is important to set forth policies pertaining to that system applies to the firm's lawyers.

A. Recording Time

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 amount of time spent on individual matters. No deliberate inflation

of the amount of time expended, nature of the work done, will be tolerated. Violators will be terminated.

2. Prompt Recording of Time

Consistent with point 1 above, the only way to ensure integrity and accuracy is to keep careful records to record and submit time on a daily basis. Lawyers are expected to compile their notes and submit time at the end of each work day or, at the latest, the next morning. Lawyers who attempt to “reconstruct” their time from memory and stray notes at the end of the week or month cannot possibly be accurate, which means that either the client or the firm will be treated unfairly, through inaccurate recording.

3. Provide Meaningful Detail

In recording and describing time, lawyers should put themselves in the position of the client receiving bill, and ask “Does this give me the detail I need to evaluate the quality and quantity of the services provided?” Thus, sufficient detail must be provided. In the absence of further instructions from the client (see item 4 below), meaningful but not exhaustive detail should be included. Thus, a 4.35-hour entry which says merely, “Research”, or “Legal Research” or “Research Summary Judgment Brief” is insufficient. A more appropriate entry would be “Research statute of limitations issue under Alabama and New Jersey law for summary judgment motion”.

Note also that lawyers should not “bundle” descriptions, e.g., “research; conference call; and draft memo on X case.”

4. Be Sure to Observe Client Requirements

Some clients have very specific requirements for time-recording. The billing partner will inform you of those requirements. Be sure to follow them, so that entries do not have to be “reconstructed” or revised when the draft bill is issued.

B. Hours Expectations/Model “Diet”

The firm expects its lawyers to render quality service commensurate with each lawyer’s experience level.

That is the first and most important “expectation.” With respect to expectations as to hours, the firm chooses to set no hard-and-fast minimum levels. Again, we expect that our lawyers are here because they are energized about the practice, eager to serve our clients, eager to enjoy the life of the firm, eager to serve the higher ideals of the profession, including through pro bono work, and eager to learn.

At the same time, we recognize the reality that guidance as to the typical level of effort that, on average, the firm expects in order to meet its revenue and profitability goals is a useful piece of communication between the firm and its associates. To that end, we are providing below a model “diet” or mix of work that the “typical” associate should have as a goal.¹ The

¹ This model recognizes that the “typical” associate — and therefore the typical annual “diet” — is apocryphal. Every year, something unexpected happens that would make consistent achievement of these targets impossible — whether it is a fivemonth trial, an all-consuming, year long transaction, a major pro bono commitment, the drafting of a major, non-billable article or book for client development

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firm recognizes that in any given year, the mix will vary, and it will take account of those variations in evaluating associates' level of effort.² For example, an associate assigned to a pro bono or client development project that requires 500 hours of effort in a given year is not likely to achieve 100% of the expected billable hour total that year. Nevertheless, the mix reflected below will be used as a tool in evaluating each associate's level of effort and determining if each associate is meeting the firm's expectations.

Finally, the mix reflected below obviously does not apply to those on partial work schedules.³

The model diet, reflecting typical expectations, is as follows:

1. Billable client work — 1900 hours

Our firm recognizes that this level of billable work, if achieved on average by the firm's associates, is sufficient for evaluation and compensation purposes.⁴

2. Pro bono work — 100 hours

Our firm recognizes not only the social purpose served by doing pro bono work, but also the reality that pro bono work is in some cases weighted to more junior lawyers, and that pro bono work serves training and development goals.⁵

3. Service to the Firm — 100 hours

Service to our firm – for example, in recruitment, mentoring more junior associates, serving on firm committees — is an important part of the life of the firm and the organizational development of the associate.

4. Client Development — 75 hours

Our firm is aware that associates are eager to learn about effective techniques for

purposes, assignment of important and very time-consuming firm duties, or other developments. This model is intended as a hypothetical one, achievable on average over the course of a number of years.

² This model is designed to work within the billable hour system, and therefore assumes that the hypothetical associate's client work load is based essentially 100% on billable hours. The model is not intended to discourage in any way the ongoing effort to develop alternative pricing models for the profession.

³ Needless to say, this "diet" does not address the issue of part-time work, and there is absolutely no intention to undermine the importance of the availability of such work schedules by setting out this full-time "diet."

⁴ We chose 1900 billable hours because that is typical at large firms (see the Altman Weil 2002 Survey of Law Firm Economics, which estimates the average number of hours associates worked in 2001 at a firm with 150 or more attorneys at 1860). However, we defer determining the particular level of billable work to each firm, as it is a cultural choice. We are mindful of firms' productivity needs to meet profitability aspirations and attract and retain the top talent, and believe that 1900 hours is an eminently workable billable hour requirement, which should be more than adequate to achieve reasonable aspirations at a firm. A higher billable level may "crowd out" other activities, unless the expectation is that associates have no life outside the law.

⁵ A requirement of 100 hours is at the top end of the Law Firm Pro Bono Challenge (©, the Pro Bono Institute) – and averages out, per lawyer, to approximately 5% of client time.

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developing and maintaining business. Our firm also recognizes that it takes time to cultivate client relationships — the partners need to take time to teach, the associates need to devote time to learn, and all of our attorneys need to have sufficient time to assist in a full range of client development activities – e.g., articles, speeches, responses to RFPs and the like.

5. Training and Professional Development — 75 hours

The best firms, including ours, devote significant resources to training — formal in-house programs, informal training and mentoring activities, evaluation activities, occasional attendance at outside programs, and the like. In addition, self-training — keeping current with the literature in one's field — takes time as well. This is the lifeblood of developing excellent lawyers. We expect our lawyers to partake fully.

6. Service to the Profession – 50 hours

Our firm encourages our lawyers to participate in bar association activities, as well as those of other professional associations. By joining committees, participating in community projects, and otherwise getting involved, our attorneys provide an important service to the profession while learning more about it.

The total number of hours reflected in this model — 2300 hours of billable and non-billable time — is significant. The model reflects an assumption that our firm's associates are willing to work hard, that the profession is demanding, but that it provides great rewards, not only monetarily but also through the challenge and stimulation of work for paying clients as well as the other activities reflected in the model. The total is, at the same time, manageable — it represents approximately 50 hours of recorded, professional time, billable and non-billable per week, allowing for vacation, holidays, etc. We do not view that as an unrealistic burden for incentivized, enthusiastic, hard-working associates who enjoy what they do. Indeed, the allocations suggested for all types of work — billable and non-billable — are designed to provide a varied set of challenges and to enhance the psychic rewards of the practice.

C. Compensation and Billable Hours

Hard work — often measured by the number of billable hours a lawyer works in a given year — must be rewarded. At the same time, the firm absolutely rejects a compensation system tied to billable hours without flexibility and without consideration of other factors, most significantly quality of work, as well as contributions through pro bono work and service to the firm. Accordingly, while our compensation system will be adjusted from time to time to reflect developments in the market, we commit to the following guiding principles in setting salary and any bonus payments to associates:

Hard work, typically measured through number of billable hours worked, will be recognized. However, our compensation system will never be tied directly and inflexibly to billable hours — if a billable hour threshold is used to determine any salary or bonus factor, it will be tied to quality factors as well.

Quality will be the most significant determination in setting salary levels, assuming reasonable expectations as to productivity are met.

Quality performance in pro bono and firm activities will be recognized in compensation,

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through base salary levels and bonuses tied directly to those factors.

April 29, 2003 Difuntorum E-mail to KEM, cc Voogd, Sondheim, McCurdy & Yen:

Thanks Kevin,

I have not had a chance to get to this. My reaction to Tony's proposed new rule is that the desired standard already is covered by an attorney's duty to render an appropriate accounting to a client, rule 4-100(B)(3) as interpreted by the State Bar Court in *In re Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752. I am not enamored by the thought of this new rule; however, some clarification of rule 4-100 might be needed to cover the *Fonte* interpretation.

A sub-issue raised by Tony's recommendation is the topic of electronic v. hard-copy record keeping. This was addressed in COPRAC's 2000 study in response to Conf. of Del. Res. Nos. 8-8-98 and 8-9-98. (See attached agenda items setting forth resolutions adopted by the Board and attaching COPRAC's report and supplemental report.) This topic is on the Commission's plate for action and perhaps Tony's proposal is a vehicle for getting started. -Randy D.

April 30, 2003 Yen E-mail to Difuntorum, cc Voogd, Sondheim, McCurdy & KEM:

Re clarification of rule 4-100 to cover the *Fonte* interpretation, OCTC made this recommendation in their suggestions for that rule.

Excerpt from 9/27/01 OCTC Letter to RRC (Section 24 re Rule 4-100):

OCTC recommends clarifying and expanding this rule to include, among other things, a requirement that members maintain advanced fees in a trust account until earned. The suggested changes also define the term "misappropriation."

* * *

(B) A member ~~shall~~must:

(1) Deposit into a Trust Account, as described in paragraph A of this rule, all legal fees and expenses that have been paid in advance and will be withdrawn by the member only as fees are earned or expenses incurred.

* * *

~~(3)~~(4) Maintain complete records of all funds, fees, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds, fees, securities, or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

* * *

Discussion

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The accounting requirement of section (B)(4) also obligates the attorney to maintain adequate records of fees received in advance and earned and to provide the client with an appropriate accounting of those fees. *In the Matter of Forte* (Review Dept. 1994) 2 Cal. State Bar Ct., Rptr. 752, 758.) Other than a true retainer, a fee is not earned upon receipt and, therefore, the fee must be kept in a trust account until earned.

While not every failure to promptly return funds or property to a client will constitute a misappropriation by the attorney, if client funds or property are held by the attorney for an unreasonable period of time without the client's permission or consent, such withholding may constitute a misappropriation as it deprives the client of his or her rightful property and the use of that property.

June 27, 2003 Voogd Memo to RRC:

My first draft rule was rejected by the Commission on the basis such a rule was not needed and keeping contemporaneous time was too difficult.

I have collected various materials that seem to support my position. Copies are attached. Included are of a May 13, 2003 letter from Gerald Phillips and enclosures. Also included is the ABA Commission on billable Hours Report 2001-2002. Finally, I have attached copies of the following articles: 1) "It's the Money, Stupid" that appeared on page 76 of the February 2001 issue of the ABA Journal and reviewed Deborah Rhode's book on reforming the legal profession; and 2) "The Pig Factor" by Rudolph W. Giuliani that appeared in the May/June 2003 issue of Across the Board.

Inquiries made of fellow lawyers suggest that almost every firm have a lawyer or lawyers that defer preparation of time records until the end of the billing period. The information is not surprising. As a class, lawyers have more than their fair share of procrastinators. It is too easy to get away with procrastinating on timekeeping.

When I was a fresh-caught lawyer back in the '60s, I tried preparing time sheets monthly. It is impossible to prepare accurate time records days after the time was expended. A properly maintained time sheet might have twenty entries each having a different time period. You can't accurately create a time sheet of that nature days or weeks after the day in question. Memories are not that good. When you record time monthly, you are not recording time actually expended. You are trying to fill in blocks of empty time.

I switched to keeping concurrent time. I kept a time sheet on my desk and made entries on time expended on an ongoing basis. I also insured the sheet was complete at the end of the day. The form of time sheet provided by my firm had a legend at the top stating "KEEPING ACCURATE TIME IS A PROFESSIONAL RESPONSIBILITY." The memory of this legend motivated the proposed rule

Concurrent time keeping is not difficult. After a while it becomes almost instinctive. After I commenced concurrent time keeping, it soon became apparent that getting six billable hours in a normal working day is very difficult. Social conversations with lawyers and staff, prolonged lunches, trips to the bathroom, partnership meetings and the like eat up a considerable amount of time. These are the activities you readily forget if you try to prepare your time monthly. This

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is particularly true if you are trying to meet a firm standard of generating a specific number of hours a year.

Selling services on an hourly rate basis not unique to the legal profession. Over the years, I have worked on contracts where my company has purchased millions of dollars of services from construction subcontractors on an hourly rate basis. The requirements of those contracts are uniform. At the end of each working day, the subcontractor submits time sheets reflecting the hours expended by each of the subcontractor's employees working on the project. The time sheets are reviewed by an on-site representative of our company and approved the same or following day. Daily approval may not be feasible, but I don't understand why lawyers cannot meet standards readily fulfilled by welders and laborers.

I have reviewed retainer agreements used by reputable law firms. They usually provide something along the lines of the following:

"Our professional fees for legal services will be determine by the amount of time our attorneys, paralegals and other timekeepers spend on this engagement and based on their applicable hourly rates in effect at the time our invoices are rendered. My present applicable hourly rate is \$_____."

Agreements of this nature do not provide that the hours spent will be estimated once a month. Read reasonably, these agreements require that the client pay for the actual hours expended, not the estimated hours. Billing estimated hours at a minimum is a breach of the implied covenant of good faith and fair dealing, if not a species of fraud. Moreover, B&P §6148 does not authorize inaccurate timekeeping.

Assume a lawyer proposes to use a contractor for personal home improvements. The contractor and his employees will be in and out of the home at various times over a period of time. Compensation is to be made on an hourly rate basis. The contemplated contract provides that the hours expended will be estimate monthly. No sensible lawyer would sign such a contract. Yet, many lawyers believe they are entitled to assume that their clients will accede to estimated timekeeping.

Years ago I was in federal court during a hearing on the fee application of a reputable class action law firm. The judge pointed out that the firm had another fee application relating to a different class action pending before another judge of the court. He gave lawyer appearing on behalf of the firm a choice. He could either submit a more reasonable fee application or let the judge compare the two fee applications to determine whether any lawyers in the firm had worked more than 24 hours in a given day. The lawyer immediately opted to submit a revised application.

As you know, insurance companies retain experts to review lawyer invoices. An adjuster with an insurer formerly used by my company told me that by use of such experts they frequently cut invoices by 20% or more. The experts have only one way of determining whether the stated time has in fact been expended. They apply standards showing how long a particular task should take and then apply an invoice reduction. The insurer then gives the lawyer a chance to justify the invoice. In the normal course, the invoice would be justified by contemporaneously maintained time sheets. This is seldom done which suggests that the lawyers are not keeping good time.

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Other sophisticated bill payers such as general counsel use like methods of determining whether time purportedly expended is reasonable under the circumstances. It is, of course, the unsophisticated purchaser of legal services who is at risk of being abused by slovenly timekeeping practices.

I have discussed time keeping with various individuals who pay attorneys on an hourly rate basis for personal services or for services for companies where the individuals have bill paying responsibility. They share a strong concern that their attorneys' time is not being accurately recorded.

Gerald Phillips in the attached Time Bandits article states:

"The fact that lawyers are held in very low esteem is without dispute. While the causes of this poor standing are varied and worth debating, it is clear that overbilling is partly responsible. Time padding and task padding are major reasons for the low image of lawyers. These practices improperly escalate the fees billed to client and thus cause great consternation among the public."

The Commission's Charter from the Board of Governors specifically requests that we "develop proposed amendments to the California Rules that: 3) Promote confidence in the legal profession" The proposed rule would serve that purpose, even assuming that California lawyers keep perfect time.

However, the evidence is clear that there is a timekeeping problem. Failure of the Commission to address it lends credence to Sandra Rhodes' complaint that lawyer self-regulation means that the fox is guarding the chicken house.

Moreover, it is important that we stay ahead of the Legislature on issues of this nature. Rules 3-120 (Sexual Relations with Client) and 3-500 (Communication) are examples of situations where the Legislature forced State Bar action. Giuliani's "Pig Factor" article suggests that the bar will be faced by more onerous requirements unless it acts first.

If nothing else, a proposed timekeeping rule would generate some interest by members of the bar in the rule making process.

I have revised the proposed rule in the manner indicated below to reflect the foregoing comments.

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 upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years.

Ellen Peck will submit a brief memorandum setting forth alternative ways of addressing the problem.

June 29, 2003 Peck Memo to RRC:

INTRODUCTION

You have already received the excellent memorandum and supporting materials sent to you by Tony Voogd. Mr. Voogd and my own experience have convinced me that some professional standard in this area is badly needed.

The purpose of this memorandum is to briefly outline the primary possibilities for placement of such a standard.

One note on the scope of the standard: Should any professional standard be limited in application to the lawyer who contracts with a client or third party payor to provide legal services on an hourly rate, rather than upon a lawyer who has a contingency or flat fee contract, but is required by “quantum meruit” or application to a court or arbitrator for an hourly rate? The latter cases may present different public policies.

ALTERNATIVE 1: RULE OF PROFESSIONAL CONDUCT 4-200 - BLACK LETTER

If the failure to record time contemporaneously and the recreation of a billing charges more time than was actually worked, then the charges are unconscionable because they are charges for services not provided. If the lawyer charges a client for less time than he/she reasonably believes was worked, the lawyer cannot be certain with accuracy of the lesser charge and the client is without means of verifying the charges. Accordingly, this public policy would support a black letter rule provision.

Rule 4-200. Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all 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. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.

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- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

(C) A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years.

Alternative 1-A: Another alternative is to have the failure to maintain accurate records as another factor in the determination of “unconscionability.”

Rule 4-200. Fees for Legal Services

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- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.

(11) The informed consent of the client to the fee.

(12) The failure of the member to record written or electronic notations concerning the services charged to a client or third party on the basis of time expended, at or about the time of the expenditure.

(13) The member's failure to maintain copies of billing records for a period of five years after the last service is provided.

ALTERNATIVE 2: THE PRESUMPTIVE STANDARD MODEL

This model is based upon the presumptive standards for advertising and the trust account rules. It does not make the standard a disciplinary offense per se, but rather creates a presumption of a violation. This permits flexibility because a member may be able to rebut the presumption.

Rule 4-200. Fees for Legal Services

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- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

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(C) The Board of Governors of the State Bar shall formulate and adopt standards as to billing records which will be presumed to be unconscionable in violation of this rule 4-200. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Standards:

Pursuant to rule 4-200(C) the Board of Governors of the State Bar has adopted the following standards, effective _____, unless noted otherwise, as forms of billing practices which are presumed to be unconscionable in violation of 4-200:

- (1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

Standards:

Pursuant to rule 4-100(C) the Board of Governors of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

- (1) A member's failure to maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member.
- (2) A member's failure to briefly describe the services provided in any billing to the client.
- (3) A member's failure to make written or electronic notations made at or about the time of the expenditure.
- (4) A member's failure to maintain time records in support of billings and billings and other fees/costs statements for a period of five years after the last billing for that matter.

ALTERNATIVE 3: REFERRAL TO THE BOARD OF GOVERNORS FOR REFERRAL TO THE FEE ARBITRATION COMMITTEE

These issues are closely related to Business and Professions Code section 6148. The Board of Governors generally looks to the State Bar's Fee Arbitration Committee to make proposals to revise section 6148 and that committee has a great deal of expertise in the area of fees, billings and fee disputes arising out of poor time recording and record keeping.

It would be appropriate to refer this matter to the Board of Governors with the recommendation that while the subject matter is not appropriate for a rule of professional conduct, the subject matter should be considered for a revision to section 6148 [the remedy for a violation being voidability of the fee agreement].

ALTERNATIVE 4: REFERRAL TO THE BOARD OF GOVERNORS FOR REFERRAL TO

THE JUDICIAL COUNCIL

The issues of billings, fee records and similar matters is not only an issue for consumers and lawyers---it affects the courts in their ruling on the reasonableness of fees. Moreover, the materials suggest that there are other issues relevant to the courts' abilities to rule on fee motions (e.g., block billing vs. task billing). At present, there are a great number of appellate cases regarding how courts rule on fees; record keeping and other fee issues—but there are no standards guiding lawyers, clients and litigants who apply for fee awards and there are no clear standards to guide the courts' rulings.

Accordingly, it would be appropriate to recommend that the Board refer this matter to the Judicial Council to add fees/costs billings standards, recordation and record retention to the California Rules of Court in the Standards for Judicial Administration.

ALTERNATIVE 5: SUGGESTING LAWYER GUIDELINES AS AN ADJUNCT TO THE RULES OF PROFESSIONAL CONDUCT

Certain members of the Commission, including myself, have suggested that the Rules of Professional Conduct contain not only clearly defined disciplinary standards, but also standards which could guide the profession. If it is determined that this subject matter should not be a basis for disciplinary action by the California Supreme Court or the State Bar Court, but should be a standard to be considered for the guidance of the membership, it would be appropriate to incorporate this subject matter into a "guidance" section of the rules.

CONCLUSION

There are undoubtedly other means by which this important and critical subject matter may be dealt with in California's professional standards.

This issue is one of the most important issues facing the consumer of legal services today. It is hard to argue that lawyers in the electronic age, with fiduciary duties to those clients, should not be professionally responsible for recording their services contemporaneously or for retaining accurate records.

I look forward to listening to your comments at the meeting.

February 5, 2004 Voogd Memo to RRC:

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.

Consultant's Note – 2/5/04 Draft compared to 6/27/03 Draft:

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

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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 ~~shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies~~ of such records shall be provided to the client promptly upon request ~~and shall be maintained for a period of five years.~~

March 15, 2004 Difuntorum E-mail to Voogd & Peck, cc Leadership & Staff:

Tony & Ellen: See attached bill and story below from Monday's Daily Recorder. -Randy D.

Recorder Article re AB 2371 (2003-2004 Legislative Session):

New Bill Targets Plaintiffs Billing

Jeff Chorney
The Recorder
03-15-2004

SACRAMENTO -- Two tort reform groups are taking a swing at the plaintiffs bar with a bill that would require that trial lawyers give a thorough accounting of the hours they spend on contingency cases.

Assemblywoman Patricia Bates, R-Laguna Niguel, last week introduced AB 2371, the Legal Consumers' Protection Act. The measure, sponsored by the Coalition to Reform Frivolous Lawsuits and Central California Citizens Against Lawsuit Abuse, would dramatically change the way some plaintiffs lawyers handle their cases.

Lawyers would have to disclose the case's likelihood of success and estimate the number of hours a case will take, as well as how expenses will be tacked onto contingency fees and discuss the client's share of recovery.

Clients will also get the right to ask for a review of fees by a court or bar committee. And lawyers will have to give monthly reports on the time spent on a case as well as determine a fee per hour once the case is finished.

In a statement, Bates said she wasn't opposed to contingency fee arrangements. Rather, she is worried about whether contracts with lawyers are fair to consumers.

James Sturdevant, president of Consumer Attorneys of California, said it's unfair for Bates to target only personal injury lawyers for the way they bill. He said contingency fees are the only way for some people to get money. A lawyer's cases need to be viewed as part of a "portfolio" rather than just work per hour, he said.

The bill is similar to a measure introduced in 2002 that was killed in the Assembly Judiciary Committee, which is controlled by trial lawyer ally Ellen Corbett, D-San Leandro.

Sturdevant said he had "grave doubts" the new bill will make it out of Corbett's committee this time around.

March 25, 2004 Voogd Memo to RRC (w/ new draft):

The attachments show the evolution of the draft rule as well as including recent proposed legislation relating to the rule. My latest variant of the proposed rule follows:

Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made in a manner substantially contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of two years.

There is an inherent conflict of interests associated with a lawyer negotiating a fee agreement with a prospective client. If the client were to be represented by separate counsel for purposes of those negotiations that separate counsel might well request inclusion of provisions tracking the proposed rule in the agreement. I suspect that no lawyer could reasonably object to such a request. Under those circumstances the rule simply serves to alleviate the inherent conflict between lawyers and clients in establishing the relationship.

Moreover, Assembly Bill 2371 shows that unless we are proactive we will cease being a self-regulated profession.

April 19, 2004 Sondheim E-mail to RRC:

We will first discuss whether to have a new rule regarding the recording of time. If it is decided to have such a rule, ***the draft of this rule as currently proposed by Tony will be deemed as tentatively approved by the Commission for posting on our website*** except to the extent that, prior to our next meeting, there are specific objections, set forth in an e-mail, to his proposed draft.

May 3, 2004 Melchior E-mail to McCurdy (forwarded to RRC):

Are we going to legislate a prohibition against block billing? Tony's language can be read that way; but I don't think we should do that.

June 4, 2004 Sall E-mail to RRC & RRC List:

As a follow-up to the discussions on Recording Time at the last RRC meeting on May 8, I offer the following suggestions to Tony Voogd regarding his proposed rule on accurate time records:

- (A) A member shall not engage in fraudulent, dishonest or deceptive billing practices.
- (B) Where the compensation for legal services payable to a member or a member's Law Firm is based upon an hourly rate or increments of time, the member shall maintain a

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reasonably accurate method of recording such time, and written records thereof, which shall be made available to the client upon reasonable and timely request.”

Another area of potential abuse regards the billing of costs, which are often passed through to clients with an undisclosed mark-up, creating a secret profit center for the law firm. If the Commission is inclined to address costs in this proposed rule, I believe it would be appropriate to add:

(C) A member shall not charge costs to a client at an amount in excess of actual cost unless the member has the client’s informed written consent.

It is also my view that, when the Commission gets to Rule 4-200, item (A) above should be one of the factors of unconscionability. It is a shame that we have to consider rules telling lawyers to be honest.

While I am one of COPRAC’s liaisons to the Commission, the above thoughts are mine alone, and do not express the opinions, nor come with the approval, of COPRAC.

August 1, 2004 Voogd Memo to RRC:

I have no new ideas. Accordingly, I am indebted to Robert K. Sall for the following suggestion:

(A) A member shall not engage in fraudulent, dishonest or deceptive billing practices.

(B) Where the compensation for legal services payable to a member or a member’s Law Firm is based upon an hourly rate or increments of time, the member shall maintain a reasonably accurate method of recording such time, and written records thereof, which shall be made available to the client upon reasonable and timely request.

[Another area of potential abuse regards the billing of costs, which are often passed through to clients with an undisclosed mark-up, creating a secret profit center for the law firm. If the Commission is inclined to address costs in this proposed rule, I believe it would be appropriate to add:]

(C) A member shall not charge costs to a client at an amount in excess of actual cost unless the member has the client’s informed written consent.

August 12, 2004 Julien E-mail to RRC:

(new rule) Honesty in billing: I am appalled that in 2004 we have to tell professional people not to cheat; not to have sex with the folks they are "servicing" (I use the term advisedly); not to cheat their clients; and not to overbill. However, if we have to tell them not to overbill their clients then Tony’s is as good a way as any.

August 16, 2004 Tuft Memo to RRC:

To: Members of the Commission
From: Mark L. Tuft

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Re: Honesty in Billing (Open Session Item III.H)
Date: August 16, 2004

1. The subject of the proposed rule on "recording time" is part of a larger topic on charging and collecting attorney fees. The concerns addressed by this proposed rule should be taken up when we study CRPC 4-200, MR 1.5 and Bus. & Prof. Code § 6148, and particularly subpart (b).

2. There are two distinct concepts involved in fraudulent billing practices that a rule on billing should address. First is the notion that lawyers owe a duty of honesty and candor both in establishing their fee and in charging and collecting their fee. The same is true with respect to any cost, expenses or disbursements charged the client in the course of the representation.

Second, lawyers owe their clients a duty to account for the fees and expenses charged and received. The duty to account includes the duty to demonstrate that the fee has been "earned" under the terms of the agreement and that the client has been properly charged a fee that is consistent with the terms of the agreement.

3. The "mechanics" or means by which the lawyer complies with these duties should not be covered in the rule itself, but suggestions for compliance can be made part of the discussion.

4. Turning to the draft rule, an explanation is needed as to what is meant by "billing practices" in subpart (A).

5. Subparagraph (B) does not appear to take into account hybrid fee arrangements that are based in part, but not entirely, on hourly rates or increments of time. An attorney's duty to account and establish that the fee has been earned should not be limited to hourly fees, but should include all fee arrangements including fixed or flat fees.

6. It is not clear what is meant by the term "actual costs". The line between "costs" and attorney overhead as part of the lawyer's fee is not easily drawn. Although it is improper to assess a surcharge on hard costs absent an agreement with the client, lawyers can ethically charge clients the direct costs associated with the item plus, where applicable, a reasonable allocation of overhead. See ABA Formal 93-379 and ABA Model Rule 1.5(a).

August 24, 2004 Sapiro E-mail to RRC:

I like Tony's new approach. I offer the following suggestions.

1. I recommend that a paragraph in the Discussion discuss the reason for having three different concepts in paragraph (A). How do we intend to distinguish between "fraudulent, dishonest and deceptive" billing practices?
2. In paragraph (B) of the proposed rule, I recommend that we delete the phrase "and written records thereof." If an attorney records time for a telephone call that actually occurred, the attorney should not be subject to potential discipline for not also having a written note memorializing the telephone conversation. If something else is intended by the phrase "written records thereof," I would like that subject discussed at our next meeting.
3. In proposed paragraph (C), I recommend that the word "costs" be changed to the word "expenses." "Costs" has a technical meaning in litigation practice or court proceedings. Not all expenses are "costs." The concept (with which I agree) of not marking up expenses

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billed to a client in excess of the actual cost to the lawyer is appropriate, but the correct word should be used.

Again, please accept my apologies for not sending these comments sooner. My illness has not been voluntary.

January 22, 2008 Difuntorum E-mail to RRC:

Attached please find a letter and article from Gerald Phillips concerning hourly billing abuses.

As you may recall, after several discussions, the Commission decided at the 8/27-28/04 meeting to defer consideration of any possible new rule on hourly billing practices until after consideration of RPCs 4-100 and 4-200. RPC 4-200 will be a part of the batch 3 public comment and consideration of RPC 4-100 will continue at the Commission's next meeting. After public comment has been received on both of these rules, the issue of a possible new rule on hourly billing practices can be revisited. -Randy D.

January 22, 2008 Ruvolo E-mail to RRC:

As Yogi Berra said, "Deju vu all over again" Here are three memos I wrote in this subject in April, September and November 2004. I'd like to see this problem garner more attention. I seem to recall that, against my wishes, we buried something about this in a comment to one of the supervision rules (5.1-5.4).

Consultant's Note:

Attachments included:

April 22, 2004 Ruvolo E-mail to RRC re 1-310X [5.4]

September 20, 2004 Ruvolo E-mail to RRC re 1-310X [5.1]

November 15, 2004 Ruvolo Memo to RRC re 1-310X [5.1]

Each of the attachments is available in the respective Rule's e-mail compilation.

January 22, 2008 KEM E-mail to Ruvolo, cc RRC:

It is comment [3] to our proposed Rule 5.1 (included in the Interim Report to the S.Ct.), which provides:

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[3] Paragraph (a) is also intended to apply to internal policies and procedures of a law firm that involve compensation and career development of lawyers in the law firm that may induce a violation of the Rules of Professional Conduct. See Rule 2.1 and Rule 8.4(a).

Paragraph (a) provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with the Rules of Professional Conduct.

Model Rule 2.1, which we have not yet considered, provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Finally, our proposed Rule 8.4(a) provides:

It is professional misconduct for a lawyer to:

(a) knowingly assist in, solicit, or induce any violation of these Rules or the State Bar Act;

January 23, 2008 Kehr E-mail to KEM, cc RRC:

Kevin: Was there any thought, tentative or otherwise, as to where a billing Rule would go? Was this to be a new stand-alone Rule whose location and numbering have not been considered?

January 23, 2008 Difuntorum E-mail to Kehr, cc RRC:

Here is a link to what I believe was the last version of a proposed new stand-alone rule. Tony was lead drafter. Rob Sall, COPRAC liaison, also was a proponent of the rule. -Randy D.

http://calbar.ca.gov/calbar/pdfs/ethics/Honesty%20in%20Billing%20Rule_82804.pdf

January 23, 2008 KEM E-mail to Kehr, cc RRC:

Thanks, Randy.

As to Bob's inquiry:

1. There was never any discussion as to numbering or placement of the proposed Rule within the current numbering scheme or the California Rule numbering scheme. See #6, below.
2. The Rule began with the concept that a lawyer must record time accurately. The last proposal under that approach can be found in Tony's 3/25/04 Memo to the RRC:

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Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made in a manner substantially contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of two years.

3. That was followed by the 8/1/04 Tony memo that Randy linked to below. That concept provided:

“(A) A member shall not engage in fraudulent, dishonest or deceptive billing practices.

(B) Where the compensation for legal services payable to a member or a member's Law Firm is based upon an hourly rate or increments of time, the member shall maintain a reasonably accurate method of recording such time, and written records thereof, which shall be made available to the client upon reasonable and timely request.

[Another area of potential abuse regards the billing of costs, which are often passed through to clients with an undisclosed mark-up, creating a secret profit center for the law firm. If the Commission is inclined to address costs in this proposed rule, I believe it would be appropriate to add:]

(C) A member shall not charge costs to a client at an amount in excess of actual cost unless the member has the client's informed written consent.”

4. During summer 2004 when the proposal was pending, there was an assembly bill directed to consumer protection that raised some of the same issues as the proposed Rule. See AB2371, which was pending during the 2003-2004 legislative session. You can retrieve the history of the bill by going to the following site:

<http://www.assembly.ca.gov/acs/acsframeset2text.htm>

and choosing (2003-2004) in the drop-down menu and then entering 2371 in the "Bill Number" dialog box.

Much of the bill that addressed billing, however, was deleted in an amendment to the bill after it was introduced.

5. The last meeting discussion on the Honesty/Record Billing Rule took place at the 8/27/04 meeting, where the RRC voted 5-0-3 to defer consideration of the bill until we considered 4-100 [1.15] and/or 4-200 [1.5]. The RRC has voted out 1.5 for public comment and, as you know, 1.15 is still under consideration and will be placed on the next agenda.

6. If the RRC were to vote for an Honesty/Record Billing Rule -- and there appeared to be no inclination to do so in 2004 or earlier -- I think it would probably best be placed as Rule 1.5.2, in close proximity to the "Fees for Legal Services" rule (1.5) and right after the fee split rule (1.5.1). Although it arguably could be placed after 1.15 (trust accounts & accountings to clients) or 8.4 (misconduct), I think that placement near the fees rule would provide the best notice to lawyers.

I hope this helps.

January 23, 2008 Kehr E-mail to KEM:

Kevin: Regarding the numbering question, Kevin: I've just stumbled on a new billing honesty case in which the analysis is under Rule 8.4(c). The case is *In re Romansky*, 2007 D.C. Appeal Lexis 619.

January 28, 2008 Lamport E-mail to RRC:

1. I have the greatest respect for Jerry Phillips. I truly admire his work in this field. To a great extent, Jerry's article is a reprise of a point Jerry has been making for many years now. I certainly agree that billing for work that a lawyer has not performed is unethical (and in particular, unconscionable). However, I do not agree that eliminating a minimum hourly billing requirement for law firm associates is the answer.
2. The real issue is the compensatory nature of the lawyer-client relationship and, in particular, the drive to increase lawyer income that exists at both the partner and associate levels. If you want to eliminate the pressure that some may face to log unconscionable hours out of a perceived need to meet an hourly standard, cap associate salaries and cap partner income at levels that eliminate an incentive to bill more to earn more. Now I am not suggesting that we do this, and to do so would be problematic for any number of reasons; but if you really want to eliminate the incentive, you need to eliminate the economic reward.
3. A quick review of economics here. Forgive me if I belabor the obvious. Fee revenue is the revenue that supports a law practice. It costs money to run a law practice - office space, insurance, equipment, supplies, clerical assistance, library, services - and that is just for the solo practitioner. If you aren't generating any fee revenue, you can't pay your bills. You go broke and you can't provide legal services to anyone. So you need to generate enough revenue to pay those expenses before you can pay yourself. An hourly billing system is a function of time and billing rate. You make more money either by increasing your rate or increasing your hours (or both). An hourly system always carries with it a concern about over billing because embedded in it is the incentive to bill more to make more. That is particularly true at the owner/partner level where every dollar above costs and capital contribution is available for distribution to the owner/partner. It is the incentive to make more money that carries the potential for abuse.
4. Leveraging one or more associates extends your reach; but there is little economic incentive to hire an associate if you make less money in the process. The associate has to be able to generate revenue to offset the cost of the associate and add something to the bottom-line. The revenue an associate generates is based on billed hours collected. Now the associate is paid a salary, but you can't condition paying the associate's salary on revenue coming in. The associate is an employee who gets paid regardless of whether the law firm is being paid for the associate's time. And therein lies the problem. The model only works if the associate generates the revenue, but the associate has no incentive to work the time to earn the income if the associate can get paid and essentially bill nothing. Hence the billable hour requirement. It basically says to the associate, "Hey, you want to stay here and make the money, we expect you to carry your share of the work as a revenue generator."

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5. Couple this with rising associate compensation. When I started, a good associate starting salary was \$35,000. (When Kurt started, associates probably had to pay their employers.) Starting salaries are now north of \$160,000 in the larger firms. The income for senior associates is now north of \$250,000. There are benefits and other costs on top of that. Associates are as much the reason for the increase as the competition among law firms for top talent. Associates gravitate to firms that pay well. In my experience, associates notice when other firms raise salaries and expect their firms to keep pace. (Which is why I am not particularly sympathetic to the lament that young, inexperienced lawyers have to work so hard to be worthy of making over \$200,000 annually.... Please. The last time I checked the 13th Amendment has not been repealed.)
6. It is unreasonable to think that in this environment, a firm is going to keep an associate on who doesn't pay for himself or herself. Whether you incentivize the associate directly by telling him or her that he or she will need to work a minimum number of quality hours or you simply let go the ones who don't bill those quality hours, the message is going to be the same. Nor do I think that a fixed fee system is the answer, because, among other things, embedded within it is the incentive to make more by doing less for a client, which is not necessarily the best for the client.
7. We should also not lose sight of the fact that it is not just about hours. Its about quality hours. An associate who is not billing quality hours, i.e. hours that advance the client's cause, might as well not be billing the time at all. Most of us would not pass that time on to the client. When an associate is not billing quality hours it is a red flag that there is a problem with the associate that needs to be addressed.
8. For these reasons, I do not think we can address this issue in a rule as has been suggested. To me, the minimum standards of competent practice and the marketplace are the best protections we have. Someone who is billing without getting anything done is not going to keep a client. Although it pains me to paraphrase a Bruin, John Wooden was right when he said that one should not confuse effort with achievement. The marketplace, not the Bar, is the best judge on that score.

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October 28, 2009 Difuntorum E-mail to Voogd, cc Class Action Drafters & Time Billing Drafters (Foy, Peck), Chair & Staff:

As the lead drafter for the Class Action Rule and Time Billing Rule, I want to let you know what is expected. Selected excerpts from Commission action summaries and Kevin's meeting notes are pasted below. You will see from the excerpts that these topics have been previously discussed, but that finality has not been reached. The concept of a Time Billing Rule should, in part, be reassessed in light the Commission's proposed Rule 1.5 [4-200] (re unconscionable fees, see attached) and proposed Rule 1.15 [4-100] (re trust accounts, see attached). The concept of a Class Action Rule should, in part, be reassessed in light of the comment language (Cmt. [32]) included in proposed Rule 1.7 [3-310] (re conflicts, see attached).

At the November meeting, the Commission will be working on all of the Batch 6 rules that the Board is scheduled to issue for public comment at the Board's January 2010 meeting. Batch 6 is set to be the last batch of rules to be issued for an initial public comment distribution. Any rule proposal, not already finalized, that is expected to be included in the Commission's final comprehensive report to the Board must make the train for Batch 6.

If you and the respective codrafters on a Class Action Rule or a Time Billing Rule are in agreement that the Commission should abandon consideration, then a simple email reporting that recommendation is all that is needed for the November agenda materials. If, on the other hand, the codrafters wish to bring forward a rule to be included in Batch 6, then a revised draft of the rule is needed together with an explanation of why the rule is desirable. The explanation should be consistent with the recent Commission practice of explaining rule amendment proposals to the Board in relation to the ABA Model Rules as representative of a national standard. For the moment, don't worry about Dashboards or comparison charts for a Class Action Rule or Time Billing Rule. The goal is to place a recommendation before the Commission as to whether a Class Action Rule or a Time Billing Rule should be pursued. Hope this helps clear up the assignment. –Randy D.

P.S.

Please include Diane Karpman on your Class Action Rule (Karpethics@aol.com). For the Time Billing Rule, you might want to include Gerald Phillips (gphillips@pillaw.com) as he has written informal comment letters in support of a time billing rule (see attached letter from 2008).

SELECTED ACTION SUMMARY EXCERPTS:

Honesty in Billing/Recording Time - Proposed New Rule – COMMISSION CONSIDERATION HISTORY (2001-2007)

5/2/03 Meeting:

The Commission considered a recommendation for a proposed new rule submitted by Mr. Voogd, in consultation with the Chair. Mr. Voogd's recommendation presented the following discussion draft.

“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

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the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request.”

The Chair asked for a discussion of whether the concept of this proposal should be pursued? Among the points raised during the discussion were the following:

- (1) As a disciplinary rule, there are interpretation problems that would need to be addressed by further drafting.
- (2) The Commission must determine whether this rule is needed given the legal profession’s current industry practices.
- (3) Bus. & Prof. Code §6148(B) obviates the need for this rule.
- (4) The proposed standard of contemporaneous record-keeping would be impossible to meet in actual practice.
- (5) Consideration should be given to a different approach that focuses on the problem of falsified billing practices.
- (6) The proposal includes one component that is not addressed in existing authorities and that is a requirement for maintaining billing records. Rule 4-100 sets a records retention standard for trust account records but there is no comparable standard for billing records.
- (7) In evaluating this proposal, the Commission should review the State Bar Court’s interpretation (in the Fonte case) of an attorney’s duty to render an appropriate accounting.
- (8) Regarding assumptions about an onerous burden imposed by a contemporaneous record-keeping standard, medical doctors seem to have developed methods for similar documentation practices and this may be model for considering possible changes in law firm culture.
- (9) It is not uncommon to find, in both civil and State Bar matters, that lawyers and their clients have not kept or have destroyed billing records.

Following discussion, it was agreed that Mr. Voogd would consider all of the comments and prepare a revised recommendation. Ms. Peck volunteered to serve as back-up on the assignment.

7/11/03 Meeting:

Mr. Voogd presented his June 23, 2003 memorandum recommending a revised draft of a proposed new rule on “recording time.” As the set forth in the memorandum, the proposed new rule would be as follows:

“Rule _____. Recording Time.

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A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years.”

In addition to Mr. Voogd’s memorandum, members were directed to Ms. Peck’s June 29, 2003 memorandum offering placement alternatives for rule language addressing “recording time.” The alternatives were: (1) a new paragraph (C) in RPC 4-200; (2) a new standard to RPC 4-200 creating a presumptive violation of the rule; (3) a recommendation that the Board refer the matter to the State Bar Committee on Mandatory Fee Arbitration for consideration of an amendment to Bus. & Prof. Code §6148; (4) a recommendation that the Board refer the matter to the Judicial Council for consideration of an amendment to the California Rules of Court Standards for Judicial Administration; and (5) placement in a new “guidance” section to the RPC’s. The Chair asked for a general discussion of whether the concept of the proposed new rule should be pursued. Among the points raised during the discussion were the following:

(1) Although the ABA report and other agenda materials make a compelling case for lawyer accountability issues in billing practices, it is still not clear whether the promulgation of a new RPC is the appropriate response to these issues.

(2) As a topic, billing procedures seems to fall into the category of law office management rather ethics.

(3) Assuming this would not be a stand alone rule, including this concept as an unconscionability factor under RPC 4-200 or as discussion text to that rule still seems to be out of place. The concept probably belongs in the Bus. & Prof. Code as part of the written fee agreement statute.

(4) In one sense, this issue is analogous to the question of ‘how long to keep closed client files’ because both are real world concerns in the practice of law that do not present an immediate satisfactory answer as a rule of professional conduct proposition.

(5) The anecdotal and other evidence of abuse should be taken as a given but implementation of a disciplinary standard as a remedy is a serious policy question.

(6) Bus. & Prof. Code §6148 addresses much of this concern and any new rule text should not be redundant of existing law.

(7) Billing fraud should be the target not billing practices.

(8) Billing fraud is covered by moral turpitude and criminal sanctions but clients are in need of protection against lazy and non-existent billing records. Absent clear and precise billing statements and records, how would a client know that they have been defrauded?

(9) An ethical obligation to generate and maintain billing statements is an appropriate topic for the rules because the concept is similar to the fiduciary trust account record-keeping standards already present in RPC 4-100.

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(10) The PCLM case includes the proposition that billing records can be created after the fact.

(11) From the public's perspective, it should not be a bid deal to expect contemporaneous billing records from a professional service provider who charges by the hour. If contractors can provide a daily invoice then lawyers should be able to do so as well.

(12) The common practice of documenting billable hours to support court awarded fees is distinguishable from the instant issue because an across-the-board new rule on billing practices would intrude into the contractual relationship negotiated between nearly every attorney and client.

(13) In the legal services arena time records ordinarily are for the benefit of third-party payors rather than indigent clients.

(14) Estimated hours and rounded hours offend the general fiduciary duty of a lawyer to prefer a client's best interest over that of the lawyer's.

(15) From the perspective of State Bar prosecutorial discretion, billing issues are matters that may be diverted to fee arbitration or other civil remedies; however, if RPC 4-200 is changed from unconscionable to unreasonable fees then this could change.

(16) As a prohibition, unconscionability and RPC 4-200 are triggered by a complete failure in the billing relationship between lawyer and client. This is different from a standard intended as a general business practice guideline. Put another way, although charging an unreasonable fee can and should taint enforceability, it should not necessarily implicate discipline.

Following discussion, a consensus vote revealed that the Commission supported the concept of a "recording time" standard as a new component to be placed somewhere in the rules (rule text, discussion text, or Board adopted standard). The codrafters were asked to prepare a further draft and recommendation in accordance with the points raised in the discussion. Mr. Melchior was added as a new codrafter.

9/5/03 Meeting: Matter carried over.

10/24/03 Meeting: Matter carried over.

2/20/04 Meeting:

The Commission considered a February 5, 2004 revised draft of a proposed new rule on recording time. As an alternative to a new rule, it was suggested that a new factor be added to RPC 4-200 regarding factors to consider in determining whether a fee charged is unconscionable. It was also suggested that a records retention period be specified in the proposed new rule. After this brief discussion, the co-drafters were asked to prepare a redraft for the next meeting.

5/7/04 Meeting:

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The Commission considered a March 25, 2004 memorandum by Mr. Voogd presenting a revised draft new rule. The Commission discussed possible options for variations on the concept Mr. Voogd's

On a proposal to explore a new rule or rule amendment addressing honesty in billing practices (patterned on current rule 2-400 that requires a civil finding before any disciplinary sanction), the Commission voted 8 yes, 1 no, and 1 abstain.

Among the points raised in the course of the discussion were the following.

- (1) The report from the ABA Solo Practice Section includes findings indicating public concerns that lawyers charge too much and are unwilling to account for fees and billing practices.
- (2) Feedback offered at the 2004 State Bar Annual Ethics Symposium suggests a level of interest in self-regulating this area.
- (3) It may be possible to address the asserted concerns under RPC 4-200 rather than in a new rule.
- (4) The Commission should seek to establish necessary public protection standards but should not pander to public approbation of lawyers.
- (5) Maintaining public confidence is a valid purpose of the RPCs.
- (6) Micro-managing billing is not an appropriate function of the RPCs. The rocky relations between insurance defense lawyers and insurance companies would likely be exacerbated by billing standards under penalty of State Bar discipline.
- (7) Billing fraud is difficult to prove in a civil matter. A new rule would be helpful.
- (8) Billing fraud is already covered by B&P Code sec. 6106.
- (9) Many excessive and double-billing claims are dependent upon the actual terms of the specific fee agreement at issue and the conduct of the lawyer and client in abiding (or not abiding) by those terms. A one size fits all standard that is successful in imposing certainty in these situations may be difficult to construct.
- (10) Law firm culture could be positively impacted by the State Bar's leadership role in cleaning-up billing practices that are tantamount to fraud. The Legislature has demonstrated an interest in reforming consumer protection in the hiring of lawyers.

8/27-28/04 Meeting:

The Commission considered an 8/1/04 draft suggested by Robert Sall, COPRAC Liaison. Mr. Voogd presented the background of the proposed new rule. The Commission considered a motion to defer any discussion of this proposal until the Commission considers RPC's 4-100 and/or 4-200. This motion passed by a vote of 5 yes, 0 no, and 3 abstain.

* * *

Attached:

Rule 1.5 materials

Rule 1.7 materials

Rule 1.15 materials

8/18/08 Gerald Phillips Comment to RRC re hourly billing

October 28, 2009 Difuntorum E-mail to Voogd, cc Drafters, Chair & Staff:

For your convenient reference here is the proposed billing rule previously recommended by Rob Sall (former COPRAC member, former Chair of the State Bar Committee on Mandatory Fee Arbitration).

October 28, 2009 Peck E-mail to Voogd, cc Drafters, Chair & Staff:

While I am sympathetic to the concept of the proposed time billing rule, I think that we will not be able to reach consensus concerning a proposed standard. Therefore, as a member of the drafting team, I propose that we abandon the project. This issue can be taken up by the RRC II.

If you want to continue, I will support you. However, I think life is too short for this one.

October 28, 2009 Martinez E-mail to Voogd, cc Drafters, Chair & Staff:

I agree with Ellen on the time billing rule,

October 28, 2009 Tuft E-mail to Voogd, cc Drafters, Chair & Staff:

The members of RRC II may still be a gleam in their mothers' eyes.

October 28, 2009 Sapiro E-mail to Voogd, cc Drafters, Chair & Staff:

I agree with Ellen that we should not resurrect the time billing rule.