

**Rule 1.13 Organization as Client**  
**(Commission's Proposed Rule – Clean Version)**

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official or body of the organization other than the individual who is to be represented, or by the shareholders.

## COMMENT

### *The Entity as the Client*

- [1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [13]. An organizational client cannot act except through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.
- [2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with the constituent(s) authorized by the organization or by law to instruct or communicate with the lawyer with respect to the matter for which the organization has retained the lawyer.
- [3] When a constituent of an organizational client communicates with the organization's lawyer in that constituent's organizational capacity, the communication is protected by Rule 1.6 and Business and Professions Code section 6068(e). Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6 and Business and Professions Code section 6068(e). This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except as permitted by Rule 1.6 or by Business and Professions Code section 6068(e).
- [4] When constituents of an organization make decisions for it, a lawyer ordinarily must accept those decisions even if their utility or prudence is doubtful. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (b) involves one aspect of that duty. It applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i) violates a legal obligation to the organization or is a violation of law reasonably imputable to the organization, and (ii) is likely to result in substantial injury to the organization. In those circumstances, the lawyer must proceed as is reasonably necessary in the best lawful interest of the organization.
- [5] Paragraph (b) applies when a lawyer knows that an officer or other constituent of the organization intends to engage, is engaging or has engaged in the conduct. Under this knowledge standard, a lawyer is not required to audit the client's activities or initiate an investigation to uncover the existence of such conduct. Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. See Rule 1.0.1(f).

[6] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization. The "knows or reasonably should know" standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that trigger the lawyer's obligations under paragraph (b).

[7] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the

constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[8] Paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[9] Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For example, if a lawyer acting on behalf of an organizational client knows that an actual or apparent agent of the organization acts or intends or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is a violation of a legal duty to the organization or a violation of law reasonably imputable to the organization, but the lawyer does not know or reasonably should know that such conduct is likely to result in substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Rule 1.6 and Business and Professions Code section 6068(e), the lawyer may take such actions as appear to the lawyer to be in the best lawful interest of the organization. Such actions may include among others (i) urging reconsideration of the

matter while explaining its likely consequences to the organization; or (ii) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, to the highest authority, as determined by applicable law, that can act on behalf of the organization.

- [10] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal and the reason for the lawyer's discharge or withdrawal.
- [11] Proceeding in the best lawful interest of the organization under this Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

#### *Relation to Other Rules*

- [12] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.4, 1.6, 1.16, 3.3, 4.1, or the 1.8 series of Rules.

- [13] Absent circumstances that would require withdrawal under paragraph (d), the lawyer may continue to represent an organizational client if, despite the lawyer's actions under paragraph (b), the constituent continues to insist on or continues to act or refuse to act in a manner that triggers the application of paragraph (b). Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16. Where the lawyer continues to represent the organization, the lawyer must proceed as is reasonably necessary in the best lawful interests of the organization, including continuing to urge reconsideration, where appropriate. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1).

#### *Governmental Organizations*

- [14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by

the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.

- [15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Rule 1.6 or Business and Professions Code section 6068(e), a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.

*Clarifying the Lawyer's Role*

- [16] There are times when the lawyer knows or reasonably should know that the organization's interest may be or become adverse to those of one or more of its constituents or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent. Under paragraph (f), in such circumstances the lawyer must not mislead the constituent into believing that a lawyer-client relationship exists between the lawyer and the constituent when such is not the case and shall make a reasonable effort to correct a constituent's mistaken belief in that regard. In such circumstances, the lawyer must advise the constituent that the lawyer does not represent the constituent and that communications between the lawyer and the constituent are not confidential as to the organization and may be disclosed to the organization or used for the benefit of the organization. See Rule 4.3

*Dual Representation*

- [17] Paragraph (g) allows lawyers to represent both an organization and a constituent of an organization in the same matter, so long as the lawyer complies with these Rules, including Rules 1.7, 1.8.2, 1.8.6, and 1.8.7. Paragraph (g) requires that the organization's consent to dual representation of the organization and a constituent of the organization must be provided by someone other than the constituent who is to be represented. When there is no appropriate official of the organization to provide consent and the appropriate body of the organization is deadlocked, consent may be given by the shareholders of the organization to the extent allowed by law or by the rules or regulations governing the conduct of the organization's affairs. When there is no appropriate official, body or ownership group that can consent for the organization, the constituent to be represented in the dual representation may provide such consent in some cases. As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership.
- [18] This Rule does not prohibit lawyers from representing both an organization and a constituent of an organization in separate matters, so long as the lawyer has addressed the conflicts of interest that may arise. In dealing with a close corporation or small association, lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v.*

*Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)