

**McCurdy, Lauren**

RE: 1.13  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.AA.

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Wednesday, June 16, 2010 6:30 PM  
**To:** Kevin Mohr  
**Cc:** Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren; Robert L. Kehr; Kurt Melchior (E-mail); Dominique Snyder  
**Subject:** RE: Comment Chart on Rule 1.13

Well done, Kevin. Thank you.

Mark L. Tuft  
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=====  
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=====  
**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Wednesday, June 16, 2010 6:14 PM  
**To:** Mark Tuft  
**Cc:** Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren; Robert L. Kehr; Kurt Melchior (E-mail); Dominique Snyder  
**Subject:** Re: Comment Chart on Rule 1.13

Greetings all:

I've attached XDFT 2.2 (6/16/10) of the Chart, which includes the changes I made in the draft I

circulated earlier today, and Mark's proposed responses to OCTC. I've also deleted the word "limited" in the response to OCBA, so that the sentence begins, "In the circumstances that trigger ..."

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

Mark Tuft wrote:

<<636763\_1.DOC>>

Here is a revised commenters' chart that picks OCTC comments on Rule 1.13 with proposed responses.

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## Difuntorum, Randall

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**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Wednesday, June 16, 2010 9:04 AM  
**To:** Kevin Mohr; Robert L. Kehr  
**Cc:** Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Kurt Melchior (E-mail); Dominique Snyder; Difuntorum, Randall; McCurdy, Lauren  
**Subject:** RE: Comment Chart to Rule 1.13 June 25-26, 2010 agenda item AA

I would not refer to the circumstances that trigger paragraph (b) as "limited." Otherwise, ok.

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=====  
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=====

**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Wednesday, June 16, 2010 7:20 AM  
**To:** Robert L. Kehr  
**Cc:** Mark Tuft; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Kurt Melchior (E-mail); Dominique Snyder; Difuntorum, Randall; McCurdy, Lauren  
**Subject:** Re: Comment Chart to Rule 1.13 June 25-26, 2010 agenda item AA

Greetings:

I've attached Draft 2.1 (6/16/10) of the Public Comment Chart, which does the following:

1. I've added the comments of OCTC and Zitrin et al. I've inserted a response to Zitrin but left the response to OCTC blank for now.
2. I've placed the Commenters in alphabetical order.
3. I've made Bob's suggested change in his item #1, below.
4. I've made Kurt's nit changes, w/ which all the drafters who have responded so far agree.
5. I've added Bob's suggested addition in his item #2, below. I think it's an important point we should emphasize in the response.

Revisions are highlighted in yellow.

Other Comments:

1. Re Bob #3. I think the response is fine but it can be discussed at the meeting.
2. Re Bob #4. I agree we should discuss at the meeting.
3. Re Bob #5. I don't see any reason to change the language in paragraph (d) at this late date. The language is simply carried forward from current rule 3-600(C). As drafted, the language emphasizes that under the appropriate circumstances, it is not just discretionary with the lawyer whether to withdraw/resign, but an obligation. I would leave it as is.
  - a. Related to this is OCTC's comment #2 re whether there is a less drastic option for in-house counsel to resigning. See Cal. Ethics Op. 2003-163, which might provide some useful language concerning this. The digest of that opinion states in part: "If the lawyer's duty of competent representation of the corporation requires the lawyer to provide advice to the corporation adverse to the constituent, then the lawyer must withdraw if providing such advice to the corporation would violate the lawyer's duties to the constituent. The lawyer is not required to withdraw as to any other matter. The lawyer must withdraw in a manner that does not violate her duties to the corporation or to the officer."

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc

Robert L. Kehr wrote:

Mark and all:

1. I join with Kurt (his message was at 4:03) in supporting the RRC Response to the O.C. comment. That Response seems to me to be entirely correct. Kurt has suggested that we

emphasize in the Response the trigger to any duty under paragraph (b). I have no objection to that but, given the other comment about the "know or reasonably should know" standard, we should accommodate Kurt's point without quoting the language. We could accommodate any resolution on that point, for example, by changing the fifth sentence of the Response to say:

"If In the limited circumstances that trigger a lawyer's duty under paragraph (b), ..."

2. Kurt also points out that O.C. has missed the key point that, under Rule 1.13 the organization is the client so that reporting up the ladder has nothing to do with Rule 1.6. Again, I have no objection to Kurt's comment, which could be handled by inserting a new sentence after what now is the third sentence, along the following lines: "Reporting up the ladder does not violate Rule 1.6 because the client is the organization and the report is made only to the organization." I have no strong feeling about this.

3. COPRAC's comment on Comment [5] seems to me to be a *non sequitur*, but in any event I don't think the Response covers it. The non-audit, which I think is important, is specific to the lawyer's knowledge of the facts and has no application to the lawyer's understanding of the significance of the facts.

4. I'm afraid that I don't see the fix to paragraph (g) and Comment [17] that you refer to you in your email. Perhaps we can pick this point up at the meeting as I think we are to the point at which additional emails are going to be hard to process.

5. The problem with regard to the Rule 1.16 reference is that paragraph (d) is not quite right. It currently says: "The lawyer's response may include the right, and where appropriate, the duty to resign or withdraw in accordance with Rule 1.16." The error in this is that the placement of "where appropriate" causes it to modify only "duty" while it also should modify "right". A lawyer's right to terminate a representation is limited by Rule 1.16. I suggest we change the paragraph (d) sentence to say: "The lawyer's response may include an explanation of the lawyer's right or duty to withdraw from the representation in accordance with Rule 1.16." ("withdraw" is the word used throughout Rule 1.16). Also, in the draft Response, there is an error in the reference to Rule 1.6 rather than 1.16.

rlk

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**From:** Mark Tuft [<mailto:MTuft@cwclaw.com>]

**Sent:** Tuesday, June 15, 2010 3:29 PM

**To:** Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Kurt Melchior (E-mail); Robert L. Kehr; Dominique Snyder

**Cc:** Difuntorum, Randall; McCurdy, Lauren

**Subject:** Comment Chart to Rule 1.13

<<636763\_1.DOC>>

Fellow drafters and dearest friends:

Attached for your review and blessing are proposed responses to comments to proposed rule 1.13 received from San Diego, Orange Co and COPRAC.

Two issues warrant close attention:

1. COPRAC argues that we should drop the "ought to know" standard in paragraph (b) and stay with the Model Rule's "actual knowledge" standard both in regard to the constituent's act or omission and whether it is illegal and will substantially injury the organization. While I have defended the Commission's decision in the proposed response, I agree with COPRAC that this is a significant policy issue worthy of reconsideration by the Commission.

2. I have agreed with COPRAC's final comment regarding paragraph (g) and Comment [17] and have proposed a fix in the response column. Let me know if you agree.

--  
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**Rule 1-13 Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	COPRAC	M	Yes		<p>COPRAC agrees that the rule should not permit a lawyer to report outside of the organization as the Model Rule permits. To do so would be contrary to California's statutory protections and historical view on the importance of confidentiality.</p> <p>However, the addition of the objective standard in paragraph (b) is troublesome in that a lawyer could be subject to discipline if he or she "reasonably should have known" that an act is illegal and likely to result in substantial injury to the organization. This language goes beyond both the current California rule and the Model Rule and appears to be unprecedented. What constitutes "reasonably should have known"? Will a tax lawyer be deemed to "reasonably should have known" that an action violates antitrust laws if it is outside the scope of the matter on which he or she is working? If he or she is working for a national firm with lawyers who practice in such areas, will the lawyer be held to a higher standard (essentially imputing the knowledge of others at the firm to that lawyer)?</p>	<p>No response necessary.</p> <p>The Commission disagreed and did not make any revisions to the Rule. The Commission believes that requiring a lawyer to act when the lawyer has <i>actual knowledge</i> of a constituent's act or failure to act in a matter <i>that relates to the lawyer's representation</i> and knows or <i>reasonably</i> should know that the conduct meets the criteria under paragraph (b) strikes the proper balance in protecting the organization and the public. Having an objective rather than an actual knowledge standard alerts lawyers that ignoring violations of law that will likely <i>injure</i> the organization is no longer an option. "Reasonably should know" is a defined term in the Rules and means that a lawyer of reasonable prudence and competence would ascertain the matter at issue. See Proposed Rule 1.0(j). "Reasonably" is also a defined term and refers to conduct of a reasonable prudent and competent lawyer. Proposed Rule 1.0(h). Comment [6] (rather than Comment [5]) explains the</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.13: Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Comment [5] says that a lawyer is not required to audit the client's activities or initiate an investigation, but that statement is directed to the portion of paragraph (b) that deals with knowledge of the conduct (not the consequences thereof). For these reasons, COPRAC believes that knowledge also should be the standard with respect to the consequences of the conduct.</p> <p>Further, paragraph (b) mandates that a lawyer refer such matters to a higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." While urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed in Comment [7], it is only mentioned as a possibility "in some circumstances." COPRAC recognizes that some occasions may arise in which reporting up the ladder may be necessary, however, contrary to the suggestion of Comment [7], COPRAC believes that in certain situations, urging reconsideration should be the first response. If the general rule becomes reporting up the ladder, the free flow of communication that is essential to the attorney-client relationship will most certainly be damaged, possibly beyond repair, as the</p>	<p>"reasonably should know" standard in the context of the Rule and advises lawyers 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 under paragraph (b) that requires action on the lawyer's part.</p> <p>See response to Orange County Bar Association (above).</p>

**Rule 1.13 Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>constituents with whom the lawyer communicates on a regular basis will think twice about speaking openly with counsel. Consequently, COPRAC believes that urging reconsideration should be included in the text of the rule itself as an optional first step, except in exigent circumstances.</p> <p>Similarly, while paragraph (g) requires independent consent for dual representation, Comment [17] recognizes this is not always possible and, therefore, not always required. COPRAC believes that this exception also should be included in the text of the rule.</p> <p>With regard to Comment [17], COPRAC notes that the third sentence appears to be much more restrictive than the language of paragraph (g) that it is interpreting. Paragraph (g) simply permits shareholders to provide consent to dual representation, whereas Comment [17] implies that shareholders may consent only when there is no official to consent and the board is deadlocked. Neither condition is mandated by the rule, and there is no reason for both to be required.</p> <p>Finally, the last sentence of paragraph (d) says that "[t]he lawyer's response may include</p>	<p>No change in paragraph (g) is necessary. Paragraph (g) closely tracks Model Rule 1.13(g) and Comment [17], which is derived from State Bar Formal Opinion 1993-153, is sufficient to point out there are circumstances when independent consent may not be possible.</p> <p>No change is necessary. The third sentence in Comment [17] is consistent with paragraph (g). Neither the Rule nor the Comment refers to shareholders. The Rule refers to other official or body of the organization while Comment [17] refers to other constituent of the organization.</p> <p>The Commission agreed and has changed the last sentence in Comment [13] to read: Paragraph (d)</p>

**Rule 1.13. Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16." Comment [13] attempts to rephrase this in the following terms: "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." However, paragraph (d) does not seem to "confirm" such a restriction, but rather merely notes that the duty to resign or withdraw may be a permissible response. As the sentence appears to be unnecessary to Comment [13], COPRAC suggests that it be deleted.	confirms that the lawyer's response may include the right, and where appropriate, the duty to resign or withdraw in accordance with Rule 1.6."
4	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.13(b)	<p>1. The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.</p> <p>2. OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her</p>	<p>1. The Commission disagrees and no change to paragraph (b) has been made. The quoted phrase comes directly from Model Rule 1.13(b) and is intended to include constituents of the organization who are not officers or employees.</p> <p>2. Paragraph (a) expressly provides that the rule applies to lawyers "employed or retained" by the organization. The clear intent of the rule is to apply to all lawyers who represent organizational clients including in-house counsel. Paragraph (d) provides that the lawyer's response "may include the lawyer's right and, where appropriate, duty to resign or withdraw <u>in accordance with rule 1.16.</u>" Rule 1.16 applies to in-house and outside counsel. Thus, the</p>

**Rule 1.13: Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment's to the rule distinguish the circumstances requiring an in-house counsel's withdrawal from representation of the organization to the in-house counsel's resignation.</p> <p>3. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>appropriate response takes into account the circumstances and what is in the best lawful interests of the organization. Distinguishing the circumstances requiring an in-house counsel's withdrawal from the representation from resignation in the comments to the rule is not necessary and would vary depending on the specific circumstances.</p> <p>3. The Commission disagrees and no change has been made. Like the Model Rules, the comments are intended to provide explanation and guidance to lawyers in complying with the rule.</p>
2	Orange County Bar Association ("OCBA")	M	Yes	1.13(b)	<p>We believe Proposed Rule 1.13 is inconsistent with the position taken in Proposed Rule 1.6 concerning confidential client information. Proposed Rule 1.6(b) restricts permissible disclosure of confidential client information to five limited circumstances, but does not mandate such disclosures if the lawyer chooses not to reveal such information. Further, even in situations where the lawyer reasonably believes that a criminal act by the client is likely to result in substantial bodily harm or death, Proposed Rule 1.6 first requires that the lawyer attempt</p>	<p>The Commission disagrees and has not made the requested changes to the rule. Rule 1.13 is consistent with proposed Rule 1.6. Indeed, paragraph (c) provides that in taking any action pursuant to paragraph (b) the lawyer shall not violate his or her duty to protect all confidential client information. Moreover, reporting up the ladder within the client organization does not violate Rule 1.6 because the client is the organization and the report is made only to the organization. Further, paragraph (b) does not mandate "up the ladder" reporting as the lawyer's first response. In the circumstances that trigger a lawyer's duty under</p>

**Rule 1.13 Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [14], [15]	<p>to persuade the client not to take such action, if doing so is reasonable under the circumstances. In contrast, Proposed Rule 1.13(b) <i>mandates</i> that a lawyer refer certain matters to higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." Urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed not in the rule itself, but rather in Comment [7] to Proposed Rule 1.13 as a possibility "in some circumstances," <i>i.e.</i>, as the "exception to the rule" of reporting up the ladder.</p> <p>The OCBA recognizes that the five limited circumstances in Proposed Rule 1.6(b) anticipate disclosure to a non-client, whereas Proposed Rule 1.13(b) provides disclosure to a higher authority within the client organization, although Comments [14] and [15] to Proposed Rule 1.13 note that, at times, such a higher authority may be outside of the organization. Nonetheless, suggesting that a lawyer immediately report "up the ladder" rather than urging reconsideration as an initial step would conflict with the policies furthered by the duty of confidentiality as set forth in Comment [2] to Proposed Rule 1.6. The policies furthered by the duty of confidentiality</p>	<p>paragraph (b), the lawyer's response is to proceed in the best lawful interests of the organization, which may include urging reconsideration. Comment [7] does not suggest that asking a constituent to reconsider the matter is an exception to the lawyer's obligations under paragraph (b). Paragraph (b) obligates the lawyer to refer the matter to higher authority unless the lawyer reasonably believes it is not necessary in the best lawful interests of the organization to do so. Thus, the Rule does not mandate that a lawyer immediately report up the ladder rather than urging reconsideration as the first step. The Commission disagreed that urging reconsideration as a prerequisite to reporting up the ladder needs to be expressly stated in paragraph (b)</p> <p>The Commission believes the proposed Rule better promotes the policies furthered by the duty of confidentiality owed to the organization as described in Rule 1.6, Comment [2]. Comments [14] and [15] provide guidance on identifying the government client including the highest authority for purposes of the rule and do not detract from Rule 1.6.</p>

**Rule 1.13: Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					include encouraging the client "to seek legal assistance and to communicate fully and frankly with the lawyer." The Comment recognizes that "[t]he lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." However, if the lawyer's first response is the report up the ladder, constituents likely will not advise the lawyer of matters he or she may need to know in connection with the representation, chilling the communication necessary to such representation since the information needed usually will not be provided by the highest authority in the organization, but by its lower-level constituents. We believe that urging reconsideration should be, absent exigent circumstances, a prerequisite to reporting up the ladder and should be expressly included as such in the text of the rule itself. Such a step is particularly important, as the lawyer: (a) may be mistaken about what is in the best interest of the organization; (b) may not understand the constituent's reasons for taking such actions; or (c) may be able to persuade the constituent that his or her intended actions would be ill-advised.	
1	San Diego County Bar Association	A	Yes		Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code section 6068(e) on confidentiality.	No response necessary.

**Rule 1.13. Organization as Client**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Zitrin, Richard (on behalf of law professors)		Yes		it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.	No response necessary.

**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 Business and Professions Code section 6068(e)(1).
- (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)(1). 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 section 6068(e)(1). 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 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 Business and Professions Code section 6068(e)(1), 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 Business and Professions Code section 6068(e)(1) or Rule 1.6, 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].)

**June 9, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.0 (Agenda Item III.A)
- 3.3 (Agenda Item III.MM)
- 4.3 (Agenda Item III.WW)
- 5.1 (Agenda Item III.ZZ)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf  
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc  
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf  
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc  
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf  
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc  
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf  
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc  
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf  
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

**June 14, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

New comments in opposition or recommending modifications have been received for the following rules and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

- 1.10 (Agenda Item III.X)
- 1.13 (Agenda Item III.AA)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 3-600 [1-13] - Public Comment Complete - REV (06-14-10).pdf  
RRC – 3-310 [1-10] - Public Comment Complete - REV (06-14-10).pdf  
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc  
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc

**June 15, 2010 Tuft E-mail to Drafters (Kehr, Melchior, Mohr & Snyder), cc Staff:**

Attached for your review and blessing are proposed responses to comments to proposed rule 1.13 received from San Diego, Orange Co and COPRAC.

Two issues warrant close attention:

1. COPRAC argues that we should drop the "ought to know" standard in paragraph (b) and stay with the Model Rule's "actual knowledge" standard both in regard to the constituent's act or omission and whether it is illegal and will substantially injure the organization. While I have defended the Commission's decision in the proposed response, I agree with COPRAC that this is a significant policy issue worthy of reconsideration by the Commission.
2. I have agreed with COPRAC's final comment regarding paragraph (g) and Comment [17] and have proposed a fix in the response column. Let me know if you agree.

***Attached:***

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

**June 15, 2010 Kehr E-mail to Tuft, cc Drafters & Staff:**

Did you intend to refer to Comment [13] and paragraph (d) rather than to Comment [17] and paragraph (g)?

**June 15, 2010 Tuft E-mail to Kehr, cc Drafters & Staff:**

The comment chart responds to COPRAC's comments regarding both. My email highlights the comment regarding paragraph (g) and comment [17].

**June 15, 2010 Melchior E-mail to Drafters, cc Staff:**

I think that the response to OCBA is basically correct; but I suggest two additional points, first as follows (in red):

Paragraph (b) is triggered only where the lawyer "knows or reasonably should know" that the conduct in question is "likely to result in substantial injury to the organization," and then only obligates the lawyer to refer the matter to higher authority unless the lawyer reasonably believes it is not necessary in the best lawful interests of the organization to do so.

The important point which OCBA misses altogether is that (b) only kicks in after a significant trigger is activated..

Secondly, OCBA refers to disclosure to a non-client and throughout its comments considers that the constituent with whom the lawyer deals is the client. That of course puts the entire matter upside down: the point of the entire rule is that the organization, not its agent, is the client. Should we not also correct that argument?

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Re COPRAC's concerns, I have a different perspective: this is an exceptionally sensitive area, in which perhaps my usual objections to advisory musings may be less applicable, so that the Comments are probably appropriate. I continue to wrestle with that question. I also think that the Comments are essentially correct, although it's been a long time since we had them before us. Off the top of my head, I think that the Comments are correct and that the answers are proper, but I wouldn't mind opening this up to discussion , esp. given the nature of the critic.

Two nits: on line 6, the word should be "reasonable;" and 5 lines down on the next page the word should be "injure."

---

Re objection to comment 17, I agree with the response but continue to believe that there are relatively rare situations where dual representation should be allowed though there is no uninvolved party to provide consent. I have seen several instances where, e.g., one of two members sues the organization and the other member. Despite *Forrest v. Baeza* (which dealt with 3-600 as it stands), there is no reason why the defendants should need to spend money on separate representation of the two responding parties. But we do not address that issue.

**June 15, 2010 Tuft E-mail to Drafters, cc Staff:**

I agree with Kurt's first comment.

I do not believe a further response to OCBA's comment is necessary.

I am in favor of the current objective standard paragraph (b) for the reasons stated but do not oppose a discussion of COPRAC's position at the meeting.

I agree with Kurt's nits.

**June 15, 2010 Kehr E-mail to Drafters, cc Staff:**

1. I join with Kurt (his message was at 4:03) in supporting the RRC Response to the O.C. comment. That Response seems to me to be entirely correct. Kurt has suggested that we emphasize in the Response the trigger to any duty under paragraph (b). I have no objection to that but, given the other comment about the "know or reasonably should know" standard, we should accommodate Kurt's point without quoting the language. We could accommodate any resolution on that point, for example, by changing the fifth sentence of the Response to say:

“If In the limited circumstances that trigger a lawyer’s duty under paragraph (b), ....”

2. Kurt also points out that O.C. has missed the key point that, under Rule 1.13 the organization is the client so that reporting up the ladder has nothing to do with Rule 1.6. Again, I have no objection to Kurt’s comment, which could be handled by inserting a new sentence after what now is the third sentence, along the following lines: “Reporting up the ladder does not violate Rule 1.6 because the client is the organization and the report is made only to the organization.” I have no strong feeling about this.

3. COPRAC’s comment on Comment [5] seems to me to be a *non sequitur*, but in any event I don’t think the Response covers it. The non-audit, which I think is important, is specific to the lawyer’s knowledge of the facts and has no application to the lawyer’s understanding of the significance of the facts.

4. I’m afraid that I don’t see the fix to paragraph (g) and Comment [17] that you refer to in your email. Perhaps we can pick this point up at the meeting as I think we are to the point at which additional emails are going to be hard to process.

5. The problem with regard to the Rule 1.16 reference is that paragraph (d) is not quite right. It currently says: “The lawyer’s response may include the right, and where appropriate, the duty to resign or withdraw in accordance with Rule 1.16.” The error in this is that the placement of “where appropriate” causes it to modify only “duty” while it also should modify “right”. A lawyer’s right to terminate a representation is limited by Rule 1.16. I suggest we change the paragraph (d) sentence to say: “The lawyer’s response may include an explanation of the lawyer’s right or duty to withdraw from the representation in accordance with Rule 1.16.” (“withdraw” is the word used throughout Rule 1.16). Also, in the draft Response, there is an error in the reference to Rule 1.6 rather than 1.16.

**June 15, 2010 Tuft E-mail to Kehr, cc Drafters & Staff:**

I agree with your comment No. 4.

**June 15, 2010 KEM E-mail to Drafters, cc Staff:**

I’ve attached Draft 2.1 (6/16/10) of the Public Comment Chart, which does the following:

1. I’ve added the comments of OCTC and Zitrin et al. I’ve inserted a response to Zitrin but left the response to OCTC blank for now.
2. I’ve placed the Commenters in alphabetical order.
3. I’ve made Bob’s suggested change in his item #1, below.
4. I’ve made Kurt’s nit changes, w/ which all the drafters who have responded so far agree.
5. I’ve added Bob’s suggested addition in his item #2, below. I think it’s an important point we should emphasize in the response.

Revisions are highlighted in yellow.

Other Comments:

1. Re Bob #3. I think the response is fine but it can be discussed at the meeting.
2. Re Bob #4. I agree we should discuss at the meeting.
3. Re Bob #5. I don't see any reason to change the language in paragraph (d) at this late date. The language is simply carried forward from current rule 3-600(C). As drafted, the language emphasizes that under the appropriate circumstances, it is not just discretionary with the lawyer whether to withdraw/resign, but an obligation. I would leave it as is.
  - a. Related to this is OCTC's comment #2 re whether there is a less drastic option for in-house counsel to resigning. See Cal. Ethics Op. 2003-163, which might provide some useful language concerning this. The digest of that opinion states in part: "If the lawyer's duty of competent representation of the corporation requires the lawyer to provide advice to the corporation adverse to the constituent, then the lawyer must withdraw if providing such advice to the corporation would violate the lawyer's duties to the constituent. The lawyer is not required to withdraw as to any other matter. The lawyer must withdraw in a manner that does not violate her duties to the corporation or to the officer."

Please let me know if you have any questions.

**Attached:**

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc

**June 16, 2010 Tuft E-mail to Drafters, cc Staff:**

I would not refer to the circumstances that trigger paragraph (b) as "limited." Otherwise, ok.

**June 16, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date

<http://sites.google.com/site/commentsrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

**RRC – Rule 1.13 [3-600]  
E-mails, etc. – Revised (6/21/2010)**

**MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**5.1** (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

**5.2** (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)

**5.3** (Agenda Item III.BBB) - OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

**June 16, 2010 Tuft E-mail to Drafters, cc Staff:**

Here is a revised commenters' chart that picks OCTC comments on Rule 1.13 with proposed responses.

***Attached:***

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

**June 16, 2010 KEM E-mail to Drafters, cc Staff:**

I've attached XDFT 2.2 (6/16/10) of the Chart, which includes the changes I made in the draft I circulated earlier today, and Mark's proposed responses to OCTC. I've also deleted the word "limited" in the response to OCBA, so that the sentence begins, "In the circumstances that trigger ..."

Please let me know if you have any questions.

**Attached:**

RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

**June 16, 2010 Tuft E-mail to KEM, cc Drafters & Staff:**

Well done, Kevin. Thank you.

**June 16, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date

<http://sites.google.com/site/commentsrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK)- OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 5.1 (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 5.2 (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 5.3 (Agenda Item III.BBB) - OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

**June 21, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a

**RRC – Rule 1.13 [3-600]  
E-mails, etc. – Revised (6/21/2010)**

number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc  
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc  
RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc  
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc  
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

**Rule 1.13. Organization as Client.  
[Sorted by Commenter]**

TOTAL = 5 Agree = 1  
Disagree = 0  
Modify = 3  
NI = 1

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	COPRAC	M	Yes		<p>COPRAC agrees that the rule should not permit a lawyer to report outside of the organization as the Model Rule permits. To do so would be contrary to California's statutory protections and historical view on the importance of confidentiality.</p> <p>However, the addition of the objective standard in paragraph (b) is troublesome in that a lawyer could be subject to discipline if he or she "reasonably should have known" that an act is illegal and likely to result in substantial injury to the organization. This language goes beyond both the current California rule and the Model Rule and appears to be unprecedented. What constitutes "reasonably should have known"? Will a tax lawyer be deemed to "reasonably should have known" that an action violates antitrust laws if it is outside the scope of the matter on which he or she is working? If he or she is working for a national firm with lawyers who practice in such areas, will the lawyer be held to a higher standard (essentially imputing the knowledge of others at the firm to that lawyer)?</p>	<p>No response necessary.</p> <p>The Commission disagreed and did not make any revisions to the Rule. The Commission believes that requiring a lawyer to act when the lawyer has <i>actual knowledge</i> of a constituent's act or failure to act in a matter <i>that relates to the lawyer's representation</i> and knows or <b>reasonably</b> should know that the conduct meets the criteria under paragraph (b) strikes the proper balance in protecting the organization and the public. Having an objective rather than an actual knowledge standard alerts lawyers that ignoring violations of law that will likely <b>injure</b> the organization is no longer an option. "Reasonably should know" is a defined term in the Rules and means that a lawyer of reasonable prudence and competence would ascertain the matter at issue. See Proposed Rule 1.0(j). "Reasonably" is also a defined term and refers to conduct of a reasonable prudent and competent lawyer. Proposed Rule 1.0(h). Comment [6] (rather than Comment [5]) explains the</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.13. Organization as Client.  
[Sorted by Commenter]**

TOTAL = 5 Agree = 1  
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					<p>Comment [5] says that a lawyer is not required to audit the client's activities or initiate an investigation, but that statement is directed to the portion of paragraph (b) that deals with knowledge of the conduct (not the consequences thereof). For these reasons, COPRAC believes that knowledge also should be the standard with respect to the consequences of the conduct.</p> <p>Further, paragraph (b) mandates that a lawyer refer such matters to a higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." While urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed in Comment [7], it is only mentioned as a possibility "in some circumstances." COPRAC recognizes that some occasions may arise in which reporting up the ladder may be necessary, however, contrary to the suggestion of Comment [7], COPRAC believes that in certain situations, urging reconsideration should be the first response. If the general rule becomes reporting up the ladder, the free flow of communication that is essential to the attorney-client relationship will most certainly be damaged, possibly beyond repair, as the</p>	<p>"reasonably should know" standard in the context of the Rule and advises lawyers 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 under paragraph (b) that requires action on the lawyer's part.</p> <p>See response to Orange County Bar Association (above).</p>

**Rule 1.13. Organization as Client.  
[Sorted by Commenter]**

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					<p>constituents with whom the lawyer communicates on a regular basis will think twice about speaking openly with counsel. Consequently, COPRAC believes that urging reconsideration should be included in the text of the rule itself as an optional first step, except in exigent circumstances.</p> <p>Similarly, while paragraph (g) requires independent consent for dual representation, Comment [17] recognizes this is not always possible and, therefore, not always required. COPRAC believes that this exception also should be included in the text of the rule.</p> <p>With regard to Comment [17], COPRAC notes that the third sentence appears to be much more restrictive than the language of paragraph (g) that it is interpreting. Paragraph (g) simply permits shareholders to provide consent to dual representation, whereas Comment [17] implies that shareholders may consent only when there is no official to consent and the board is deadlocked. Neither condition is mandated by the rule, and there is no reason for both to be required.</p> <p>Finally, the last sentence of paragraph (d) says that “[t]he lawyer’s response may include</p>	<p>No change in paragraph (g) is necessary. Paragraph (g) closely tracks Model Rule 1.13(g) and Comment [17], which is derived from State Bar Formal Opinion 1993-153, is sufficient to point out there are circumstances when independent consent may not be possible.</p> <p>No change is necessary. The third sentence in Comment [17] is consistent with paragraph (g). Neither the Rule nor the Comment refers to shareholders. The Rule refers to other official or body of the organization while Comment [17] refers to other constituent of the organization.</p> <p>The Commission agreed and has changed the last sentence in Comment [13] to read: Paragraph (d)</p>

**Rule 1.13. Organization as Client.  
[Sorted by Commenter]**

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16." Comment [13] attempts to rephrase this in the following terms: "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." However, paragraph (d) does not seem to "confirm" such a restriction, but rather merely notes that the duty to resign or withdraw may be a permissible response. As the sentence appears to be unnecessary to Comment [13], COPRAC suggests that it be deleted.	confirms that the lawyer's response may include the right, and where appropriate, the duty to resign or withdraw in accordance with Rule 1.6."
4	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.13(b)	<p>1. The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.</p> <p>2. OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her</p>	<p>1. The Commission disagrees and no change to paragraph (b) has been made. The quoted phrase comes directly from Model Rule 1.13(b) and is intended to include constituents of the organization who are not officers or employees.</p> <p>2. Paragraph (a) expressly provides that the rule applies to lawyers "employed or retained" by the organization. The clear intent of the rule is to apply to all lawyers who represent organizational clients including in-house counsel. Paragraph (d) provides that the lawyer's response "may include the lawyer's right and, where appropriate, duty to resign or withdraw <u>in accordance with rule 1.16.</u>" Rule 1.16 applies to in-house and outside counsel. Thus, the</p>

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					<p>employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment's to the rule distinguish the circumstances requiring an in-house counsel's withdrawal from representation of the organization to the in-house counsel's resignation.</p> <p>3. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>appropriate response takes into account the circumstances and what is in the best lawful interests of the organization. Distinguishing the circumstances requiring an in-house counsel's withdrawal from the representation from resignation in the comments to the rule is not necessary and would vary depending on the specific circumstances.</p> <p>3. The Commission disagrees and no change has been made. Like the Model Rules, the comments are intended to provide explanation and guidance to lawyers in complying with the rule.</p>
2	Orange County Bar Association ("OCBA")	M	Yes	1.13(b)	We believe Proposed Rule 1.13 is inconsistent with the position taken in Proposed Rule 1.6 concerning confidential client information. Proposed Rule 1.6(b) restricts permissible disclosure of confidential client information to five limited circumstances, but does not mandate such disclosures if the lawyer chooses not to reveal such information. Further, even in situations where the lawyer reasonably believes that a criminal act by the client is likely to result in substantial bodily harm or death, Proposed Rule 1.6 first requires that the lawyer attempt	The Commission <b>disagrees</b> and <b>has</b> not <b>made the</b> requested changes to the rule. Rule 1.13 is consistent with proposed Rule <b>1.6</b> . Indeed, paragraph (c) provides that in taking <i>any</i> action pursuant to paragraph (b) the lawyer shall not violate his or her duty to protect all confidential client information. <b>Moreover, reporting up the ladder within the client organization does not violate Rule 1.6 because the client is the organization and the report is made only to the organization. Further, paragraph (b) does not mandate "up the ladder" reporting as the lawyer's first response. In the circumstances that trigger a lawyer's duty under</b>

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[Sorted by Commenter]**

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					<p>to persuade the client not to take such action, if doing so is reasonable under the circumstances. In contrast, Proposed Rule 1.13(b) <i>mandates</i> that a lawyer refer certain matters to higher authority in the organization “unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization.” Urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed not in the rule itself, but rather in Comment [7] to Proposed Rule 1.13 as a possibility “in some circumstances,” <i>i.e.</i>, as the “exception to the rule” of reporting up the ladder.</p> <p><b>Comments [14], [15]</b></p> <p>The OCBA recognizes that the five limited circumstances in Proposed Rule 1.6(b) anticipate disclosure to a non-client, whereas Proposed Rule 1.13(b) provides disclosure to a higher authority within the client organization, although Comments [14] and [15] to Proposed Rule 1.13 note that, at times, such a higher authority may be outside of the organization. Nonetheless, suggesting that a lawyer immediately report “up the ladder” rather than urging reconsideration as an initial step would conflict with the policies furthered by the duty of confidentiality as set forth in Comment [2] to Proposed Rule 1.6. The policies furthered by the duty of confidentiality</p>	<p>paragraph (b), the lawyer's response is to proceed in the best lawful interests of the organization, which may include urging reconsideration. Comment [7] does not suggest that asking a constituent to reconsider the matter is an exception to the lawyer's obligations under paragraph (b). Paragraph (b) obligates the lawyer to refer the matter to higher authority unless the lawyer reasonably believes it is not necessary in the best lawful interests of the organization to do so. Thus, the Rule does not mandate that a lawyer immediately report up the ladder rather than urging reconsideration as the first step. The Commission disagreed that urging reconsideration as a prerequisite to reporting up the ladder needs to be expressly stated in paragraph (b)</p> <p>The Commission believes the proposed Rule better promotes the policies furthered by the duty of confidentiality owed to the organization as described in Rule 1.6, Comment [2]. Comments [14] and [15] provide guidance on identifying the government client including the highest authority for purposes of the rule and do not detract from Rule 1.6.</p>

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					include encouraging the client “to seek legal assistance and to communicate fully and frankly with the lawyer.” The Comment recognizes that “[t]he lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.” However, if the lawyer’s first response is the report up the ladder, constituents likely will not advise the lawyer of matters he or she may need to know in connection with the representation, chilling the communication necessary to such representation since the information needed usually will not be provided by the highest authority in the organization, but by its lower-level constituents. We believe that urging reconsideration should be, absent exigent circumstances, a prerequisite to reporting up the ladder and should be expressly included as such in the text of the rule itself. Such a step is particularly important, as the lawyer: (a) may be mistaken about what is in the best interest of the organization; (b) may not understand the constituent’s reasons for taking such actions; or (c) may be able to persuade the constituent that his or her intended actions would be ill-advised.	
1	San Diego County Bar Association	A	Yes		Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code section 6068(e) on confidentiality.	No response necessary.

**Rule 1.13. Organization as Client.  
[Sorted by Commenter]**

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Disagree = 0  
Modify = 3  
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5	Zitrin, Richard (on behalf of law professors)	NI	Yes		It is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.	No response necessary.