

Proposed Rule 1.13 [RPC 3-600]

“Organization as Client”

(Draft # 11, 10/20/09)

Summary: Proposed Rule 1.13 is based on Model Rule 1.13 but, because of California’s strong policy on client confidentiality, diverges from the Model Rule in one significant respect. Unlike the Model Rule, the proposed Rule does not permit a lawyer for an organization to report suspected wrongdoing of the organization’s constituents outside the organization’s chain of command. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule	RPC 3-600
Statute	Business & Professions Code § 6068(e)(1).
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 0

Abstain 1

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

In rejecting the Model Rule's provisions that permit a lawyer to report misconduct outside the organization, the proposed Rule creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act and which also permit reporting outside the organization. See Introduction.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.13* Organization as Client

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.13 is based on Model Rule 1.13. However, the proposed rule diverges significantly from the Model Rule in not permitting a lawyer for an organization to report suspected wrongdoing of the organization's constituents outside the organization's chain of command. The Commission makes this recommendation because the Model Rule provision is based on policy decisions that are inimical to California's traditional emphasis on protection of client confidentiality.

The American Bar Association revised Model Rule 1.13 in August 2003, following the financial debacles involving companies such as Enron, Global Crossing and WorldCom. The revisions of Model Rule 1.13, which permit whistle blowing by lawyers outside the corporate structure, were intended as a companion piece to the ABA's concurrent revisions to Model Rule 1.6, which created exceptions to confidentiality that permit a lawyer to reveal a client's confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. The Commission has recommended rejection of those exceptions for the same reason it recommends rejection of the whistle blowing provision in Model Rule 1.13(c): First, Model Rules 1.6 and 1.13 are inconsistent with the all but absolute duty of confidentiality under § 6068(e). Second, these provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. Proposed Rule 1.13 provides that assurance by mandating that a lawyer who knows of wrongdoing by a constituent in the organization attempt to dissuade the constituent from his or her action and, failing that, to go up the organizational ladder – if necessary to highest authority in the organization authorized to act on its behalf, in an attempt to change the course of conduct. If the lawyer's

* Proposed Rule 1.13, Draft 11.1 (10/20/08).

INTRODUCTION (Continued):

attempts fail, then the lawyer must abide by the lawyer's duty of confidentiality under Business & Professions Code § 6068(e)(1) and not reveal the information outside the corporate chain of command. See Explanation of Changes for Comments [2] and [9].

The Commission believes that this approach will better promote the organizational client's compliance with the law by encouraging the client's constituents to be candid with the lawyer, a candor that would be lost if the constituents know the lawyer is authorized to report misconduct outside the organization. In conformance with this approach, both the black letter and comment to the Model Rule have been revised to alert lawyers that ignoring violations of duty or law that will likely injure the organization is not an option. For example, the black letter of Model Rule 1.13(b) has been revised to impose on an organization's lawyer an objective standard ("knows or reasonably should know") to determine when the lawyer must report up the organization's ladder. In addition, the comment to the Rule has been revised to emphasize that a lawyer may no longer hide his or her head in the sand. See, e.g., Explanation of Changes for Comments [4], [5] and [6].

Variation in Other Jurisdictions. Most jurisdictions have adopted to some extent the 2003 revisions to Model Rule 1.13, i.e., they have added revised paragraph (c) and new paragraphs (d) and (e), and accompanying comments, which together address a lawyer's authority to report misconduct outside the organization. Jurisdictions that have not adopted those paragraphs include the District of Columbia, Georgia, Missouri, New York, Ohio, Pennsylvania and Texas.

Potential Conflict with SEC Standards of Professional Conduct. The Commission's proposed Rule arguably creates a potential conflict for California lawyers with the SEC Standards of Professional Conduct, which were promulgated pursuant to the Sarbanes-Oxley Act, 15 U.S.C. § 7245 and which also permit reporting outside an organization. See 17 C.F.R. 205.3(d)(i)-(iii). However, because the SEC rules are permissive and not mandatory, California lawyers should be able to fulfill their duties under proposed Rule 1.13 (as they have been able to do under current rule 3-600), without violating duties imposed under the SEC Rules. See also *The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality* (Spring 2004), available at <http://www.calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf>.

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Commission’s Proposed Rule*</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.</p>	<p>(a) A lawyer employed or retained by an organization represents <u>shall conform his or her representation to the concept that the client is</u> the organization <u>itself</u>, acting through its duly authorized constituents <u>overseeing the particular engagement</u>.</p>	<p>Paragraph (a) is based on Model Rule 1.13(a), but two clarifying changes have been made: first, emphasis is placed on the fact that the lawyer is <i>obligated</i> to treat the organization as the client; and second, emphasis is placed on the fact that the organization acts through those duly authorized constituents who <i>oversee the particular engagement</i> for which the lawyer has been retained.</p>
<p>(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.</p>	<p>(b) If a lawyer for representing an organization knows that an officer, employee or other person associated with the organization is engaged in action <u>acting</u>, intends to act or refuses to act in a matter related to the representation <u>in a manner that the lawyer knows or reasonably should know is (i)</u> a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed <u>imputable</u> to the organization, and that is (ii) likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization. <u>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</u></p>	<p>Paragraph (b) closely follows Model Rule 1.13(b), but with several changes. First, the word “representing” is substituted for the word “for” as a clarification. Second, the word “acting” is substituted for “engaged in action” for economy of language. Third, the phrase “in a manner” has been added to make the sentence grammatically correct.</p> <p>Fourth, and most important, using “knows or reasonably should know” imposes an objective standard on a lawyer’s determination of whether the constituent’s action is (i) a violation of a legal obligation or a violation of law, and (ii) likely to result in substantial injury to the organization. Although the lawyer must have actual knowledge of the constituent’s action, the lawyer’s analysis of the action’s consequences must be objective. Further, romanettes are used to clarify that both a (i) “violation” (of duty or law) <u>and</u> (ii) likely injury to the organization must be present before the lawyer’s duty to act is triggered. By using the “knows or reasonably should know” standard, the lawyer’s obligations under paragraph (b) are expanded beyond the Model Rule and the rules adopted in most jurisdictions, thereby increasing the likelihood that</p>

* Proposed Rule 1.13, Draft 11.1 (10/20/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>can act on behalf of the organization as determined by applicable law.</p>	<p>a lawyer will go up the corporate ladder to report malfeasance or misfeasance.</p> <p>Finally, "lawful" has been added as a modifier of "interest" to emphasize that the lawyer's duty only to pursue the best "lawful" interests of the client organization.</p>
<p>(c) Except as provided in paragraph (d), if</p> <p>(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and</p> <p>(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,</p> <p>then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.</p>	<p>(c) Except as provided in paragraph (d), if</p> <p>(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and</p> <p>(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,</p> <p>then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.</p>	<p>The Commission recommends the deletion of Model Rule 1.13(c) because it is inimical to California's strong policy of protecting the confidentiality and maintaining the trust of the client. See Business & Professions Code § 6068(e)(1) and Explanation of Changes for paragraph (c), below. See also Introduction, ¶¶. 2,3.</p> <p>In recommending that Model Rule 1.13(c) not be adopted, the Commission urges the continuation of the longstanding approach reflected in current California Rule 3-600 of requiring the lawyer to work within the organization in situations defined in paragraph (b) and not to have unilateral discretion to report outside the organizational, conduct that would be contrary to the lawyer's duties under section 6068(e).</p>

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 1.13 Organization as Client</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>(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).</u></p>	<p>Paragraph (c) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (c), which correctly states California policy on protecting a client's confidential information. See Introduction, ¶¶. 2,3. See also Explanation of Changes for deleted Model Rule 1.13(c).</p>
<p>(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.</p>	<p>(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.</p>	<p>Because the Commission has recommended deleting Model Rule 1.13(c), see Explanation of Changes, above, it also recommends deletion of Model Rule 1.13(d), which limits the application of deleted paragraph (c).</p>
	<p><u>(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.</u></p>	<p>Paragraph (d) has no counterpart in the Model Rule. The Commission recommends adoption of paragraph (d) because it states, in accordance with California's strong policy of confidentiality, the appropriate course of action a lawyer should take if the lawyer is unsuccessful in persuading the organization's constituents not to pursue action that is a violation of duty or law, and likely to substantially injure the organization. In effect, it rejects the permissive disclosure procedure sanctioned by Model Rule 1.13(c). See Introduction, ¶¶. 2,3.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.</p>	<p>(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who <u>resigns or</u> withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, 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.</p>	<p>Paragraph (e) is based on Model Rule 1.13(e), but has been modified to conform to the differences between proposed paragraphs (b), (c) and (d), and Model Rule 1.13(b), (c) and (d).</p>
<p>(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.</p>	<p>(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer <u>representing the organization</u> shall explain the identity of the <u>lawyer's</u> client when<u>whenever</u> the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents<u>constituent(s)</u> with whom the lawyer is dealing.</p>	<p>Paragraph (f) is based on Model Rule 1.13(f). The phrase "representing the organization" and the word "lawyer" have been added to clarify when the lawyer's duty under the paragraph is triggered. The second romanette clause, concerning the constituent's mistaken belief, has been added to emphasize the lawyer's duty to avoid misapprehension by an unrepresented person that the lawyer represents that person. See also proposed Rule 4.3.</p> <p>The second sentence of paragraph (f) is carried forward from current California rule 3-600(D). This sentence adds an affirmative duty not to mislead to the duty in the first sentence to correct the constituent's misapprehension.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.13 Organization as Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.</p>	<p>(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 <u>1.7, 1.8.2, 1.8.6, and 1.8.7</u>. If the organization's consent to the dual representation is required by <u>Rule 1.7</u> <u>any of these Rules</u>, the consent shall be given by an appropriate official <u>or body</u> of the organization other than the individual who is to be represented, or by the shareholders.</p>	<p>Paragraph (g) closely follows Model Rule 1.13(g). References to several other rules that might create a dual representation conflict have been added, as well as an appropriate grammatical change ("any of these Rules").</p> <p>The phrase, "or body" has been added in recognition that an organization often authorizes a group of constituents to consider and approve conflict waivers. This might be, for example, the Board of Directors or a litigation committee of the Board.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>The Entity as the Client</p> <p>[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.</p>	<p>The Entity as the Client</p> <p>[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to<u>This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to</u><u>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 held by persons acting for. In the case of other organizational clients that are not corporations, 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.</u></p>	<p>Although the substance of Model Rule 1.13, cmt. [1] and that of proposed Comment [1] are generally the same, the Commission recommends adoption of proposed Comment [1] because it provides better guidance than the Model Rule comment concerning the nuances of who is the client when a lawyer represents an organization. In particular, the proposed comment gives examples of the kinds of organizations within the rule, (see first sentence) and explains that an agent or fiduciary who acts on behalf of the organization is a constituent within the scope of the Rule for purposes of the matter (last sentence).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[2] When a lawyer is retained by an organization, the lawyer is required to take direction from and communicate with 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.</u></p>	<p>Comment [2] has no counterpart in the Model Rule. It has been added to improve guidance to a lawyer on the constituents within the organization with whom the lawyer should communicate with or from the lawyer should take direction.</p>
<p>[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.</p>	<p>[2][3] When one of the constituents <u>When a constituent</u> of an organizational client communicates with the organization's lawyer in that person's constituent's organizational capacity, the communication is protected <u>by Rule 1.6 and Business and Professions Code section 6068(e)(1).</u> 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 <u>and Business and Professions Code section 6068(e)(1).</u> This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise <u>as</u> permitted by Rule 1.6 <u>or Business and Professions Code section 6068(e).</u></p>	<p>Comment [3] is based on Model Rule 1.13, cmt. [2]. The Comment has been revised to provide appropriate reference to the governing provisions in California. The example provided in the second sentence has been deleted as unnecessary.</p> <p>In addition, that part of the comment that discusses a lawyer's implied authority to disclose client information has been deleted because the Commission has recommended the rejection of the implied authority provision in Model Rule 1.6 ("Confidentiality of Information").</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.</p>	<p>[3] When constituents of the an organization make decisions for it, the decisions a lawyer ordinarily must be accepted by <u>accept those lawyer decisions</u> 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, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the <u>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</u> lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent <u>of the organization intends to engage, is engaging, or has engaged in conduct that the lawyer knows or reasonably should know (i)</u> violates a legal obligation to the organization or is in a violation of law that might be imputed <u>reasonably imputable</u> to the organization, <u>and (ii) is likely to result in substantial injury to the organization. In those circumstances,</u> the lawyer must proceed as is reasonably necessary in the best <u>lawful</u> interest of the organization.</p>	<p>Comment [4] is based on Model Rule 1.13, cmt. [3]. The first two sentences have been modified to be in the active voice. The third sentence has been added not only to remind lawyers of their duties to inform the client of significant developments, but also to point out that, even if the ultimate decision is the client's, the lawyer generally is obligated to provide the client with information that will enable the client to make an informed decision. The last sentence has been revised to track the modifications to paragraph (b), i.e., the addition of romanettes, to better set forth the trigger for the lawyer's duties to go up the organization ladder.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[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. As defined in Rule 1.0(f) Nevertheless, knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.-See Rule 1.0.1(f).</u></p>	<p>Comment [5] has no counterpart in the Model Rule. The first two sentences clarify that the lawyer is under no duty to investigate his or her client to uncover evidence of wrongdoing. However, the last sentence of the Comment, taken from Model Rule 1.13, cmt. [3], is a reminder that although a lawyer must have actual knowledge of the conduct, the lawyer cannot turn a blind eye to events that indicate a breach of duty or violation of law on the part of a constituent.</p>
	<p><u>[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).</u></p>	<p>Comment [6] has no counterpart in the Model Rule. It has been added to clarify that, although a lawyer must have actual knowledge of the constituent's action or inaction, (see Explanation for Comment [5]), the lawyer is held to an objective standard in analyzing the situation to determine whether the constituent's action or inaction is a violation of duty or law, and is likely to substantially injure the organizational client.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its 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. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of</p>	<p>[47] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its <u>potential</u> 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; f. 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. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of <u>For the responsibility of a subordinate lawyer in</u></p>	<p>Comment [7] closely follows Model Rule 1.13, cmt. [4]. The last two sentences of the Model Rule comment have been deleted because they are expository practice pointers. In their place, a cross-reference to Rule 5.2, concerning the responsibilities of subordinate lawyers, has been added.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>sufficient importance to warrant doing so in the best interest of the organization.</p>	<p>representing an organization, see Rule 5.2. organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.</p>	
<p>[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.</p>	<p>[58] 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.</p>	<p>Comment [8] is identical to Model Rule 1.13, cmt. [5].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[9] <u>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.</u></p>	<p>Comment [9] has no counterpart in the Model Rule. It has been added to explain several alternatives a lawyer might take in order to vindicate the lawyer's duty to act "in the best lawful interest of the organization" under the conditions of paragraph (b). Much of the language included here can be found in current California rule 3-600(B).</p> <p>See also Explanation of Changes for paragraph (b) concerning the use of a "knows or reasonably should know" standard.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[8]¹ A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.</p>	<p>[8]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 (c), or who <u>resigns or</u> withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs<u>under circumstances described in paragraph (d)</u>, 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.</p>	<p>Comment [10] is based on Model Rule 1.13, cmt. [8]. It is intended to provide guidance to lawyers on how to proceed under paragraph (e). The comment has been modified to conform to proposed paragraph (d), which diverges from the Model Rule. See Explanation of Changes for paragraph (e).</p>
	<p>[11]<u>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.</u></p>	<p>Comment [11] has no counterpart in the Model Rule. It has been added to remind lawyers that they are not authorized to substitute their judgment for that of the organization's constituents. See also Comment [4] and the Explanation of Changes thereto.</p>

¹ **Commission Note:** The Commission recommends a slight reorganization of the proposed counterparts to Model Rule 1.13, cmts. [6] and [7]. Therefore, those Model Rule comments are found below, following proposed Comment [11].

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Relation to Other Rules</p> <p>[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.</p>	<p>Relation to Other Rules</p> <p>[6]^[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 <u>1.4, 1.6, 1.8, 1.16, 3.3, or 4.1, or the 1.8 series of rules.</u> Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.</p>	<p>Comment [12] is based on the first two sentences of Model Rule 1.13, cmt. [6]. References to other rules that are applicable in the organizational context and are not superseded by proposed Rule 1.13 have been added. The reference to "1.8" has been replaced by a reference to "the 1.8 series of rules" because of the numbering convention the Commission recommends for those unrelated conflicts rules.</p> <p>The remainder of the Model Rule comment has been deleted because it addresses paragraphs (c) and (d) of the Model Rule, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.</p>	<p>[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.</p>	<p>The Commission recommends rejection of Model Rule 1.13, cmt. [7], because it relates to paragraphs (c) and (d) of Model Rule 1.13, which the Commission has recommended be rejected. See also Explanation for Model Rule 1.13, cmt. [7].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[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 1.2.1 [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).</u></p>	<p>Comment [13] has no counterpart in the Model Rule. It has been added to provide guidance to lawyers proceeding under paragraph (d).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Government Agency</p> <p>[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.</p>	<p>Governmental Agency Organizations</p> <p>[9]^[14] The duty defined in this Rule applies to In representing governmental organizations. Defining, it may be more difficult to define precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter the lawyer's obligations. However, those matters are beyond the scope of these Rules. [See Scope [18].] Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military services may be defined by statutes and regulations. This Rule does not limit that authority. See Scope</p>	<p>The title of this section of the Comment has been revised to conform to the terms used in the following comment.</p> <p>Comment [14] is based on Model Rule 1.13, cmt. [9], with some revisions.</p> <p>The first two sentences have been revised for clarity.</p> <p>The references to "Scope [18]" and "Scope" have been deleted because the Commission does not recommend the adoption of the Scope section of the Model Rules. See Introduction and Explanation of Changes for proposed Rule 1.0 ("Purpose and Scope of the Rules of Professional Conduct"). The Commission recommends substituting Rule 1.0 for the concepts found in the Preamble and Scope of the Model Rules.</p> <p>Finally, the next to last sentence of the Model Rule comment has been deleted. The Commission has recommended that Model Rule 1.13(c) be rejected, so disclosure outside the organization is not permitted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[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.</u></p>	<p>Comment [15] has no counterpart in the Model Rule. It has been added to clarify that although proposed Rule 1.13 does not permit reporting outside an organizational client, a governmental organization can establish procedures for lawyers to report misconduct within the organization.</p>
<p>Clarifying the Lawyer's Role</p> <p>[10]There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.</p>	<p>[40]<u>[16]</u> There are times when <u>the lawyer knows or reasonably should know that</u> the organization's interest may be or become adverse to those of one or more of its constituents <u>or when the constituent with whom the lawyer is communicating mistakenly believes that the lawyer has formed a lawyer-client relationship with that constituent.</u> Under paragraph (f), in such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, <u>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</u></p>	<p>Comment [16] is based on Model Rule 1.13, cmt. [10]. The Comment has been revised to conform to the revisions made to Model Rule 1.13(f). See Explanation of Changes for paragraph (f), above.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>constituent that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions<u>does not represent the constituent and that communications</u> between the lawyer for and the constituent are not confidential as to the organization and the individual may <u>be disclosed to the organization or used for the benefit of the organization. See Rule 4.3.</u>not be privileged.</p>	
<p>[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.</p>	<p>[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.</p>	<p>The Commission recommends deleting Model Rule 1.13, cmt. [11], because it states the obvious.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Dual Representation</p> <p>[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.</p>	<p>Dual Representation</p> <p>[12] Paragraph (g) recognizes that a <u>allows</u> lawyer for <u>to represent both</u> an organization may also represent a principal officer or major shareholder. <u>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.</u></p>	<p>Comments [17] and [18] expand upon the terse Model Rule Comment [12] to provide guidance concerning an issue that often arises. The guidance provided in these comments is derived from State Bar Formal Opn. 1999-153.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[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. {(See State Bar Formal Opn. 2003-463.)} 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 <i>Goldstein v. Lees</i> (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; <i>In re Banks</i> (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) Similar issues can arise in a derivative action. (See <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].)</u></p>	<p>See Explanation of Changes for Comment [17].</p> <p>The case law citations after the next to last sentence are intended to provide specific examples of the kinds of situations that often require resolution in the organizational context.</p> <p>The last sentence replaces Model Rule 1.13, cmts. [13] and [14], concerning derivative actions. The Commission recommends the rejection of those comments in favor of this sentence and citation. Suitable guidance concerning a lawyer's duties when involved in a derivative action is beyond the scope of a rule comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.13 Organization as Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Derivative Actions</p> <p>[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.</p>	<p>Derivative Actions</p> <p>[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.</p>	<p>See Explanation of Changes for Comment [18], paragraph 3.</p>
<p>[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.</p>	<p>[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.</p>	<p>See Explanation of Changes for Comment [18], paragraph 3.</p>

Rule 1.13 Organization as Client

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) ~~In representing~~ A lawyer employed or retained by an organization, ~~a lawyer~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~highest~~ duly authorized ~~officer, employee, body, or constituent~~ 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, ~~subdivision~~ (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 ~~inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless~~ proceed as the lawyer reasonably believes necessary to assure that it is not in the best lawful interest ~~organization's highest authority is informed of the organization to do so~~ lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer representing ~~an~~ the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know ~~(i) that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent is under the mistaken belief that he or she is in a client-lawyer relationship with the lawyer. [See Rule 4.3.] The lawyer shall not mislead such a constituent into believing, and shall make a reasonable effort to correct the constituent's mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may~~

~~communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization's benefit.~~

- (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 ~~3-310~~ [1.7 ~~(3-310(B), (C)), 1.8.2 ~~(3-310(E), 1.8.7 ~~(3-310(D), 1.8.6 ~~(3-310(F), 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 ~~is intended to apply~~ 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 ~~lawyer has a duty to the organization under~~ communication is protected by Rule 1.6 and Business and Professions Code section 6068, ~~subdivision~~-(e)(1). Thus, by way of example, if an organizational client requests its lawyer to ~~protect~~ investigate allegations of wrongdoing, interviews made in the ~~confidential information imparted~~ 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 ~~for disclosures explicitly or [impliedly authorized] by the organizational client in order to carry out the representation or as otherwise~~ permitted by Rule ~~3-100~~ 1.6 or by ~~law~~ 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, subdivision~~-(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 4-01.0.1(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 ~~is~~reposes elsewhere, for example, in the independent directors of a corporation.
- [9] Even in circumstances where a lawyer is not obligated ~~by Rule 1.13~~ 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 ~~is~~ the lawyer knows or ~~may be~~ 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 a substantial injury to the organization, paragraph (b) does not apply. Nevertheless, in such circumstances, subject to Business and Professions Code section 6068, ~~subdivision~~ (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 ~~the next~~ higher authority in the organization, including, if warranted by the seriousness of the matter, ~~referral~~ 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.

[40]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

[44]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, ~~4-8~~1.6, 1.16, ~~{3.3} or~~ [4.1], or the 1.8 series of Rules.

[42]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 ~~{3-700}~~. 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 ~~4-2-1~~ ~~{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).

Government Agencies and Governmental Organizations

[1314] ~~This Rule applies to the representation of~~ In representing governmental organizations—Defining, it may be more difficult to define precisely the identity of the client and ~~prescribing the resulting lawyer's obligations of such lawyers may be more difficult in the government context and is a matter. However, those matters are~~ beyond the scope of these Rules. ~~[See Scope [18].]~~ Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. 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.

[4415] 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, ~~subdivision (e)(1)~~ or Rule ~~3-400~~ 1.6, a governmental organization has the option of ~~considering—and~~ establishing internal organizational ~~policies~~ 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

[4516] 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 ~~communication~~ 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

[4617] 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 representation~~ of the organization and a constituent of the organization must be provided by someone other

than the constituent who is to be represented. ~~However, when~~ When there is no ~~other constituent who~~ 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. ~~(See State Bar Formal Opn. 2003-163.)~~ As used in this Rule, "shareholder" includes shareholders of a corporation, members of an association or limited liability company, or partners in a partnership. ~~1999-153.)~~

[1718] This Rule isdoes not ~~intended to~~ 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. ~~(See State Bar Formal Opn. 2003-163.)~~—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].)

Rule ~~3-600~~1.13 Organization as Client

(Comparison of the Current Proposed Rule to Current California Rule)

- (a) ~~(A) In representing~~ A lawyer employed or retained by an organization, ~~a member~~ shall conform his or her representation to the concept that the client is the organization itself, acting through its ~~highest~~ duly authorized officer, employee, body, or constituent 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] ~~(B) If~~ Even in circumstances where a member 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 organization 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 is the lawyer knows or may be 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 in a manner which reasonably should know that such conduct is likely to result in substantial injury to the organization, the member shall paragraph (b) does not violate his or her duty of protecting all confidential information as provided apply. Nevertheless, in Business and Professions Code section 6068 such circumstances, subdivision (e). Subject subject to

Business and Professions Code section 6068, ~~subdivision (e)(1)~~, the ~~member~~lawyer may take such actions as appear to the ~~member~~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.

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

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

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

~~(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into~~

~~believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.~~

[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

~~(E) A member representing~~^[17] Paragraph (g) allows lawyers to represent both an organization ~~may also represent any~~ and a constituent of its ~~directors, officers, employees, members, shareholders, or other constituents, subject to an organization in the provisions of rule 3-310~~ 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 the dual representation is required by rule 3-310, of the consent shall be given by an appropriate organization and a constituent of the organization must be provided by someone other than the individual or 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 shareholder(s) 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.~~

Discussion:-

~~Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.~~

~~Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply~~

~~one example) in establishing employee benefit packages for closely held corporations or professional partnerships.~~

[18] ~~This Rule 3-600 is~~ does not intended to create or to validate artificial distinctions between entities ~~prohibit lawyers from representing both an organization and their officers, employees, or members, nor is it the purpose a constituent of an organization in separate matters, so long as the rule to deny lawyer has addressed the existence or importance conflicts of such formal distinctions interest that may arise.~~ In dealing with a close corporation or small association, ~~members~~ lawyers commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, ~~members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty~~ a lawyer's duties as counsel for the organization may preclude the lawyer from representing the organization's constituents in ~~perceiving their correct duty matters related to control of the organization. In resolving such multiple relationships, lawyers must rely on case law.~~ (See ~~People ex rel Deukmejian v. Brown (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; Goldstein v. Lees (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; In re Banks (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law~~ Similar issues can arise in a derivative action. (See ~~Forrest v. Baeza (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857].~~)

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].)

Rule 1.13: Organization as Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona has adopted the 2003 version of ABA Model Rule 1.13 verbatim. Regarding entity clients, the Arizona Legislature has also enacted the following statute, A.R.S. §12-2234, to codify the attorney-client privilege for corporations and other entities in civil cases:

(B) ...[A]ny communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

(C) The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

The statute was passed in reaction to the Arizona Supreme Court's decision in *Samaritan Foundation v. Goodfarb*, 862 P.2d 870 (Ariz. 1993), which rejected the federal courts' broad view of the attorney-client privilege for corporations announced in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Samaritan court instead adopted a "functional" test for the attorney-client privilege and required a defendant hospital to disclose information that the defendant contended was privileged. The following year, after intense lobbying by corporate interests, the Arizona Legislature enacted §12-2234, which effectively overruled the *Samaritan* opinion and adopted *Upjohn*. However, in *Roman Catholic Diocese of Phoenix v. Superior Court*, 62 P.3d 970 (Ariz. App. 2003), a lower appellate court has held that §12-2334 applies only in civil proceedings and that Samaritan remains good law in criminal cases.

California: Rule 3-600 substantially follows the positions in Rule 1.13 as originally adopted. Among other things, it does not create an exception to confidentiality when conditions like those in Model Rule 1.13(c) are present but says only that the lawyer may, or must, resign.

District of Columbia omits paragraphs (c), (d) and (e) of ABA Model Rule 1.13.

Georgia: Rule 1.13 tracks the pre-2003 version of ABA Model Rule 1.13 verbatim, but Georgia adds the following paragraph (f): “‘Organization’ as used herein includes governmental entities.”

Maryland, Michigan, and New Jersey all retain verbatim the Kutak Commission’s 1981 draft of Rule 1.13(c), which provides that “remedial action” may, if necessary, include “revealing information otherwise protected by Rule 1.6” -- but “only if the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interest of the organization.”

Michigan: Rule 1.13(a) tracks the Kutak Commission’s 1980 draft by providing that a lawyer for an organization represents the organization “as distinct from” its directors, officers, employees, members, shareholders, or other constituents. Moreover, Michigan Rule 1.13(f) provides as follows:

For purposes of this rule “organization” includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Minnesota effectively deletes the requirement in ABA Rule 1.13(c)(2) that the lawyer “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.” Minnesota also deletes ABA Model Rule 1.13(d).

Missouri: Missouri retains the 2002 version of ABA Model Rule 1.13 verbatim and thus has no equivalent to

paragraphs (d) and (e) of the current version of ABA Model Rule 1.13.

New Jersey: Rule 1.13(a), which borrows from the Kutak Commission’s 1980 draft, states that a lawyer employed or retained to represent an organization represents the organization “as distinct from its directors, officers, employees, members, shareholders or other constituents. In addition, New Jersey adds that for purposes of Rules 4.2 and 4.3 “the organization’s lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group,” which is defined as follows:

Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization’s legal position in the matter whether or not in litigation, provided, however, that “significant involvement” requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization’s lawyer but may at any time disavow said representation.

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

TOTAL = 7 Agree = 5
 Disagree = 1
 Modify =
 NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			<p>1.13(b)(ii) should provide guidance on the term “substantial injury” to the organization within the civil context.</p> <p>Is the “best lawful interest of the organization” in (b)(ii) an objective standard? How will it be evaluated?</p> <p>Rule should not eliminate language of 3-600 with regard to urging reconsideration by the constituent with whom the lawyer is dealing.</p> <p>Comment [13] should be deleted because it implies that the rule permits disclosure of privileged information under the context of whistle blowing statutes yet the CA Supreme Court has not ruled on this.</p>	<p>Commission did not make the requested revision, in part, because such determinations depend upon the facts of a particular situation.</p> <p>The “best lawful interest of the organization” is a standard used in current California Rule 3-600.</p> <p>Urging reconsideration is encompassed within the rule because the rule states that “the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization.” The rule specifies reporting to “higher authorities,” in part, to emphasize important corrective steps that a lawyer might be reluctant to take without explicit authorization in the rule.</p> <p>The Commission did not make the requested revision, in part, because the comments include an explicit statement that the rule does not authorize a governmental organization’s lawyer to act as a whistle-blower (see Comment [15]).</p>

¹ 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 = 7 Agree = 5
 Disagree = 1
 Modify =
 NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [14] should be amended to provide that the lawyer report to his internal supervisor before continuing up the ladder.	A report to an immediate supervisor is encompassed within the rule because the rule states that “the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization.” The rule specifies reporting to “higher authorities,” in part, to emphasize important corrective steps that a lawyer might be reluctant to take without explicit authorization in the rule.
2	Lewis, Steven	A			In 1.13(f) change the phrase “are adverse” to “are or will be adverse”. When it’s reasonably foreseeable to a lawyer that a constituent’s interests will become adverse to the organization then the attorney should be required to be up front with the constituent about that.	Commission did not make the requested revision, in part, because the language at issue is being adopted from Model Rule 1.13.
3	Los Angeles County Bar Association (Toby A. Rothschild)	D			Using “duly authorized representative” language (as used in the ABA model rule) is more realistic and accurate than “highest authorized officer” as used in subsection (a). Model rule uses single term “constituents” while current and proposed rules use phrase “officer, employee, body or constituent,” which	Language contained in paragraph has been revised to read: “In representing an organization, a lawyer 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.” The phrase “duly authorized constituents” is the language used in Model Rule 1.13(a). Language contained in paragraph (b) has been revised to read: “If a lawyer representing an organization knows that an officer, employee or other person associated with the organization . . .”

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

TOTAL = 7 Agree = 5
 Disagree = 1
 Modify =
 NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					ignores partners in partnerships Supports sections 1.13(b), (c), (d) and (f). Subsection (e) should be reconsidered; it fails to take into account the possibility that the lawyer represents both the organization and an officer or principal in the organization in his or her individual capacity, and is withdrawing based on information communicated in confidence by the individual client. Also, the term "highest authority" is ambiguous in the non-corporate setting.	No response necessary. Commission did not make the requested revision, in part, because this concept is being adopted from Model Rule 1.13.
4	OCTC (State Bar) (Scott J. Drexel)	NI			The phrase "other person associated with the organization" contained in paragraph (b) of is vague and could lead to litigation. OCTC seeks to clarify whether the rule is intended to apply equally to in-house counsel and to outside counsel, or whether an in-house counsel's response to an organizational client's insistence on engaging in misconduct can be less drastic than resignation from the lawyer's employment.	The Commission did not make a change. The Commission has taken the phrase, "other person associated with the organization," from the Model Rule. It is intended to include other persons who are not officers or employees, such as independent contractors who, by their action, might cause harm to the client organization. The Commission notes first, that the Rule applies to both outside and in-house counsel and, second, that by its terms, the last sentence of paragraph (d), implies that something less than resignation might be an appropriate response for an in-house counsel (The lawyer's response <i>may include</i> the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16). See also

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

TOTAL = 7 Agree = 5
 Disagree = 1
 Modify =
 NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Comment [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).)
5	Orange County Bar Association (Trudy Levindofske)	A			<p>1.13(b) should state that when appropriate a lawyer should urge reconsideration of the matter before appealing to higher authority in the organization. This would be consistent with 3-100 where making a good faith effort to persuade the client is generally the lawyer's first obligation before revealing information.</p> <p>1.13(b) should provide guidance about what constitutes "the best lawful interest of the organization."</p> <p>Revise first two sentences of Comment [6] to read: "Paragraph (b) distinguishes between the lawyer's knowledge of the conduct and knowledge of the consequences of that conduct, using 'knows' with respect to the conduct and 'knows or reasonably should know' with respect to the consequences."</p>	<p>Urging reconsideration is encompassed within the rule because the rule states that "the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization." The rule specifies reporting to "higher authorities," in part, to emphasize important corrective steps that a lawyer might be reluctant to take without explicit authorization in the rule.</p> <p>The "best lawful interest of the organization" is a standard used in current California Rule 3-600.</p> <p>Commission did not make the requested revision, in part, because the revision might be construed as rendering the concept in the comment inconsistent with the terms of the rule itself.</p>

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

**TOTAL = 7 Agree = 5
Disagree = 1
Modify =
NI = 1**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Comment [8] statement that “timely” action is required is not made clear by 1.13(b).</p> <p>Comment [13] should indicate that the rule applies to other types of organizations not just governmental organizations.</p> <p>Concerned about Comment [14] impact on lawyer’s duty to maintain confidences if the designated recipient of whistle-blower reports is outside of the client organization. Do internal policies necessarily satisfy “informed consent” under current 3-100?</p> <p>Typo corrections: Comment [3], an apostrophe is necessary at end of “constituents” on the sixth line; Comment [15], “communication” should be plural in the last sentence; Comment [16], there is an errant “of representation” in the second sentence that should be deleted.</p>	<p>Commission did not make the requested revision, in part, because the concept of timely action is being adopted from Model Rule 1.13.</p> <p>Commission did not make the requested revision, in part, because Comment [1] was slightly modified to expressly state that the rule applies to “all forms of legal organizations” and to “governmental organizations.”</p> <p>The commenter seems to believe that the conduct contemplated by the comment is an act that breaches the duty of confidentiality such that consent is needed to waive the attorney-client privilege. Revealing information within a broader client structure would not be an act of that breaches the duty of confidentiality and would not waive the privilege.</p> <p>Commission corrected typos that it deemed appropriate.</p>

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

TOTAL = 7 Agree = 5
 Disagree = 1
 Modify =
 NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	San Diego County Bar Association (Heather L. Rosing)	A			Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code section 6068(e) on confidentiality.	No response necessary.
7	Santa Clara County Bar Association (Christine Burdick)	A			<p>Delete “reasonably should know” standard in 1.13(b) & (f), or if it is retained, make the last sentence of Comment [6] part of the Rule.</p> <p>Comment [7] should make it clear that in context of a government entity or corporation where there is a legal department, a subordinate lawyer’s reporting to a higher authority under 1.13(b) must first include the legal department.</p> <p>Comment [13]: delete sentence beginning with “Moreover, in a matter...” because it is superfluous.</p> <p>Comment [14] should be deleted in its entirety because it attempts to allow whistle-blowing while avoiding the constraints of the attorney client relationship and duty of confidentiality.</p>	<p>Commission did not make the requested revision, in part, because the Commission anticipates that a terminology rule will be drafted that will help define these terms.</p> <p>Comment [7] contains a reference for subordinate lawyers to consult Rule 5.2.</p> <p>Commission did not make the requested revision, in part, because the language at issue is being adopted from Model Rule 1.13.</p> <p>The commenter seems to believe that the conduct contemplated by the comment is an act that breaches the duty of confidentiality such that consent is needed to waive the attorney-client privilege. Revealing information within a broader client structure would not be an act that breaches the duty of confidentiality and would not waive the privilege.</p>