

Rule 1.13 [3-600] Organization as Client

- (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 directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows* that a constituent 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 reveal information protected by Business and Professions Code § 6068(e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization 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 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 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 private, public and governmental organizations. See Comment [6]. An organizational client can only act 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. For purposes of this Rule, 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] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. 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 § 6068(m). Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Rule 1.6 and Business and Professions Code § 6068(e).

[3] 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.

[4] In determining how to proceed under paragraph (b), the lawyer should consider 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, the lawyer may 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.

[5] 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.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. 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. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify

an official, agency, organization, or other person* to serve as the designated recipient of whistleblower reports from the organization's lawyers, consistent with Rule 1.6 and Business and Professions Code § 6068(e). This Rule is not intended to limit that authority.

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- (c) In taking any action pursuant to paragraph (b), the lawyer shall not ~~violate his or her duty of protecting all~~ reveal¹ information protected by Business and Professions Code § 6068(e)(~~4~~).²
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization 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.
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¹ Style change to avoid awkward construction of using "protect" twice in the sentence. No change in substance is intended.

² See Synopsis Table, response to COPRAC.

Comment

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[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. 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 § 6068(m). Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Rule 1.6 and Business and Professions Code § 6068(e).

[3] 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.

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[5] ~~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

³ [See Synopsis Table, response to DOJ.](#)

taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.⁴

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⁴ [See Synopsis Table, response to OCTC #4.](#)

**Proposed Rule 1.13 [3-600] Organization as Client
Synopsis of Public Comments**

TOTAL = 4	A = 1
	D = 0
	M = 2
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43be	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	(c)	Paragraph (c) should refer simply to 6068(e), not specifically (e)(1).	The Commission agrees that in this instance, reference to subdivision (e) is appropriate and has made the change.
X-2016-56	Brown, David (8-31-2016)	N	NI	1.13	<p>Commenter cites two examples where government lawyer placed the interests of the governing body and their staff above those of the constituents.</p> <p>If attorneys aren't acting as fiduciaries for their real clients (the public) then government money is at risk.</p> <p>Attorneys should serve the right master and be held accountable if they don't.</p>	The Commission recognizes that it can be more difficult in the governmental than the private setting to identify the "client" or those authorized to speak for the "client". Rather than attempting to create governmental-specific definitions, which the Commission does not think would be possible, it has referred to the complexity of this issue in proposed Comment [1]. Nevertheless, the starting point is that the client of a lawyer for a public agency is the agency itself, not its constituents, not the voters or the public, and not what the lawyer believes is in the best interests of the voters or the public. If the lawyer believes that agency is acting inappropriately he or she proceed as provided under paragraph (b) and may resign, as lawyers for private clients are able to do in certain

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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						situations.
X-2016-86b	U.S. Department of Justice (Ludwig) (9-27-16)	Y	M	Cmt. 1	Limit definition of “constituent” to this rule so it doesn’t conflict with Rule 4.2(b).	The Commission has revised the last sentence of Cmt. [1] to clarify that constituent has the stated meaning “for purposes of this Rule.”
X-2016-104ab	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(b), cmts. 2-5	<p>1. Generally supports this rule, but has the same concerns regarding use of the term “knowing” in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments section of this letter, i.e., By using the term “knowingly” in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness.</p> <p>2. Supports Comments 1, 2, 4, and 6, except Comment 2 may need to be rewritten if the Commission revises its proposals to have a single rule for</p>	<p>1. The Commission has considered this issue when drafting the rule and determined that the “know” standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides:</p> <p>“Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.</p> <p>The second sentence of that definition prohibits “willful blindness.”</p> <p>2. The Commission has not made the suggested change because it continues to believe that competence, diligence, and supervision should be set</p>

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					<p>competence, diligence, and supervision.</p> <p>3. Has the same concerns regarding use of the term “knowing” in Comment 3 for the same reasons it has concerns about subsection (b) of this rule, as well as proposed Rule 1.9 and the General Comments section of this letter.</p> <p>4. Comment 5 appears to cover the same issues as Comment 2 and, thus, is unnecessary and should be stricken.</p>	<p>forth in separate rules.</p> <p>3. See response to comment 1.</p> <p>4. The Commission disagrees that all of Comment [5] covers the same issues as Comment [2] but has retained only the last sentence of that comment, which provides important interpretative guidance on the meaning and application of the term, “best lawful interests.”</p>

