

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.13 [3-600]**

### **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE**

#### **Rule 3-600 Organization As Client**

- (A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.
- (B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:
  - (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.

- (E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

### **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.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members 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 in perceiving their correct duty. (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.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.13 [3-600]

Vote: 12 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.13 [3-600]

Vote: X (yes) – X (no) – X (abstain)

### **III. COMMISSION'S PROPOSED RULE 1.13 (CLEAN)**

#### **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, constituent, 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.

[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 Business and Professions Code § 6068(m) and Rule 1.4. 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 Business and Professions Code § 6068(e) and Rule 1.6.

[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 whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority..

#### **IV. COMMISSION'S PROPOSED RULE 1.13 (REDLINE TO CURRENT CALIFORNIA RULE 3-600)**

##### **Rule 1.13 [3-600] Organization as Client**

- (Aa) ~~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~~ directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (Bb) If a ~~member acting on behalf of~~ lawyer representing an organization knows\* that ~~an actual or apparent agent of the organization acts or~~ a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that ~~is or may be~~ 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, ~~or in a manner which is~~ and (ii) likely to result in substantial\* injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be lawyer shall proceed as is reasonably\* necessary in the best lawful interest of the organization. ~~Such actions may include among others:~~

- 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 ~~(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~~ circumstances, to the highest ~~internal~~ 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).
- (~~Cd~~) If, despite the ~~member's~~ lawyer's actions in accordance with paragraph (~~Bb~~), the highest authority that can act on behalf of the organization insists upon action, or ~~a refusal~~ fails to act, in a manner that is a violation of ~~law~~ 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 ~~member's response is limited to the member's~~ 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 3-700~~ 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.
- (~~Df~~) In dealing with an organization's ~~directors, officers, employees, members, shareholders, or other~~ constituents, a ~~member~~ lawyer representing the organization shall explain the identity of the lawyer's client ~~for whom the member acts,~~ whenever ~~it is or becomes apparent~~ the lawyer knows\* or reasonably should know\* that the organization's interests are ~~or may become~~ adverse to those of the constituent(s) with whom the ~~member~~ lawyer 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.~~
- (~~Eg~~) A ~~member~~ lawyer representing an organization may also represent any of its ~~directors, officers, employees, members, shareholders, or other~~ constituents, subject to the provisions of ~~rule 3-310~~ 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 ~~rule 3-310~~ any of these Rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual ~~or constituent~~ who is to be represented, or by the ~~shareholder(s) or organization members~~ shareholders.

## Comment**Discussion**

### 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.

[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 Business and Professions Code § 6068(m) and Rule 1.4. 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 Business and Professions Code § 6068(e) and Rule 1.6.

[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 whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code § 6068(e) and Rule 1.6. This Rule is not intended to limit that authority.

~~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.~~

~~Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members 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 in perceiving their correct duty. (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.~~



## V. RULE HISTORY

Current rule 3-600 was adopted in 1987 and was based on ABA Model Rule 1.13.<sup>1</sup> Although as discussed below, there was an attempt to amend the rule, and two legislative attempts to permit government lawyers to report misconduct outside their agency, there have been no changes to rule 3-600 since it originally became operative.

The rule provides that, where a lawyer provides legal services to an organization, the organization itself is the only client, acting through an individual authorized to instruct the lawyer (“constituent”). (Rule 3-600(A).) The rule is intended to clarify that the lawyer owes duties to the organization itself and must maintain a confidential relationship with the organization. If the lawyer believes that the constituent is operating unlawfully or in a manner likely to result in substantial injury to the organization, rule 3-600 provides that the lawyer *may* take action to protect the organization, including referring the matter to a higher authority within the organization. (Rule 3-600(B).) In taking action, however, the rule emphasizes that the lawyer must protect the confidential information of the client organization. (Id.) Thus, if the highest authority of the organization (e.g., the Board of Directors) continues to operate unlawfully or in a manner likely to result in substantial injury, rule 3-600 provides that the lawyer’s response is limited to the lawyer’s right, and perhaps duty, to withdraw. (Rule 3-600(C).) Additionally, the rule describes situations where it is necessary for the lawyer to warn individuals of the organization, who may be exposed to personal liability, that the lawyer’s duties are solely to the organization and not the individual. (Rule 3-600(D).) Rule 3-600 also specifies that the lawyer may represent individuals of the organization so long as the lawyer complies with the conflicts rules. (Rule 3-600(E).)

In 2002, the State Bar Board of Governors adopted proposed amended rule 3-600. The amended rule would have permitted government lawyers, in limited circumstances, to report governmental misconduct to an oversight or law enforcement agency (whistle-blower provisions). The California Supreme Court did not approve the proposed amended rule. In a May 10, 2002 letter, the Court stated:

“The State Bar Board of Governors’ request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e).”

Following the California Supreme Court’s rejection of the amendments, AB 363 was proposed to codify language similar to the whistleblower language from proposed amended rule 3-600. On September 30, 2002, AB 363 was vetoed by Governor Davis. In his veto message, Governor Davis stated that the bill “chips away at the attorney-client relationship which is intended to foster candor between an attorney and client.”

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<sup>1</sup> Model Rule 1.13 was amended in 2003. Current rule 3-600 now substantially diverges from model rule 1.13 See discussion at section VII.A.

Subsequent to the Davis veto, AB2713, which provided for similar whistleblower provisions, was proposed. That bill was similarly vetoed. In his September 28, 2004, veto message, Governor Schwarzenegger stated:

“I am returning Assembly Bill 2713 without my signature.

This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.

Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.

For the reasons stated I am unable to support this measure.”

No further attempts to create a whistleblower exception for lawyers in an organizational context, whether limited to government lawyers or not, have been made.

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC 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.
2. OCTC 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 competence, diligence, and supervision.
3. OCTC 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.
4. Comment 5 appears to cover the same issues as Comment 2 and, thus, is unnecessary and should be stricken.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**

**(In response to 45-day public comment circulation):**

1. OCTC 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 OCTC’s September 27, 2016 letter.
2. OCTC 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 competence and diligence. OCTC also remains concerned about having separate rules for supervision, as discussed in OCTC’s September 27, 2016 letter.
3. OCTC 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.
4. Comment 5 covers the same issues as Comment 2 and, thus, is unnecessary and should be deleted.

- **State Bar Court:** No comments were received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Three comments, including the above comment from OCTC, were received. One agreed with the proposed rule. Two agreed only if modified. A public comment synopsis table, with the Commission’s responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- **Background of Model Rule 1.13.** ABA Model Rule 1.13 is the Model Rules counterpart to current rule 3-600, with several key differences. In 2002, the ABA’s President appointed a Corporate Responsibility Task Force to study whether, in light of the financial debacles involving Enron and Worldcom, amendments to the Model Rules – specifically Model Rules 1.6 and 1.13 – were warranted. In 2003, the ABA House of Delegates adopted the Task Force’s recommended modifications to both rules. The two major amendments to Model Rule 1.13 were to (i) mandate (“shall”) going “up the ladder” within the organization, i.e., reporting violations of law or legal obligations to a higher authority within the client entity and (ii) permit, in limited circumstances, disclosure of confidential information outside the client entity (whistleblowing). The changes to Model Rule 1.13 complemented the changes to Model Rule 1.6, i.e., the addition of paragraph (b)(2) and (b)(3), which provide express exceptions to a lawyer’s duty of confidentiality to prevent, rectify or mitigate substantial financial injury to a person that results from a client’s crime or fraud for which the lawyer’s services were employed.

The modifications to Model Rule 1.13 represent a significant departure from current rule 3-600 which, like the pre-2003 version of the Model Rule, provides only for permissive (“may”) reporting to a higher authority within the client entity. Unlike the pre-2003 Model Rule 1.13, current rule 3-600 also reinforces a lawyer’s duty to protect a client’s confidential information as required by Business and Professions Code § 6068(e) first, by preceding the permissive language of paragraph (B) with a plain statement that the lawyer “shall” comply with the duties imposed by § 6068(e) and second, by not permitting disclosure of confidences outside the client entity, limiting a lawyer’s response to resignation or withdrawal, (see rule 3-600(C)).

- **Model Rule 1.13.** The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2,” revised May 13, 2015, is available at:
  - [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_13.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_13.authcheckdam.pdf) [Last visited 1/30/16]
  - Eighteen jurisdictions have adopted Model Rule 1.13 verbatim, including the 2003 Task Force changes.<sup>2</sup> Fifteen jurisdictions have adopted a modified version of the Model Rule, two of which include the 2003 changes,<sup>3</sup> twelve of which included modified versions of the 2003 changes,<sup>4</sup> and seven of which did not adopt any of the 2003 changes.<sup>5</sup> Twelve jurisdictions have a rule that is substantially different from the Model Rule in that they do not include the 2003 changes.<sup>6</sup>

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

1. Recommend adoption of paragraph (a), which carries forward the concept in current rule 3-600(A) that when a lawyer represents an organization, the organization is the client, which acts through its constituents.
  - Pros: Continues the rule that the client is the organization, not the constituent.

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<sup>2</sup> The eighteen jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, West Virginia, Wyoming.

<sup>3</sup> The two jurisdictions are: Washington, Wisconsin.

<sup>4</sup> The twelve jurisdictions are: Alaska, Hawaii, Illinois, Michigan, Minnesota, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont.

<sup>5</sup> The seven jurisdictions are: Alabama, Delaware, Georgia, Mississippi, Pennsylvania, South Dakota, Virginia.

<sup>6</sup> The twelve jurisdictions are: California, District of Columbia, Florida, Kansas, Maine, Maryland, Missouri, Montana, New Jersey, New York, Ohio, Texas.

- Cons: None identified.
2. Recommend that the rule clarify that it is applicable to both in-house and outside counsel by substituting the clause, “A lawyer employed or retained by an organization” for current rule 3-600(A)’s clause, “In representing an organization.”
    - Pros: The change is an important clarification of the rule’s scope. It conforms to a request from OCTC in 2010 to the prior Commission.
    - Cons: Application to in-house attorneys raises issues around withdrawal. However, this is true of the current rule and was an issue during the legislative consideration of statutory whistleblower reforms for government attorneys.
  3. Recommend that the Rule **require** that a lawyer report ongoing or intended illegal or fraudulent conduct by a constituent “up the corporate ladder” to a higher authority within the organization, including the highest authority that can act on behalf of the organization. (See paragraph (b). Compare current rule 3-600(B), which permits but does not require that the lawyer take such steps.)
    - Pros: This is consistent with the national trend. Requiring reporting up assures that the client organization is fully informed in its decision making. In addition, there is an exception to this requirement where the lawyer reasonably believes that a report is “not necessary in the best lawful interest of the organization.”
    - Cons: Mandatory reporting up is difficult to enforce.
  4. Recommend that the trigger for imposing the duty to go up the ladder be: (1) that the lawyer **knows** that a constituent is acting, has acted, or intends to act in a way (2) that the lawyer **knows or reasonably should** know is (i) a violation of a legal duty to the organization or a violation of law, **and** (ii) likely to result in substantial injury to the organization. Under this approach:
    - a. There are two scienter standards: (1) a subjective standard, i.e., actual knowledge that a constituent is acting, has acted, or plans to act; and (2) an objective standard, i.e., a reasonable lawyer would conclude that the constituent’s actions (i) violate the law or his/her legal duty; and (ii) likely result in substantial injury to the organization. (See also Comment [3].)
    - b. In addition, unlike current rule 3-600, which *permits* a lawyer to take corrective action if there is either a violation of law/legal duty or likely substantial injury to the organization, the proposed rule imposes a duty on the lawyer only if both are present. However, see discussion of Comment [2], below.

- Pros: An objective standard for the knowledge factor would impose a duty to investigate on the lawyer, which may not be appropriate in many situations. On the other hand, assessing a known situation for the violation and substantial injury factors is part of the duty of lawyers. However, there is no need to require reporting up if only one of the two factors is met (but see Comment [2] which explains that this Rule does not preclude a lawyer from reporting up if only one of the factors is met.)
  - Cons: Current law is covered by other provisions.
5. Recommend carrying forward in a separate paragraph the concept in current rule 3-600(B) that any action a lawyer might take under this rule is subject to the duty to protect client confidential information contained in Bus. & Prof. Code § 6068(e)(1). (See paragraph (c).)
- Pros: This reminds counsel that, with the exception of a threat of death or substantial bodily harm, there is no exception to Bus. & Prof. Code § 6068(e)(1) that would permit a lawyer to report misconduct outside of the organization client in this context, unlike ABA Model Rule 1.13.
  - Cons: Bus. & Prof. Code § 6068(e) has no exception for organizational clients, so the reminder is not necessary.
6. Recommend carrying forward the concept in current rule 3-600(C) that if the highest authority in the organization insists on a course of conduct that violates law/legal duty and is likely to result in substantial injury to the organization, the lawyer's response may include the right and, where appropriate the duty, to resign or withdraw in compliance with Rule 1.16 [3-700]. (See paragraph (d).)
- Pros: There is no reason to change the current California rule regarding withdrawal. Given the statutory constraints of Bus. & Prof. § 6068(e), California does not have the option of following the ABA rule permitting reporting out. (Compare ABA Model Rule 1.13(c).)
  - Cons: None identified.
7. Recommend adoption of a provision similar to Model Rule 1.13(e), which requires a lawyer discharged because of the lawyer's attempt to take steps to assure that the highest authority in the organization is informed of the lawyer's discharge. (See paragraph (e).)
- Pros: It is important for the highest authority in the organization to be made aware that a lawyer has been retaliated against because the lawyer attempted to perform the lawyer's duty of protecting the client from substantial injury as a result of improper conduct by a constituent. Such retaliation may constitute a further violation of law.
  - Cons: Once the attorney is terminated, he has no further duty to the client.

8. Recommend carrying forward the concept in current rule 3-600(D) requiring a lawyer for the organization to explain who is the client when it is apparent that the organization's interest are or may become adverse to those of a constituent with whom the lawyer is dealing. Also recommend deleting the second sentence of rule 3-600(D) because that concept of not misleading a constituent is already in proposed Rule 4.3 (Communicating with Unrepresented Persons). (See paragraph (f).)
  - Pros: There is no reason to change the current rule regarding notifying a constituent of the nature of the representation. This is a frequent area of misunderstanding. The second sentence is not necessary in light of Rule 4.3.
  - Cons: Although possibly unnecessary, retaining the second sentence of rule 3-600(D) would make clear that this duty is not intended to be altered.
9. Recommend carrying forward the concept in current rule 3-600(E) which expressly recognizes that a lawyer may jointly represent the organization and a constituent so long as the requirements of rules addressing actual or potential conflicts of interest are satisfied. (See paragraph (g).)
  - Pros: This is a common situation which should be acknowledged in the Rule, as it is under the current rule.
  - Cons: None identified.
10. Recommend adoption of a comment that explains the scope of the Rule's application to different organizations, as well as to governmental organizations. (See Comment [1].)
  - Pros: It is useful to have a comment that explains that the Rule applies to a wide variety of organizations, clarifying its application.
  - Cons: This comment doesn't add anything to explain the rule's application and could be deleted.
11. Recommend adoption of comments that clarify a lawyer's responsibilities under paragraph (b), including: (i) explaining the different scienter requirements in paragraph (b); (ii) clarifying that in appropriate circumstances, a lawyer **may** go up the ladder within an organization even if the requirements for imposing a duty to do so are not present, i.e., both a violation of law/legal duty **and** likely substantial injury to the organization and (iii) explaining that a lawyer should not generally substitute the lawyer's judgment for that of the highest authority in the organization. (See Comments [2], [3], [4] and [5].)
  - Pros: These Comments clarify various aspects of the Rule, clarifying, for example, that although the change from the current California Rule *requiring* up-the-ladder reporting applies only if both prongs of the standard are met,

up-the-ladder reporting is still permitted even if only one prong of the test is met.

- Cons: None identified.

12. Recommend adoption of a comment that clarifies it is appropriate, before taking action under paragraph (b), to urge reconsideration of the constituent's proposed course of action that is a violation of law/legal duty. (See Comment [4].)

- Pros: This comment is comparable to the comments to Rule 1.6 (3-100) regarding the steps the lawyer should take to consult with a client before taking extraordinary action. In this situation, the lawyer is encouraged to remonstrate with the constituent to reconsider before bringing the lawyer's position to a higher authority in the organization.
- Cons: Since nothing in the Rules expressly prohibits up-the-ladder reporting, this comment is not necessary.

13. Recommend adoption of comment that expressly recognizes the difficulty inherent in attempting to generalize about duties of lawyers representing governmental organizations. (See Comment [6].)

- Pros: Lawyers for government agencies are in a unique position. The diverse structures of local, state, and federal government agencies make giving specific guidance difficult. This Comment clarifies that each government lawyer's situation is different and needs to be assessed within its own structure.
- Cons: This doesn't add anything to the rule and is unnecessary. The subject matter covered is more appropriate for an ethics opinion that is anchored to specific facts.

**B. Concepts Rejected (Pros and Cons):**

1. Recommend adoption of Model Rule 1.13(c), which would permit a lawyer to disclose information protected by Bus. & Prof. Code § 6068(e)(1) outside of the organization to the extent necessary to prevent substantial injury to the organization.

- Pros: Reporting out, under Model Rule 1.13, may protect the client from harm. It also adds to uniformity of the Rules.
- Cons: This concept is inimical to California's strong duty of confidentiality. Bus. & Prof. Code § 6068(e) prohibits reporting out. Both the California Supreme Court and the legislature have repeatedly rejected this approach in the government lawyer context. The most grave situations, involving threats of death or great bodily harm, are covered by existing law.



2. Related to the adoption of Model Rule 1.13(c), recommend the adoption of Model Rule 1.13(d), which expressly provides that MR 1.13(c) does not apply to lawyers retained to investigate possible misconduct in the organization or to defend the organization or constituent against an allegation that they have violated the law.
  - Pros: A lawyer should not be required to report if the risk of harm is the reason he or she was retained.
  - Cons: This provision would only apply were a provision permitting reporting out be adopted, which, as noted, cannot be accomplished in California without a statutory change.
3. Carry forward the second sentence in current rule 3-600(D), which prohibits a lawyer from misleading a constituent into believing the lawyer represents the constituent when that is not true.
  - Pros: It is misconduct for a lawyer to engage in deceptive conduct. The provision expressly prohibits such conduct in the context of an organization.
  - Cons: The concept is already more generally addressed in proposed Rule 4.3 (Communicating with Unrepresented Person)

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. Mandating that a lawyer go up the corporate ladder when the lawyer knows of action by a constituent that is a violation of law/legal duty and likely to result in substantial injury to the organization. (See Section IX.A.3, above.)
2. Apply a subjective standard to knowledge of the conduct but an objective standard regarding knowledge of the probable consequences of the conduct. (See Section IX.A.4.a, above.)
3. Require that there be both (i) a violation of law/legal duty and (ii) likely substantial injury to the organization before a lawyer's duty to go up the ladder is triggered. (See Section IX.A.4.b, above.)
4. Require that a lawyer discharged because the lawyer complied with paragraph (b) to take steps to assure that the highest authority in the organization is aware of the discharge. (See Section IX.A.7, above.)

#### **D. Non-Substantive Changes to the Current Rule:**

1. Substitute the term “lawyer” for “member.”
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Clarifying that the Rule applies to both in-house and outside lawyers by substituting the clause, ““A lawyer employed or retained by an organization” for current rule 3-600(A)’s clause, “In representing an organization.” (See Section IX.A.2, above.)

#### **E. Alternatives Considered:**

See section V above. The main alternative considered was whether this rule could include a provision authorizing a lawyer to make a report to a person or entity outside of the client organization. The Commission concluded that the overlapping regulation of the statutory duty of confidentiality and the statutory lawyer-client privilege rendered it difficult for the Commission to consider any such provisions because the Commission’s Charter is restricted to proposing amendments to the Rules of Professional Conduct.~~None.~~

**X.     RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommends adoption of proposed Rule 1.13 [3-600] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 1.13 [3-600] in the form attached to this Report and Recommendation.

