

AMERICAN BAR ASSOCIATION
TASK FORCE ON CORPORATE RESPONSIBILITY
SECTION OF BUSINESS LAW
SECTION OF TAXATION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
YOUNG LAWYERS DIVISION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW
TASK FORCE ON IMPLEMENTATION OF SECTION 307 OF
SARBANES-OXLEY ACT OF 2002
LAW PRACTICE MANAGEMENT SECTION
SECTION OF FAMILY LAW
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, that Rule 1.13 of the Model Rules of Professional Conduct and its
2 Comment be amended as follows:

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4
5 **RULE 1.13: ORGANIZATION AS CLIENT¹**

6 (a) A lawyer employed or retained by an organization represents
7 the organization acting through its duly authorized constituents.

8
9 (b) If a lawyer for an organization knows facts from which a reasonable
10 lawyer, under the circumstances, would conclude that an officer, employee or
11 other person associated with the organization is engaged in action, intends to act
12 or refuses to act in a matter related to the representation that is a violation of a
13 legal obligation to the organization, or a violation of law which reasonably might
14 be imputed to the organization, and that is likely to result in substantial injury to
15 the organization, then the lawyer shall proceed as is reasonably necessary in the
16 best interest of the organization. ~~In determining how to proceed, the lawyer shall~~
17 ~~give due consideration to the seriousness of the violation and its consequences,~~
18 ~~the scope and nature of the lawyer's representation, the responsibility in the~~
19 ~~organization and the apparent motivation of the person involved, the policies of~~
20 ~~the organization concerning such matters and any other relevant considerations.~~

¹ Proposed additions are underlined; stricken text indicates proposed deletions.

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21 ~~Any measures taken shall be designed to minimize disruption of the organization~~
22 ~~and the risk of revealing information relating to the representation to persons~~
23 ~~outside the organization. Such measures may include among others:~~

- 24 (1) ~~asking for reconsideration of the matter;~~
25 (2) ~~advising that a separate legal opinion on the matter~~
26 ~~be sought for presentation to appropriate authority in~~
27 ~~the organization; and~~
28 (3) ~~referring~~

29 Unless the lawyer reasonably believes that it is not necessary in the best
30 interest of the organization to do so, the lawyer shall refer the matter to
31 higher authority in the organization, including, if warranted by the
32 circumstances, seriousness of the matter, referral to the highest authority
33 that can act on behalf of the organization as determined by applicable law.

34
35 (c) Except as provided in paragraph (d), if,

36
37 (1) despite the lawyer's efforts in accordance with paragraph
38 (b); the highest authority that can act on behalf of the organization
39 insists upon or fails to address in a timely and appropriate manner
40 an action or a refusal to act, that is clearly a violation of law and is
41 likely to result in substantial injury to the organization, and

42
43 (2) the lawyer reasonably believes that the violation is
44 reasonably certain to result in substantial injury to the organization,

45
46 then the lawyer may: resign in accordance with Rule 1.16, reveal
47 information relating to the representation whether or not Rule 1.6 permits
48 such disclosure, but only if and to the extent the lawyer reasonably
49 believes necessary to prevent substantial injury to the organization.

50
51 (d) Paragraph (c) shall not apply with respect to information
52 relating to a lawyer's representation of an organization to investigate an
53 alleged violation of law, or to defend the organization or an officer,
54 employee or other constituent associated with the organization against a
55 claim arising out of an alleged violation of law.

56
57 (e) A lawyer who reasonably believes that he or she has been discharged
58 because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who

59 withdraws under circumstances that require or permit the lawyer to take action
60 under either of those paragraphs, shall proceed as the lawyer reasonably
61 believes necessary to assure that the organization's highest authority is informed
62 of the lawyer's discharge or withdrawal.
63

64 (d) (f) In dealing with an organization's directors, officers,
65 employees, members, shareholders or other constituents, a lawyer shall
66 explain the identity of the client when the lawyer knows or reasonably
67 should know that the organization's interests are adverse to those of the
68 constituents with whom the lawyer is dealing.

69
70 (e) (g) A lawyer representing an organization may also represent
71 any of its directors, officers, employees, members, shareholders or other
72 constituents, subject to the provisions of Rule 1.7. If the organization's
73 consent to the dual representation is required by Rule 1.7, the consent
74 shall be given by an appropriate official of the organization other than the
75 individual who is to be represented, or by the shareholders.
76

77 **Comment**

78 **The Entity as the Client**

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81
82 [1] An organizational client is a legal entity, but it cannot act
83 except through its officers, directors, employees, shareholders and other
84 constituents. Officers, directors, employees and shareholders are the
85 constituents of the corporate organizational client. The duties defined in
86 this Comment apply equally to unincorporated associations. "Other
87 constituents" as used in this Comment means the positions equivalent to
88 officers, directors, employees and shareholders held by persons acting for
89 organizational clients that are not corporations.
90

91 [2] When one of the constituents of an organizational client
92 communicates with the organization's lawyer in that person's
93 organizational capacity, the communication is protected by Rule 1.6. Thus,
94 by way of example, if an organizational client requests its lawyer to
95 investigate allegations of wrongdoing, interviews made in the course of
96 that investigation between the lawyer and the client's employees or other
97 constituents are covered by Rule 1.6. This does not mean, however, that
98 constituents of an organizational client are the clients of the lawyer. The
99 lawyer may not disclose to such constituents information relating to the
100 representation except for disclosures explicitly or impliedly authorized by
101 the organizational client in order to carry out the representation or as
102 otherwise permitted by Rule 1.6.
103

104 [3] When constituents of the organization make decisions for it,
105 the decisions ordinarily must be accepted by the lawyer even if their utility
106 or prudence is doubtful. Decisions concerning policy and operations,
107 including ones entailing serious risk, are not as such in the lawyer's
108 province. ~~However, different considerations arise~~ Paragraph (b) makes
109 clear, however, that when the lawyer knows facts that would lead a
110 reasonable lawyer under the circumstances to conclude that the
111 organization may is likely to be substantially injured by action of a an
112 officer or other constituent that violates a legal obligation to the
113 organization or is in violation of law ~~In such a circumstance, it may be~~
114 ~~reasonably necessary for the lawyer to ask the constituent to reconsider~~
115 ~~the matter. If that fails, or if the matter is of sufficient seriousness and~~
116 ~~importance to the organization, it may be reasonably necessary for the~~
117 ~~lawyer to take steps to have the matter reviewed by a higher authority in~~
118 ~~the organization. Clear justification should exist for seeking review over~~
119 ~~the head of the constituent normally responsible for it. The stated policy of~~
120 ~~the organization may define circumstances and prescribe channels for~~
121 ~~such review, and a lawyer should encourage the formulation of such a~~
122 ~~policy. Even in the absence of organization policy, however, the lawyer~~
123 ~~may have an obligation to refer a matter to higher authority, depending on~~
124 ~~the seriousness of the matter and whether the constituent in question has~~
125 ~~apparent motives to act at variance with the organization's interest.~~
126 ~~Review by the chief executive officer or by the board of directors may be~~
127 ~~required when the matter is of importance commensurate with their~~
128 ~~authority. At some point it may be useful or essential to obtain an~~
129 ~~independent legal opinion.~~ that might be imputed to the organization, the
130 lawyer must proceed as is reasonably necessary in the best interest of the
131 organization. As defined in Rule 1.0(f), knowledge can be inferred from
132 circumstances, and a lawyer cannot ignore the obvious. The lawyer's
133 obligation to proceed as is reasonably necessary in the best interest of the
134 organization is determined by the conclusions that a reasonable lawyer
135 would, under the circumstances, draw from the facts known. The terms
136 "reasonable" and "reasonably" imply a range within which the lawyer's
137 conduct will satisfy the requirements of Rule 1.13. In determining what is
138 reasonable in the best interest of the organization the circumstances at
139 the time of determination are relevant. Such circumstances may include,
140 among others, the lawyer's area of expertise, the time constraints under
141 which the lawyer is acting, and the lawyer's previous experience and
142 familiarity with the client. For example, the facts suggesting a violation
143 may be part of a large volume of information that the lawyer has
144 insufficient time fully to comprehend. Or the facts known to the lawyer may
145 be sufficient to signal the likely existence of a violation to an expert in a
146 particular field of law but not to a lawyer who works in another specialty.
147 Under such circumstances the lawyer would not have an obligation to
148 proceed under Paragraph (b).
149

150 [4] In determining how to proceed under Paragraph (b), the
151 lawyer should give due consideration to the seriousness of the violation
152 and its consequences, the responsibility in the organization and the
153 apparent motivation of the person involved, the policies of the organization
154 concerning such matters, and any other relevant considerations.
155 Ordinarily, referral to a higher authority would be necessary. In some
156 circumstances, however, it may be appropriate for the lawyer to ask the
157 constituent to reconsider the matter; for example, if the circumstances
158 involve a constituent's innocent misunderstanding of law and subsequent
159 acceptance of the lawyer's advice, the lawyer may reasonably conclude
160 that the best interest of the organization does not require that the matter
161 be referred to higher authority. If a constituent persists in conduct contrary
162 to the lawyer's advice, it will be necessary for the lawyer to take steps to
163 have the matter reviewed by a higher authority in the organization. If the
164 matter is of sufficient seriousness and importance or urgency to the
165 organization, referral to higher authority in the organization may be
166 necessary even if the lawyer has not communicated with the constituent.
167 Any measures taken should, to the extent practicable, minimize the risk of
168 revealing information relating to the representation to persons outside the
169 organization. Even in circumstances where a lawyer is not obligated by
170 Rule 1.13 to proceed, a lawyer may bring to the attention of an
171 organizational client, including its highest authority, matters that the lawyer
172 reasonably believes to be of sufficient importance to warrant doing so in
173 the best interest of the organization.

174
175 [4][5] Paragraph (b) also makes clear that when it is reasonably
176 necessary to enable the organization to address the matter in a timely and
177 appropriate manner, the lawyer must refer the matter to higher authority,
178 including, if warranted by the circumstances, the highest authority that can
179 act on behalf of the organization under applicable law. The organization's
180 highest authority to whom a matter may be referred ordinarily will be the
181 board of directors or similar governing body. However, applicable law may
182 prescribe that under certain conditions the highest authority reposes
183 elsewhere, for example, in the independent directors of a corporation.

184 **Relation to Other Rules**

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186
187 [5][6] The authority and responsibility provided in this Rule are
188 concurrent with the authority and responsibility provided in other Rules. In
189 particular, this Rule does not limit or expand the lawyer's responsibility
190 under Rules 4.6, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule
191 supplements Rule 1.6(b) by providing an additional basis upon which the
192 lawyer may reveal information relating to the representation, but does not
193 modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (6). Under
194 Paragraph (c) the lawyer may reveal such information only when the
195 organization's highest authority insists upon or fails to address threatened

196 or ongoing action that is clearly a violation of law, and then only to the
197 extent the lawyer reasonably believes necessary to prevent reasonably
198 certain substantial injury to the organization. It is not necessary that the
199 lawyer's services be used in furtherance of the violation, but it is required
200 that the matter be related to the lawyer's representation of the
201 organization. If the lawyer's services are being used by an organization to
202 further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3)
203 may permit the lawyer to disclose confidential information. In such
204 circumstances Rule 1.2(d) can may also be applicable, in which event,
205 withdrawal from the representation under Rule 1.16(a)(1) may be required.
206

207 [7] Paragraph (d) makes clear that the authority of a lawyer to
208 disclose information relating to a representation in circumstances
209 described in Paragraph (c) does not apply with respect to information
210 relating to a lawyer's engagement by an organization to investigate an
211 alleged violation of law or to defend the organization or an officer,
212 employee or other person associated with the organization against a claim
213 arising out of an alleged violation of law. This is necessary in order to
214 enable organizational clients to enjoy the full benefits of legal counsel in
215 conducting an investigation or defending against a claim.
216

217 [8] A lawyer who reasonably believes that he or she has been
218 discharged because of the lawyer's actions taken pursuant to Paragraph
219 (b) or (c), or who withdraws in circumstances that require or permit the
220 lawyer to take action under either of these Paragraphs, must proceed as
221 the lawyer reasonably believes necessary to assure that the organization's
222 highest authority is informed of the lawyer's discharge or withdrawal, and
223 what the lawyer reasonably believes to be the basis for his or her
224 discharge or withdrawal.
225

226 **Government Agency**

227

228 [6] [9] The duty defined in this Rule applies to governmental
229 organizations. Defining precisely the identity of the client and prescribing
230 the resulting obligations of such lawyers may be more difficult in the
231 government context and is a matter beyond the scope of these Rules. See
232 Scope [18]. Although in some circumstances the client may be a specific
233 agency, it may also be a branch of government, such as the executive
234 branch, or the government as a whole. For example, if the action or failure
235 to act involves the head of a bureau, either the department of which the
236 bureau is a part or the relevant branch of government may be the client for
237 purposes of this Rule. Moreover, in a matter involving the conduct of
238 government officials, a government lawyer may have authority under
239 applicable law to question such conduct more extensively than that of a
240 lawyer for a private organization in similar circumstances. Thus, when the
241 client is a governmental organization, a different balance may be

242 appropriate between maintaining confidentiality and assuring that the
243 wrongful act is prevented or rectified, for public business is involved. In
244 addition, duties of lawyers employed by the government or lawyers in
245 military service may be defined by statutes and regulation. This Rule does
246 not limit that authority. See Scope.

247 248 **Clarifying the Lawyer's Role**

249
250 ~~[7]~~ [10] There are times when the organization's interest may
251 be or become adverse to those of one or more of its constituents. In such
252 circumstances the lawyer should advise any constituent, whose interest
253 the lawyer finds adverse to that of the organization of the conflict or
254 potential conflict of interest, that the lawyer cannot represent such
255 constituent, and that such person may wish to obtain independent
256 representation. Care must be taken to assure that the individual
257 understands that, when there is such adversity of interest, the lawyer for
258 the organization cannot provide legal representation for that constituent
259 individual, and that discussions between the lawyer for the organization
260 and the individual may not be privileged.

261
262 ~~[8]~~ [11] Whether such a warning should be given by the
263 lawyer for the organization to any constituent individual may turn on the
264 facts of each case.

265 266 **Dual Representation**

267
268 ~~[9]~~ [12] Paragraph (g) recognizes that a lawyer for an
269 organization may also represent a principal officer or major shareholder.

270 271 **Derivative Actions**

272
273 ~~[40]~~[13] Under generally prevailing law, the shareholders or
274 members of a corporation may bring suit to compel the directors to
275 perform their legal obligations in the supervision of the organization.
276 Members of unincorporated associations have essentially the same right.
277 Such an action may be brought nominally by the organization, but usually
278 is, in fact, a legal controversy over management of the organization.

279
280 ~~[44]~~ [14] The question can arise whether counsel for the organization may
281 defend such an action. The proposition that the organization is the lawyer's client
282 does not alone resolve the issue. Most derivative actions are a normal incident of
283 an organization's affairs, to be defended by the organization's lawyer like any
284 other suit. However, if the claim involves serious charges of wrongdoing by those
285 in control of the organization, a conflict may arise between the lawyer's duty to
286 the organization and the lawyer's relationship with the board. In those

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circumstances, Rule 1.7 governs who should represent the directors and the organization.