

1 Rule 1.13. Organization as a Client.

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

4 (b) If ~~in a matter related to the representation of a lawyer for~~ an organization a
5 ~~lawyer~~ knows that an officer, employee or other person associated with the organization
6 is engaged in action, intends to ~~engage in,~~ act or refuses to ~~take action in~~ act in a
7 matter related to the representation that is a violation of a legal obligation ~~of~~ to the
8 organization, or a violation of law that ~~may~~ reasonably might be imputed to the
9 organization, and that is likely to result in substantial injury to the organization, then the
10 lawyer shall proceed as is reasonably necessary in the best interest of the organization.
11 ~~In determining how to proceed, the lawyer shall give due consideration to the~~
12 ~~seriousness of the violation and its consequences, the scope and nature of the lawyer's~~
13 ~~representation, the responsibility in the organization and the apparent motivation of the~~
14 ~~person involved, the policies of the organization concerning such matters and any other~~
15 ~~relevant considerations. Any measures taken shall be designed to minimize disruption~~
16 ~~of the organization and the risk of revealing information relating to the representation to~~
17 ~~persons outside the organization, except as required by law or other rules of~~
18 ~~professional conduct. Such measures may include among others:~~

19 (b)(1) ~~asking reconsideration of the matter;~~

20 (b)(2) ~~advising that a separate legal opinion on the matter be sought for presentation~~
21 ~~to appropriate authority in the organization; and~~

22 (b)(3) ~~referring~~ Unless the lawyer reasonably believes that it is not necessary in the
23 best interest of the organization to do so, the lawyer shall refer the matter to higher
24 authority in the organization, including, if warranted by the circumstances, seriousness
25 ~~of the matter, referral~~ to the highest authority that can act ~~in~~ on behalf of the
26 organization as determined by applicable law.

27 (c) Except as provided in paragraph (d), if,

28 (c)(1) despite the lawyer's efforts in accordance with paragraph (b), the highest
29 authority that can act on behalf of the organization insists upon or fails to address in a
30 timely and appropriate manner an action, or a refusal to act, that is clearly a violation of
31 ~~law and is likely to result in substantial injury to the organization,~~ and

32 (c)(2) the lawyer reasonably believes that the violation is reasonably certain to result
33 in substantial injury to the organization, then the lawyer ~~may~~has "good cause" to resign
34 ~~or withdraw, as appropriate, under Rule 1.16(b)(6)~~ reveal information relating to the
35 representation whether or not Rule 1.6 permits such disclosure, but only if and to the
36 extent the lawyer reasonably believes necessary to prevent substantial injury to the
37 organization.

38 (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's
39 representation of an organization to investigate an alleged violation of law or to defend
40 the organization or an officer, employee or other constituent associated with the
41 organization against a claim arising out of an alleged violation of law.

42 (e) A lawyer who has been discharged and reasonably believes the discharge was
43 because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who
44 withdraws under circumstances that require or permit the lawyer to take action under
45 either of those paragraphs, shall proceed as the lawyer reasonably believes necessary
46 to ensure that the organization's highest authority is informed of the lawyer's discharge
47 or withdrawal.

48
49 ~~(d)(f)~~ In dealing with an organization's directors, officers, employees, members,
50 shareholders or other constituents, a lawyer shall explain the identity of the client when
51 ~~it is apparent that the organization's~~ the lawyer knows or reasonably should know that
52 the organization's interests are adverse to those of the constituents with whom the
53 lawyer is dealing.

54 ~~(e)(g)~~ A lawyer representing an organization may also represent any of its directors,
55 officers, employees, members, shareholders or other constituents, subject to the
56 provisions of Rule 1.7. If the organization's consent to the dual representation is
57 required by Rule 1.7, the consent shall be given by ~~a person or entity,~~ an appropriate
58 official of the organization other than the individual who is to be represented, or by the
59 shareholders, properly authorized by the organization.

60 ~~(f)(h)~~ A lawyer elected, appointed, retained, or employed to represent a
61 governmental entity shall be considered for the purpose of this rule as representing an
62 organization. The government lawyer's client is the governmental entity except as the

63 representation or duties are otherwise required by law. The responsibilities of the lawyer
64 in paragraphs (b) and (c) may be modified by the duties required by law for the
65 government lawyer.

66 Comment

67 The Entity as the Client

68 ~~Organizations subject to this rule include corporations, partnerships, joint ventures,~~
69 ~~unincorporated associations, governmental bodies and agencies, and any other entity~~
70 ~~that acts collectively rather than as one or more individuals acting singly.~~

71 [1] An organizational client is a legal entity, but it cannot act except through its
72 officers, directors, employees, shareholders and other constituents. Officers, directors,
73 employees and shareholders are the constituents of the corporate organizational client.
74 The duties defined in this Comment apply equally to unincorporated associations.
75 "Other constituents" as used in this Comment means the positions equivalent to
76 officers, directors, employees and shareholders held by persons acting for
77 organizational clients that are not corporations.

78 [2] When one of the constituents of an organizational client communicates with the
79 organization's lawyer in that person's organizational capacity, the communication is
80 protected by Rule 1.6. Thus, by way of example, if an organizational client requests its
81 lawyer to investigate allegations of wrongdoing, interviews made in the course of that
82 investigation between the lawyer and the client's employees or other constituents are
83 covered by Rule 1.6. This does not mean, however, that constituents of an
84 organizational client are the clients of the lawyer. The lawyer may not disclose to ~~the~~
85 ~~organization's employees and such~~ constituents information relating to the
86 representation except for disclosures explicitly or impliedly authorized by the
87 organizational client in order to carry out the representation or as otherwise permitted by
88 Rule 1.6.

89 [3] When constituents of the organization make decisions for it, the decisions
90 ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.
91 Decisions concerning policy and operations, including ones entailing serious risk, are
92 not as such in the lawyer's province. Paragraph (b) makes clear, however, that when
93 the lawyer knows that the organization is likely to be substantially injured by action of an

94 officer or other constituent that violates a legal obligation to the organization or is in
95 violation of law. If a lawyer undertakes action under subparagraph (b)(3), clear
96 justification should exist for seeking review over the head of the constituent normally
97 responsible for it. The stated policy of the organization may define circumstances and
98 prescribe channels for such review, and a lawyer should encourage the formulation of
99 such a policy. Even in the absence of organization policy, however, the lawyer may
100 have an obligation to refer a matter to higher authority, depending on the seriousness of
101 the matter and whether the constituent in question has apparent motives to act at
102 variance with the organization's interest. Review by the chief executive officer or by the
103 board of directors may be required when the matter is of importance commensurate
104 with their authority. that might be imputed to the organization, the lawyer must proceed
105 as is reasonably necessary in the best interest of the organization. As defined in Rule
106 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the
107 obvious.

108 [4] In determining how to proceed under paragraph (b), the lawyer should give due
109 consideration to the seriousness of the violation and its consequences, the
110 responsibility in the organization and the apparent motivation of the person involved, the
111 policies of the organization concerning such matters, and any other relevant
112 considerations. Ordinarily, referral to a higher authority would be necessary. In some
113 circumstances, however, it may be appropriate for the lawyer to ask the constituent to
114 reconsider the matter; for example, if the circumstances involve a constituent's innocent
115 misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer
116 may reasonably conclude that the best interest of the organization does not require that
117 the matter be referred to higher authority. If a constituent persists in conduct contrary to
118 the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter
119 reviewed by a higher authority in the organization. If the matter is of sufficient
120 seriousness and importance or urgency to the organization, referral to higher authority
121 in the organization may be necessary even if the lawyer has not communicated with the
122 constituent. Any measures taken should, to the extent practicable, minimize the risk of
123 revealing information relating to the representation to persons outside the organization.
124 Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a

125 lawyer may bring to the attention of an organizational client, including its highest
126 authority, matters that the lawyer reasonably believes to be of sufficient importance to
127 warrant doing so in the best interest of the organization.

128 [5] Paragraph (b) also makes clear that when it is reasonably necessary to enable
129 the organization to address the matter in a timely and appropriate manner, the lawyer
130 must refer to higher authority, including, if warranted by the circumstances, the highest
131 authority that can act on behalf of the organization under applicable law. The
132 organization's highest authority to whom a matter may be referred ordinarily will be the
133 board of directors or similar governing body. However, applicable law may prescribe
134 that under certain conditions the highest authority reposes elsewhere, for example, in
135 the independent directors of a corporation.

136 Relation to Other Rules

137 [6] The authority and responsibility provided in ~~paragraph (b)~~ this Rule are
138 concurrent with the authority and responsibility provided in other Rulesrules. In
139 particular, this Rule does not limit or expand the lawyer's responsibility under Rules4.6,
140 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by
141 providing an additional basis upon which the lawyer may reveal information relating to
142 the representation, but does not modify, restrict or limit the provisions of Rule 1.6(b)(1) –
143 (6). Under paragraph (c) the lawyer may reveal such information only when the
144 organization's highest authority insists upon or fails to address threatened or ongoing
145 action that is clearly a violation of law, and then only to the extent the lawyer reasonably
146 believes necessary to prevent reasonably certain substantial injury to the organization.
147 It is not necessary that the lawyer's services be used in furtherance of the violation, but
148 it is required that the matter be related to the lawyer's representation of the
149 organization. If the lawyer's services are being used by an organization to further a
150 crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer
151 to disclose confidential information. In such circumstances, 1.2(e) and Rule 1.2(d) are
152 may also be applicable, in which event, withdrawal from the representation under Rule
153 1.16(a)(1) may be required.

154 [7] Paragraph (d) makes clear that the authority of a lawyer to disclose information
155 relating to a representation in circumstances described in paragraph (c) does not apply

156 with respect to information relating to a lawyer's engagement by an organization to
157 investigate an alleged violation of law or to defend the organization or an officer,
158 employee or other person associated with the organization against a claim arising out of
159 an alleged violation of law. This is necessary in order to enable organizational clients to
160 enjoy the full benefits of legal counsel in conducting an investigation or defending
161 against a claim.

162 [8] A discharged lawyer who reasonably believes the discharge was because of the
163 lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in
164 circumstances that require or permit the lawyer to take action under either of these
165 paragraphs, must proceed as the lawyer reasonably believes necessary to ensure that
166 the organization's highest authority is informed of the lawyer's discharge or withdrawal.

167 Clarifying the Lawyer's Role

168 [9] There are times when the organization's interest may be or become adverse to
169 those of one or more of its constituents. In such circumstances the lawyer should advise
170 any constituent whose interest the lawyer finds adverse to that of the organization of the
171 conflict or potential conflict of interest, that the lawyer cannot represent such
172 constituent, and that such person may wish to obtain independent representation. Care
173 must be taken to enassure that the individual understands that, when there is such
174 adversity of interest, the lawyer for the organization cannot provide legal representation
175 for that constituent individual, and that discussions between the lawyer for the
176 organization and the individual may not be privileged.

177 [10] Whether such a warning should be given by the lawyer for the organization to
178 any constituent individual may turn on the facts of the case.

179 Dual Representation

180 [11] Paragraph (g) recognizes that a lawyer for an organization may also represent
181 a principal officer or major shareholder.

182 Derivative Actions

183 [12] ~~When shareholders, association members, partners or other organization~~
184 ~~constituents~~ Under some circumstances, the shareholders or members of a corporation
185 may bring suit to compel the directors or other managers of the organization to perform
186 their legal obligations in the supervision of the organization, ~~the~~ Members of

187 unincorporated associations have essentially the same right. Such an action may be
188 brought nominally by the organization, but usually is, in fact, a legal controversy over
189 management of the organization.

190 [13] The question can arise whether counsel for the organization may defend
191 ~~against~~ such an action. The proposition that the organization is the lawyer's client does
192 not alone resolve the issue. ~~Although many~~ Most derivative actions are a normal
193 incident of an organization's affairs, to be defended by the organization's lawyer like any
194 other suit, ~~a. However, if the~~ claim ~~that~~ involves serious charges of wrongdoing by
195 those in control of the organization ~~may produce~~, a conflict may arise between the
196 lawyer's duty to the organization and the lawyer's relationship with ~~those in control -- the~~
197 ~~board of directors, for example~~ the board. In those circumstances, Rule 1.7 ~~applies~~
198 governs who should represent the directors and the organization.

199 Government Agency

200 [13a] Utah Rule 1.13, unlike the ABA Model Rule, contains paragraph (h), which
201 deals with the relationship between government lawyers and the government entities
202 they represent. The duty defined by this rule applies to government lawyers, except to
203 the extent the responsibilities of the government lawyers are otherwise controlled by the
204 duties imposed upon them by law. A government lawyer following those legal duties in
205 good faith will not be considered in violation of the ethical standards of this rule. The
206 government lawyer's client is generally the governmental entity itself, but the client
207 relationship may be further defined by statute, ordinance or other law. A lawyer for the
208 government may have a legal duty to question. The duty defined in this Rule applies to
209 government lawyers and lawyers in military service, except to the extent the
210 responsibilities of the government lawyers are otherwise controlled by the duties
211 imposed upon them by law. Defining precisely the identity of the client and prescribing
212 the resulting obligations of such lawyers may be more difficult in the government
213 context. For example, the government lawyer's client is generally the governmental
214 entity itself, but the relationship between the government lawyer or lawyer in military
215 service and the client may be further defined by statute, regulation, ordinance or other
216 law. This Rule does not limit that authority. the conduct of government officials and
217 perform additional remedial or corrective actions including investigation and

218 prosecution. The lawyer may also have an obligation to divulge information to persons
219 outside the government to respond to illegal or improper conduct of the organizational
220 client or its constituents. The remedial option under paragraph (c) concerning
221 resignation under Rule 1.16 may be inconsistent with the government lawyer's duties
222 under the law. The obligation of the government lawyer may require representation of
223 the public interest as that duty is specified by law. In addition, a lawyer for the
224 government may have a legal duty to question the conduct of government officials and
225 perform additional remedial or corrective actions including investigation and
226 prosecution. The lawyer may also have an obligation to divulge information to persons
227 outside the government to respond to illegal or improper conduct of the organizational
228 client or its constituents. Thus, when the client is a governmental organization, a
229 different balance may be appropriate between maintaining confidentiality and ensuring
230 that the wrongful act is prevented or rectified, where public business is involved. The
231 obligation of the government lawyer may require representation of the public interest as
232 that duty is specified by law.

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