

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-600 [1.13]

Lead Drafter: Rothschild
Co-Drafters: Chou, Kehr, Tuft
Meeting Date: February 19-20, 2016

I. CURRENT CALIFORNIA RULE 3-600

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.

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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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.13 (CLEAN)

Rule 1.13 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

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refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code § 6068(e)(1).
- (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 legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to 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. Any agent or fiduciary authorized to act on behalf of an

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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] This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's

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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.

IV. PROPOSED RULE 1.13 (REDLINE TO CURRENT CALIFORNIA RULE 3-600)

Rule ~~3-600~~1.13 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 violate his or her duty of protecting all information protected by Business and Professions Code § 6068(e)(1).
- (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

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act, in a manner that is a violation of law 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 ~~constituent~~ official 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.

DiscussionComment

~~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~~

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~~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.~~

The Entity as the Client

[1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [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. 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

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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] This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

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.

V. PROPOSED RULE 1.13 (REDLINE TO MODEL RULE 1.13)

Rule 1.13 Organization as Client

- (a) A lawyer employed or retained by an organization ~~represents~~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 ~~for representing~~ an organization knows that ~~an officer, employee or other person associated with the organization is engaged in action~~a constituent is acting, intends to act or refuses to act in a matter related to the representation ~~that~~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 ~~that~~ reasonably ~~might be imputed~~imputable to the organization, and ~~that is~~(ii) likely to result in substantial injury to the organization, ~~then~~ the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best

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- 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) ~~Except as provided in paragraph (d), if~~ In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code § 6068(e)(1).
- (~~4~~d) ~~If,~~ despite the lawyer's ~~efforts~~ actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to ~~address in a timely and appropriate manner an action, or a refusal to act, that is clearly act, in a manner that is a violation of a legal obligation to the organization or~~ a violation of law, ~~and 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].~~
- (2) ~~the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,~~
- ~~then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.~~
- (d) ~~Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.~~
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to ~~paragraphs~~ paragraph (b) ~~or (c)~~, or who resigns or withdraws under circumstances ~~that require or permit the lawyer to take action under either of those paragraphs~~ described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's ~~directors, officers, employees, members, shareholders or other~~ constituents, a lawyer representing the organization shall explain the identity of the lawyer's client ~~when~~ whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the ~~constituents~~ constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its ~~directors, officers, employees, members, shareholders or other~~ constituents, subject to the provisions of ~~Rule~~ Rules [1.7], [1.8.2], [1.8.6, and 1.8.7]. If the organization's consent to the dual

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representation is required by ~~Rule 1.7~~ any of these Rules, the consent shall be given by an appropriate official or body of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] This Rule applies to all forms of legal organizations such as corporations, limited liability companies, partnerships, and incorporated and unincorporated associations. This Rule also applies to governmental organizations. See Comment [6]. An organizational client ~~is a legal entity, but it cannot act except through its~~ 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, ~~shareholders and other constituents~~. ~~Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.~~ Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

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

[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] When constituents of the organization make decisions for it, the decisions ordinarily must be~~

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~~accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that~~ 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 ~~that the organization is likely to be substantially injured by action of an officer or other constituent that violates~~ or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, ~~or is in a~~ violation of law ~~that might be imputed~~ reasonably imputable to the organization, ~~the lawyer must proceed as is reasonably necessary in the best interest of and (ii) likely to result in substantial injury to~~ the organization. ~~As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.~~

[4] In determining how to proceed under paragraph (b), the lawyer should ~~give due consideration to~~ 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, ~~it may be appropriate for~~ the lawyer ~~to~~ may ask the constituent to reconsider the matter; ~~for~~ For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. ~~Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.~~

[5] ~~Paragraph (b) also makes clear that when it is reasonably necessary to enable~~ This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization ~~to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act or to take action~~ on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation. independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the

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[matter and the direction the lawyer has received from the organizational client.](#)

Relation to Other Rules

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

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

~~[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.~~

Government Agency [Governmental Organizations](#)

~~[96] The duty defined in [It is beyond the scope of](#) this Rule [applies to governmental organizations. Defining to define](#) precisely the identity of the client and [prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope \[18\]](#) [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, ~~such as the executive branch~~, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client~~

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~~for purposes of this Rule. Moreover, in~~ In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. ~~Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties~~ Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and ~~regulation~~ 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 ~~does~~ is not intended to limit that authority. ~~See Scope.~~

Clarifying the Lawyer's Role

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

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

Dual Representation

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

Derivative Actions

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

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

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~~Rule 1.7 governs who should represent the directors and the organization.~~

VI. PUBLIC COMMENTS SUMMARY

- Professor Stephen Gillers. Recommends conforming current rule 3-600 to Model Rule 1.13 to require mandatory “reporting up” within the organization.
- Group of law professors (Drafters: Geoffrey C. Hazard, Deborah L. Rhode and Richard Zitrin). Concedes that it is not possible for the Commission to draft a rule that would permit a lawyer whistleblower to report outside of the organization.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, _____, 2016:**
A comment on current rule 3-600 is anticipated.
- **RUSSELL WEINER, OCTC, 6/15/2010:**
 1. The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.
 2. OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment's to the rule distinguish the circumstances requiring an in-house counsel's withdrawal from representation of the organization to the in-house counsel's resignation.
 3. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.
- **MIKE NISPEROS, OCTC, 9/27/2001:**
OCTC did not comment on rule 3-600 in its 2001 memo.
- **State Bar Court:** No comments received from State Bar Court.

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VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **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 the Model Rule 1.13 represent a significant departure from current rule 3-600 which, similar to 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 under § 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 [Last visited 1/30/16]
- Eighteen jurisdictions have adopted Model Rule 1.13 verbatim, including the 2003 Task Force changes.¹ Fifteen jurisdictions have adopted a modified version of the Model Rule, two of which include the 2003 changes,² twelve of which included modified versions of the

¹ 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.

² The two jurisdictions are: Washington, Wisconsin.

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2003 changes,³ and seven of which did not adopt any of the 2003 changes.⁴ Twelve jurisdictions have a rule that is substantially different from the Model Rule in that they do not include the 2003 changes.⁵

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.
 - 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.
 - Cons: Application to in-house attorneys raises issues around withdrawal.
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.
 - 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, has, or plans to act; and (2) an objective standard, i.e., a reasonable lawyer would conclude that the constituent’s course of action is (i) a violation of law or legal duty; and (ii) likely to result in substantial injury to the

³ The twelve jurisdictions are: Alaska, Hawaii, Illinois, Michigan, Minnesota, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont.

⁴ The seven jurisdictions are: Alabama, Delaware, Georgia, Mississippi, Pennsylvania, South Dakota, Virginia.

⁵ The twelve jurisdictions are: California, District of Columbia, Florida, Kansas, Maine, Maryland, Missouri, Montana, New Jersey, New York, Ohio, Texas.

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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, imposition of a duty on the lawyer requires that both be 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. On the other hand, assessing a situation for the violation and substantial injury factors are 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].)
 - 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 in Rule 1.6 [3-100] and Bus. & Prof. Code § 6068(e)(1). (See paragraph (c).)
- Pros: This reminds counsel that there is no exception to Rule 1.6 [3-100] that would permit a lawyer to report misconduct outside of the organization client in this context, unlike ABA Model Rule 1.13.
 - Cons: Neither Rule 1.6 [3-600] nor Bus. & Prof. Code § 6068(e) has an 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 is a violation of law/legal duty and 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

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- 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: None identified.
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 explaining 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 the 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 an attempt to generalize about duties of lawyers representing governmental organizations.

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(See Comment [6].)

- Pros: Lawyers for government agencies are in a unique position. The variety of structures of government agencies, local, state and federal, 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.

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.
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)

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 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

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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 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:

None.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues for the Commission's consideration.

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XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

- Rothschild**
- [Date]: Email Comment
- Tuft**
- [Date]: Email Comment
- Kehr**
- [Date]: Email Comment
- Chou**
- [Date]: Email Comment

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-600 [1.13] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-600 [1.13] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-600
“Organization as Client”

I. Text of Current Rule:

- (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. Background/Purpose:

A. Rule History

Current rule 3-600 was adopted in 1987 and was based on ABA Model Rule 1.13.¹ 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. Where 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

¹ 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.

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 (whistleblower 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.”

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.

B. The First Commission's Proposed Rule

The first Commission's proposed rule 1.13 was based on ABA Model Rule 1.13, but with several substantive differences from both current rule 3-600 and model rule 1.13, including:

- Unlike either current rule 3-600 or the Model Rule, the proposed rule imposed an objective knowledge standard ("knows or reasonably should know") for determining whether a constituent's action is a violation of a law or legal obligation and likely to result in substantial injury to the organization. This objective standard would determine when a lawyer must report up the organization's ladder. The first Commission reasoned that the standard would strike the proper balance between protecting the organization and public, and would alert lawyers to the fact that ignoring violations of law will likely injure the organization.
- Similar to model rule 1.13, the proposed rule added a provision *mandating* that a lawyer report up the ladder to a higher authority within the organization situations where a constituent is operating in a manner that is unlawful and likely to result in substantial injury to the organization. Current rule 3-600's reporting provision is permissive, not mandatory.
- The proposed rule rejected model rule paragraphs (c) and (d), which permit limited disclosures of confidential information outside the client entity and define limitations on a lawyer's ability to disclose. The first Commission rejected the provisions because the concept of revealing confidences to non-clients without the client's consent is inconsistent with the duty of confidentiality under Business and Professions Code section 6068(e). (See also the Supreme Court's May 10, 2002 rejection of AB363, in section II.A, above.)
- The proposed rule retained the concept from current rule 3-600 that clarifies that where the lawyer's action is unsuccessful, the lawyer's response is limited to the lawyer's right, and perhaps duty, to resign or withdraw.
- Similar to model rule 1.13, the proposed rule added a provision mandating that, if the lawyer is discharged due to the lawyer's actions taken pursuant to the rule, or withdraws in accordance with the rule, the highest authority of the organization be informed of the discharge or withdrawal.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2016 Comment

In a _____, 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 3-600:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 1.13:

1. The phrase “other person associated with the organization” contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is “associated” with an organization is open to interpretation and, therefore, potential litigation.
2. OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel’s response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment’s to the rule distinguish the circumstances requiring an in-house counsel’s withdrawal from representation of the organization to the in-house counsel’s resignation.
3. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.

C. 2001 Comment

None.

IV. Initial Public Comments Received:

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. The Commission received two public comments specific to rule 3-600.

First, a group of legal ethics professors that had commented on the first Commission’s proposed Rule 1.13, resubmitted its comment on that Rule. The group’s comment to the then Board of Governors had cautioned the Board to carefully review the proposed Rule to ensure that neither its rule provisions or comments permitted reporting outside the organization because such reporting would conflict with § 6068(e).²

² In fact, the first Commission’s proposed Rule 1.13 did not permit reporting outside the organization. However, to place the group’s rule 1.13 comment in context, it was submitted together with a comment on the first Commission’s proposed Rule 1.6, which had included several exceptions to the duty of confidentiality that were grounded in decisional law but for which there was no legislative counterpart in section 6068(e). The law professor group concern with those exceptions, stating:

In addition, an individual recommended conforming to the concept in model rule 1.13 that mandates “reporting up.”

V. Potential Deficiencies in the Current Rule:

A. The current rule applies an actual knowledge standard to when a lawyer “knows” that a constituent is operating unlawfully or in a manner likely to result in substantial injury to the organization, rather than an objective knowledge standard. In a comment submitted to the first Commission, COPRAC suggested retaining the current standard, noting that an objective standard could subject a lawyer to discipline if the lawyer “reasonably should have known” that an act is illegal and likely to result in substantial injury, and that such a standard is “unprecedented.” (See also section II.B, above.)

B. The current rule’s trigger for a lawyer taking action is substantially different from the Model Rule. Paragraph (B) provides in relevant part that a lawyer may urge reconsideration or go up the organizational ladder if the lawyer knows that an organization’s agent “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.”

As written, rule 3-600(B) permits a lawyer to take action if the constituent’s actions are likely to result in substantial injury to the organization, even if there is no actual or possible violation of law. That seems to be the import of the second quoted clause, above, which is written in the disjunctive. In effect, current rule 3-600 appears to authorize a lawyer to interfere in the business decisions of an organization even if the decision is legal.

Such an approach is contrary to the trigger in the Model Rule and every other jurisdiction that has adopted some version of the Model Rule, which mandates going up the organizational ladder if a constituent of the organization “is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, **and** that is likely to result in substantial injury to the organization.” The Model Rule and jurisdictions adopting a version of the Model Rule require not only that there be substantial injury to the organization *but also that* the person acting have violated a legal obligation to the organization or violated a law. The first Commission followed suit in its proposed Rule 1.13.

C. The current rule provides that a lawyer may report up the organization’s ladder to a higher authority situations where a constituent is operating unlawfully or in a manner likely to result in substantial injury to the organization, (see paragraph B, above), rather than requiring that the lawyer report such actions up

“The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.”

the ladder. Thus, the rule already permits a lawyer to report up within an organization. However, imposing an affirmative duty to report up the ladder except where it is “not necessary to the interest of the organization” would be a measure to protect the client entity from injury. Moreover, because the reporting is made within the client organization, confidentiality is preserved.

D. As discussed below in section VII.A. concerning Model Rule 1.13 (as revised in 2003), the current rule does not have a provision that either mandates or authorizes a lawyer to report up to the highest authority in the organization the fact that the lawyer has been subject to retaliation for reporting to a higher authority the acts of lower echelon constituents as permitted under the rule. (Compare Model Rule 1.13(e).

E. The current rule is silent with respect to public sector attorneys who have multiple organizational clients. In 2003, Ethics Hotline staff noted in a comment to the first Commission that a discussion of this topic within the rule would help address frequent questions regarding who is the client when the attorney works for a government agency and whether that attorney owe duties different from private sector attorneys.

F. The current rule is silent with respect to whether the rule applies both to in-house and outside counsel. (See 2010 OCTC comments on the first Commission’s proposed rule.) Additionally, the rule is silent on whether in-house counsel must be licensed in California. Ethics Hotline staff noted that this is a frequent question that could be addressed if the rule provided clarification on the law.

VI. California Context:

A. California Law Related to Current Rule 3-600

Duty of Confidentiality. A California lawyer’s duty of confidentiality is provided in Business and Professions Code section 6068(e):

It is the duty of an attorney to do all of the following:

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

While current rule 3-600 clarifies the duties of a lawyer representing an organizational client, it reinforces a lawyer’s duty to protect the confidences of the client (the organization), even when faced with a client’s potential violation of law.

B. Federal SEC Standards of Professional Conduct

Pursuant to the Sarbanes-Oxley Act and effective in 2002, the SEC Standards of Professional Conduct require lawyers representing securities issuers to report SEC violations to the client-issuer's chief legal officer. 15 U.S.C. 7245. These rules also permit lawyers to disclose confidences of the client-issuer to the SEC. 17 C.F.R. 205.3(d)(2). These provisions potentially create a conflict for California lawyers whose statutory duty under Business and Professions Code section 6068(e) prohibits disclosure of a client's confidential information. As noted above, the only exception to the duty falls under section (e)(2), where the disclosure would be necessary to prevent death or substantial bodily harm. However, because the SEC regulations *permit* disclosure of confidences to the SEC, but do not require it, California lawyers should be able to fulfill their duties under 6068(e). See *Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality*, Spring 2004, available at:

http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-SEC_Ethics_Alert-Spring_04.pdf.

VII. ***Approach In Other Jurisdictions (National Backdrop):***

A. ABA 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" with 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 (whistleblowers). 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 the Model Rule 1.13 represent a significant departure from current rule 3-600 which, similar to 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 under § 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)).

B. The ABA State Adoption Chart

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.13: Organization as Client,” revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_13.authcheckdam.pdf

Eighteen jurisdictions have adopted Model Rule 1.13 verbatim, including the 2003 Task Force changes.³ Fifteen jurisdictions have adopted a modified version of the Model Rule, two of which include the 2003 changes,⁴ twelve of which included modified versions of the 2003 changes,⁵ and seven of which did not adopt any of the 2003 changes.⁶ Twelve jurisdictions have a rule that is substantially different from the Model Rule and do not include the 2003 changes.⁷

VIII. Public Comment Received by the First Commission:

The clean text of proposed rule 1.13 drafted by the first Commission and adopted by the Board to replace rule 3-600 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 3-600, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the first Commission’s proposed rule showing changes to rule 3-600 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

³ 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.

⁴ The two jurisdictions are: Washington, Wisconsin.

⁵ The twelve jurisdictions are: Alaska, Hawaii, Illinois, Michigan, Minnesota, Nevada, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont.

⁶ The seven jurisdictions are: Alabama, Delaware, Georgia, Mississippi, Pennsylvania, South Dakota, Virginia.

⁷ The twelve jurisdictions are: California, District of Columbia, Florida, Kansas, Maine, Maryland, Missouri, Montana, New Jersey, New York, Ohio, Texas.

IX. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should retain an actual knowledge standard for reporting up the ladder, or instead adopt an objective knowledge standard.
2. Whether the rule's trigger for a lawyer taking action should require both a likely substantial injury to the organization and that there be a violation of law or duty to the organization. (See section V.B, above.)
3. Whether the rule should include a provision mandating that a lawyer report to a higher authority within the organization instances where a constituent of the organization is operating in a manner that is unlawful and likely to result in substantial injury to the organization.
4. If the rule does mandate reporting up the ladder, whether it also should include a requirement that, before reporting up the ladder, the lawyer first urge the constituent to reconsider the matter. (See public comment received by the first Commission, enclosed with this assignment.)
5. Whether the rule should retain the provision limiting a lawyer's response to resignation where the highest authority fails to take corrective action, or instead adopt the ABA approach permitting limited disclosures of a client's confidential information outside the organization. With respect to this issue, please note that this Commission has already rejected including the financial injury exceptions to confidentiality in Model Rule 1.6(b)(2) and (3) that complement Model Rule 1.13's reporting out provisions.
6. If the rule mandates reporting up the ladder, whether it should include a provision that either requires or authorizes the lawyer to go up the organizational ladder to report that the lawyer has been subject to retaliation for having complied with the rule's requirement to go up the ladder to report misconduct by a constituent that

was likely to result in injury to the organization. (Compare Model Rule 1.13(e) and see Section V.D above.)

7. Whether to provide guidance in a comment about a government lawyer's duties when the lawyer represents multiple governmental entities. (See section V.E, above.)
8. Whether to clarify in the Rule whether the rule applies to both in-house and outside counsel and, assuming it does, whether something less than resignation is required of an in-house lawyer when the highest authority insists on engaging in conduct that is detrimental to the organization. (See 2010 OCTC comment at section III.B, above.)

X. *Research Resources:*

- California Business and Professions Code section 6068(e)
- Sarbanes-Oxley Act, 15 U.S.C. 7245
- SEC Part 205 Rules, 17 C.F.R. 205.3(d)(2)