Rule 1.13
Organization as Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with 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, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best 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

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

(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 (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, 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 shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents 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 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its 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.

[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.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be 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 when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of 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 the seriousness of the violation and its 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 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. 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.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable 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 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.

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

[9] The duty defined in this Rule applies to governmental organizations. Defining 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]. 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 for purposes of this Rule. Moreover, 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 of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not 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, Rule 1.7 governs who should represent the directors and the organization.

ANNOTATION

In many ways, representing an entity can be the most conceptually complex area of professional responsibility. It is fitting, then, that the corresponding Model Rule—Rule 1.13—is both complex and detailed. In terms of sheer length, for example, it is the third-longest rule (trailing narrowly behind Rule 1.8 and recently amended Rule 3.8), and it covers a diverse range of issues, including the lawyer's role, internal fraud and investigations, "noisy" withdrawal, and dual representation.

Subsection (a): Organization Is Client

LAWYER REPRESENTS CORPORATION

Unless a lawyer has also formed a lawyer-client relationship with a constituent, Rule 1.13 clarifies that a lawyer employed or retained by an organization represents the organization itself, not the individual constituents who act for it. Thus, the Model Rules embrace the "entity theory" of organizational representation. Model Rule 1.13(a); *see Restatement (Third) of the Law Governing Lawyers* § 96(1) cmt. b (2000) ("The so-called 'entity' theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations."); *see, e.g., Murray v. Metro. Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009) (lawyer for mutual insurance company represents entity, not policyholders); *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501 (9th Cir. 1993) (chief executive officer not in lawyer-client relationship with corporation's lawyer; lawyer informed officer he was present at board

meeting only as lawyer for corporation, and officer distinguished corporation's lawyer from another lawyer who was "personal counsel"); *Fisher v. The Grove Farm Co.*, 230 P.3d 382 (Haw. 2009) (following "majority" rule that lawyer for corporation generally owes duties to corporation, not minority shareholders; citing Rule 1.13); *Campbell v. McKeon*, 905 N.Y.S.2d 589 (App. Div. 2010) (lawyer represents corporation—not shareholders, directors, officers, or individual partners—unless lawyer assumed "affirmative duty" to the contrary); *Polovy v. Duncan*, 702 N.Y.S.2d 61 (App. Div. 2000) (corporation's lawyer represents entity, not employees, unless parties expressly agree otherwise); *Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992) (when individual retains lawyer to organize entity, "entity rule" applies retroactively so that lawyer's pre-incorporation involvement with individual is deemed representation of entity, not individual); ABA Formal Ethics Op. 08-453 (2008) (law firm's ethics counsel typically represents firm itself, not individual lawyers within firm); Colo. Ethics Op. 120 (2008) (organization's lawyer does not automatically represent its constituents); N.J. Ethics Op. 664 (1992) (lawyer who represents corporation in collections matters has lawyer-client relationship with corporation, not with corporation's credit manager); *cf. Terra Int'l, Inc. v. Miss. Chem. Corp.*, 913 F. Supp. 1306 (N.D. Iowa 1996) (corporation cannot unilaterally impose its lawyer upon its employees). *See generally* 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 26:5 (2009) (discussing potential conflicts of entity lawyer in numerous contexts, including corporate formation, closely held corporations, and shareholder derivative actions); D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 Tex. J. Bus. L., Winter 2006, at 313; Ellen A. Pansky, *Between an Ethical Rock and Hard Place: Balancing Duties to the Organizational Client and Its Constituents*, 37 S. Tex. L. Rev. 1167 (1996); George Rutherglen, *Lawyer for the Organization: An Essay on Legal Ethics*, 1 Va. L. & Bus. Rev. 141 (2006); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57 (Jan. 2003).

Even if an organization's lawyer does not represent a particular constituent, the lawyer may have authority under Rule 4.2 to prevent another lawyer from communicating with the constituent about specific matters. This is discussed in the Annotation to Model Rule 4.2 (Communication with Person Represented by Counsel).

• *Closely Held Corporations*

Although closely held corporations often look and feel quite distinct from public corporations, the entity-representation rule usually applies to closely held corporations just as it does to public corporations. *See, e.g., McKinney v. McMeans*, 147 F. Supp. 2d 898 (W.D. Tenn. 2001) (close corporation's lawyer not disqualified in suit brought against corporation by one of its two shareholders; lawyer represented corporation rather than either shareholder); *Nilavar v. Mercy Health Sys.*, 143 F. Supp. 2d 909 (S.D. Ohio 2001) (principal in closely held corporation did not have personal lawyer-client relationship with corporation's outside lawyer; principal owned only 9 percent of corporation and did not consult with lawyer on any personal legal matters); *Kopka v. Kamensky & Rubenstein*, 821 N.E.2d 719 (Ill. App. Ct. 2004) (lawyers represented incorporated law firm, not one of its three shareholder-partners); *Cutshall v. Barker*, 733 N.E.2d 973 (Ind. Ct. App. 2000) (closely held corporation's lawyer in shareholder's

derivative action must act in best interests of corporation rather than those of individual board members); Ariz. Ethics Op. 2002-06 (2002) (lawyer retained to form new corporation may limit representation to corporation and not represent its incorporating constituents, provided constituents consent after lawyer makes appropriate disclosures); D.C. Ethics Op. 216 (1991) (corporation's lawyer may represent corporation against one of two 50 percent shareholders, as long as lawyer acts consistently with corporation's interests); R.I. Ethics Op. 2005-10 (2005) (lawyers who represented corporation in obtaining permits for real estate development may later represent company to which real estate was sold in connection with same permits, even though two principals/shareholders of first corporation objected to selling real estate; former client was corporation, not constituents, and new representation not adverse to corporation's interests); *see also* Or. Ethics Op. 2005-85 (2005) (lawyer for corporation with two stockholders who are not in same family does not automatically represent stockholders as individuals as well, nor does lawyer who represents two unrelated stockholders automatically represent their corporation); *cf. Gonzalez ex rel. Colonial Bank v. Chillura*, 892 So. 2d 1075 (Fla. Dist. Ct. App. 2004) (fact that shareholder derivative action is for benefit of corporation does not mean lawyer representing plaintiff thereby represents corporation).

That said, it is not uncommon in closely held corporations for (1) a constituent's interests to be essentially identical to the corporation's interests or (2) for the constituent to rely upon the corporation's lawyer for personal legal services. In such situations, the entity's lawyer can—even unwittingly—become the individual's lawyer as well. *See Philin Corp. v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 (D. Or. Mar. 11, 2005) (interests of closely held family corporation and shareholder were sufficiently identical to warrant disqualification of law firm representing party adverse to corporation, given that firm lawyer consulted with shareholder in same matter); *United States v. Edwards*, 39 F. Supp. 2d 716 (M.D. La. 1999) (lawyer for close corporation established to obtain riverboat gambling license had lawyer-client relationship with corporation's sole shareholder because their interests were identical and shareholder reasonably expected that lawyer-client relationship existed; factors include whether lawyer ever represented shareholder in individual matters, whether lawyer's services are billed to and paid by corporation, whether shareholders treat corporation as corporation or partnership, and whether shareholder reasonably believes that lawyer acts as shareholder's individual lawyer); *Luce v. Alcox*, 848 N.E.2d 552 (Ohio Ct. App. 2006) (minority shareholder in closely held corporation who brought suit on behalf of corporation against majority shareholder deemed to have been in lawyer-client relationship with corporation's lawyers, who were now representing majority shareholder); *First Republic Bank v. Brand*, 51 Pa. D. & C.4th 167 (Pa. C.P. 2001) (creating ten-factor test to determine whether close corporation's lawyer and corporate shareholder were in implied attorney-client relationship). *See generally* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 Ala. L. Rev. 181 (Fall 2004); Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 Cornell L. Rev. 466 (Mar. 1989); Bryan J. Pechersky, Note, *Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility*, 73 Tex. L. Rev. 919 (Mar. 1995).

• *Corporate Families*

By representing one entity the lawyer does not thereby become the lawyer for affiliated entities. Model Rule 1.7, cmt. [34] ("A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."); *see also* ABA Formal Ethics Op. 95-390 (1995) ("A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter."). This general rule, however, will give way whenever there is (1) an agreement to the contrary, (2) substantial organizational overlap, or (3) shared confidential information. Model Rule 1.7, cmt. [34] (lawyer may need client consent for, or be barred from, representation adverse to affiliate when "the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client"); *see also GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010) (lawyers for parent company disqualified from representation adverse to subsidiary in light of financial interdependence and "substantial operational commonality" between parent and subsidiary, including wholly owned status of subsidiary, shared in-house legal department and other services, such as accounting and human resources, and management overlap); N.Y. City Formal Ethics Op. 2007-3 (2007) (explaining relevant factors to discern "whether the affiliate is de facto a current client"); *cf. Boston Scientific Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369 (D. Del. 2009) (law firm lawyers who engaged in adverse representation of entity client violated Rule 1.7, but court nevertheless refused to disqualify lawyers because two matters were substantially unrelated, lawyers on matters were separated geographically and by ethical wall, and entity client shared blame for conflict by confusing lawyers about which entity lawyers actually represented in corporate family). *See generally* 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 26:5 (2009) (discussing cases and ethics opinions in parent-subsidiary context).

ORGANIZATIONS OTHER THAN CORPORATIONS

• *Partnerships*

A lawyer for a partnership does not automatically represent the partners individually. *See Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994) (lawyer hired by individual partners to assist in sale of limited partnership assets had lawyer-client relationship with partnership alone rather than with partners; "there is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client the lawyer represents"); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976 (N.Y. 2009) (lawyer for limited partnership does not owe fiduciary duty to individual limited partners); *see also Thruway Invs. v. O'Connell & Aronowitz, P.C.*, 772 N.Y.S.2d 716 (App. Div. 2004) (law firm represented limited partnership formed to manage hotel, but not individual partners or corporation formed to acquire hotel); ABA Formal Ethics

Op. 91-361 (1991) (lawyer for partnership represents entity, not individual partners, unless specific circumstances indicate otherwise); Md. Ethics Op. 95-54 (1995) (lawyer for limited partnership, hired by general partner who is removed and contests removal, may continue representation when requested by new, disputed general partner; lawyer represents partnership, not individual constituent); Or. Ethics Op. 2005-85 (2005) (lawyer who represents partnership with two owners who are not related does not automatically also represent owners as individuals, nor does lawyer who represents two unrelated owners automatically represent their partnership).

But as with counsel for a closely held corporation, counsel for the partnership can easily become an individual partner's lawyer as well, whether intentionally or not. *See, e.g., Responsible Citizens v. Superior Court*, 20 Cal. Rptr. 2d 756 (Ct. App. 1993) (factors to consider include type and size of partnership, nature and scope of lawyer's engagement by partnership, kind and extent of contacts between lawyer and individual partner, and lawyer's access to information relating to partner's interests); *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996) (if partnership structured so its business is managed by "an aggregation of the general partners," lawyer-client relationship exists between partnership's lawyer and each general partner, but if management placed in hands of fewer than all partners, lawyer represents only partnership; other circumstances may also create lawyer-client relationship with individual partners). *See generally* James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 Pac. L.J. 961 (July 1995).

• *Governmental Organizations*

Precisely defining the identity of a governmental client can be difficult; as Comment [9] notes, depending upon the circumstances, the client may be a specific agency, a branch of government, or "the government as a whole." Ultimately, the question is one of law. N.Y. City Ethics Op. 2004-03 (2004) (who is governmental client, and whether government lawyer may represent more than one agency, is more dependent upon facts and law than on ethics rules); *see, e.g., Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373 (10th Cir. 1994) (school district's lawyer not representing principal individually when they consulted on personnel issues; therefore, principal not lawyer's former client for purposes of disqualifying lawyer from representing school district in principal's discrimination action); *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (law firm that represented limited number of state agencies on limited number of issues under contract with state budget department did not represent state government as a whole); *Salt Lake County Comm'n v. Salt Lake County Attorney*, 985 P.2d 899 (Utah 1999) (county lawyer had lawyer-client relationship with county as entity and not with commission or individual commissioners); ABA Formal Ethics Op. 97-405 (1997) (discussing how to identify government client for conflicts purposes); Cal. Ethics Op. 2001-156 (2001) (city lawyer generally represents municipal corporate entity acting through its constituent subentities and officials; if city charter does not give constituent parts of city government any authority to act independently of city, city lawyer does not represent constituent subentities and officials separately); Conn. Ethics Op. 03-01 (2003) (city corporation counsel may represent city in civil lawsuit filed by city employee concerning employee's transfer to another department, even though employee sometimes appears as witness for city in property code enforcement pro-

ceedings); Mass. Ethics Op. 03-01 (2003) (lawyer for municipality who advised department head in his official capacity at deposition in suit between two private parties may represent municipality in unrelated lawsuit brought by department head after his departure from municipal employment, and may introduce deposition testimony to impeach him; department head could not have reasonably assumed lawyer had been representing him personally); R.I. Ethics Op. 2002-02 (2002) (municipal lawyer must comply with municipal council's request for redacted itemized statement of prior bills; lawyer may not comply with individual council member's request for unredacted bills unless council, which is client, consents); *see also Restatement (Third) of the Law Governing Lawyers* § 97 cmt. c (2000) (relevant factors include terms of retention or other manifestations of reasonable understanding, anticipated scope and nature of lawyer's services, particular regulatory arrangements relevant to lawyer's work, and history and traditions of office); *cf.* D.C. Rule of Prof'l Conduct 1.6(k) ("The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order."). *See generally* Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. Tex. L. Rev. 269 (Spring 1999); Note, *Government Counsel and Their Obligations*, 121 Harv. L. Rev. 1409 (Mar. 2008); Note, *Rethinking the Professional Responsibility of Federal Agency Lawyers*, 115 Harv. L. Rev. 1170 (Feb. 2002).

• *Other Types of Associations*

Similarly, lawyers for other types of entities do not necessarily represent the constituents. *See, e.g., United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997) (lawyer for campaign organization of candidate for union president did not represent campaign manager who consulted him about alleged campaign contribution violations); ABA Formal Ethics Op. 92-365 (1992) (trade association's lawyer does not automatically represent individual members, although circumstances in particular instance may support finding that lawyer-client relationship with individual member has arisen; identifying factors for consideration); D.C. Ethics Op. 305 (2001) (lawyer for trade association generally not prohibited from representing association or another client in matter adverse to member of association, unless circumstances support member's expectation of lawyer-client relationship); Or. Ethics Op. 2005-27 (2005) (lawyer for trade association may also represent one association member against another member, who is not present or former client, in matter unrelated to lawyer's representation of association). *See generally* Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 Stetson L. Rev. 389 (Winter 1995); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129 (Fall 2001) (discussing indeterminate obligations of class counsel).

The nature of some unincorporated associations, however, may be such that the interests of the entity cannot be distinguished from the interests of the individual constituents. In that circumstance, courts are likely to find that the entity's lawyer represents the individual constituents as well. *See, e.g., City of Kalamazoo v. Mich. Disposal Serv.*, 151 F. Supp. 2d 913 (W.D. Mich. 2001) (lawyer-client relationship existed between individual defendant in environmental litigation and lawyer who also served as com-

mon counsel for all defendants under joint-defense agreement; defense group existed solely to represent individual members' interests in litigation); *Al-Yusr Townsend & Bottum Co., Ltd. v. United Mid-East Co.*, Civ. A. No. 95-1168, 1995 WL 592548 (E.D. Pa. Oct. 4, 1995) (interests of individual members of joint venture "so intertwined" with those of joint venture that court compelled to conclude that venture's lawyer had lawyer-client relationship with each co-venturer); *Franklin v. Callum*, 804 A.2d 444 (N.H. 2002) (lawyer who performs legal work for unincorporated waste disposal project that has no independent legal status separate from its member districts represents each district as well as project).

CONFIDENTIALITY ISSUES BETWEEN ORGANIZATION AND CONSTITUENTS

The ethical duty of confidentiality typically runs to the organization itself rather than to any of its constituents. *See, e.g.*, N.J. Ethics Op. 664 (1992) (when corporation's credit manager told corporation's lawyer about corporation's criminal and fraudulent activities, lawyer's duty was to disclose allegations to president and directors and keep allegations confidential from disclosure to others; client was corporation, not employee); R.I. Ethics Op. 2003-04 (2003) (lawyer representing unincorporated condominium association and seeking to withdraw from representation—because board breached its contract with him and consistently failed to accept his legal advice—may not tell individual unit owners why he is seeking to withdraw). *But see Restatement (Third) of the Law Governing Lawyers* § 131 cmt. e (2000) (lawyer may be prohibited from sharing confidential information with entity-employer if that information obtained from constituent who "reasonably appeared to be consulting the lawyer as present or prospective client with respect to the person's individual interests, and the lawyer failed to warn the associated person that the lawyer represents only the organization and could act against the person's interests as a result").

As a general matter, the corporate attorney-client privilege similarly belongs to the corporation, not its constituents. Because the privilege is beyond the scope of this annotation, however, see the following sources for discussion: *ABA/BNA Lawyers' Manual on Professional Conduct*, "Types of Practice: Corporate: Privilege/Confidentiality," pp. 91:2201 *et seq.*; Gary H. Collins & David Z. Seide, *Warning the Witness: A Guide to Internal Investigations and the Attorney-Client Privilege* (2010); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (5th ed. 2007).

IN-HOUSE LAWYERS: LAWYERS WHO ARE ALSO EMPLOYEES OR SHAREHOLDERS

In-house counsel are not only an entity's lawyers but also its employees, and possibly its shareholders as well. When an in-house lawyer asserts a claim against the entity, the ethical constraints attending the lawyer's role as counsel—particularly the duty of confidentiality—can make the claim difficult to pursue. Courts have taken both supportive and unsupportive views of such claims. *See, e.g., Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009) (in-house counsel may pursue whistleblower action under Sarbanes-Oxley Act; any resulting risks to attorney-client confidentiality or privilege can be adequately addressed by court's equitable powers, such as protective orders or

in camera proceedings); *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606 (D. Kan. 2007) (in-house counsel may pursue whistleblower claim under Kansas law; court granted motion for protective order for corporation's confidential information, but denied request for selective waiver protection of corporation's attorney-client privilege); *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994) (in-house counsel may pursue retaliatory discharge claim if possible to do so without breaching attorney-client privilege); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (disallowing in-house "whistleblower" lawyer's claim for retaliatory discharge; permitting such claims would have chilling effect on communications between lawyer and employer/client); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000) (in-house counsel may reveal confidential information when necessary to establish wrongful discharge claim); *Tartaglia v. UBS PaineWebber Inc.*, 961 A.2d 1167 (N.J. 2008) (former in-house counsel has common-law cause of action for wrongful discharge because she was allegedly fired for complaining about company policy that forced her to violate ethics rule concerning conflicts of interest, which is expression of state public policy); *Mancheski v. Gabelli Group Capital Partners, Inc.*, 802 N.Y.S.2d 473 (App. Div. 2005) (although former corporate counsel and his law firm were disqualified from representing shareholders against corporation, former corporate counsel is not himself precluded from suing corporation in his capacity as shareholder, notwithstanding his duty to preserve corporation's confidences and secrets); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (in-house counsel may bring retaliatory discharge action against former employer and may disclose employer-client's confidences to extent necessary to establish claim); ABA Formal Ethics Op. 01-424 (2001) ("The Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. . . . The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed."). *See generally* S.C. Ethics Op. 06-12 (2006) (in-house counsel whose professional independence is unethically infringed by nonlawyer supervisor may need to raise issue with higher authority pursuant to Rule 1.13(b)); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179 (Winter 2001); Rachel S. Richman, *A Cause Worth Quitting For? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 Ind. L.J. 963 (Summer 2000); Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 Emory L.J. 1023 (Summer 1997).

Subsection (b): Actions Inconsistent with Organization's Interests

2003 AMENDMENTS

Rule 1.13(b) was amended in 2003, following the release of a report by the ABA Task Force on Corporate Responsibility (http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) and the promulgation of new regulations by the Securities and Exchange Commission (SEC). *See generally* Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 Geo. J. Legal Ethics 35 (Fall 2003). These changes respond to the challenges highlighted by—but by no means limited to—the corporate scandals of the

Enron era. *See generally In re Enron Corp.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002) (lawyers for Enron who co-authored misleading financial reports could be responsible for securities violations as principal violators); Thomas D. Morgan, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers* 168 (2005) ("Few issues have been more challenging for lawyers over the years, and few have involved potentially greater liability for the lawyer who sees serious misconduct by a constituent official and fails to act in the best interests of the organizational client."); Milton C. Regan, Jr., *Teaching Enron*, 74 Fordham L. Rev. 1139 (Dec. 2005).

The most significant change to Rule 1.13 is the creation of a new exception to the lawyer's duty of confidentiality. In limited circumstances, the amended rule permits—though does not require—a lawyer to go outside the organization with information relating to misconduct by a constituent that is likely to cause substantial harm to the organization. *See* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 307–18 (2006). Also in 2003, the ABA made analogous amendments to the confidentiality obligation of Rule 1.6, which are discussed in the Annotation to Model Rule 1.6 (subsections (b)(2)–(3)).

WHEN CONSTITUENT'S CONDUCT LIKELY TO HARM ORGANIZATION

Under Rule 1.13(b), when a lawyer for an organization "knows" that a constituent of the organization is engaged in improper conduct that is likely to result in substantial harm to the organization, the lawyer must proceed "as is reasonably necessary in the best interest of the organization." *See* Model Rule 1.0(f) (defining "knows" as denoting "actual knowledge of the fact in question" that may be "inferred from circumstances"); Model Rule 1.13, cmt. [3] ("knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious"). Rule 1.13(b) is, in a sense, a specific application of the lawyer's duties of competence, diligence, and communication to the organizational context. *See, e.g., Restatement (Third) of the Law Governing Lawyers* § 96 cmt. e (2000) ("A lawyer is . . . required to act diligently and to exercise care by taking steps to prevent reasonably foreseeable harm to a client. Thus, [the *Restatement*, like Rule 1.13(b),] requires a lawyer to take action to protect the interests of the client organization with respect to certain breaches of legal duty to the organization by a constituent.").

Rule 1.13(b) identifies two kinds of constituent misconduct that can trigger this duty to act: a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization. *See In re Harding*, 223 P.3d 303 (Kan. 2010) (city attorney violated Rule 1.13 by failing to act in best interests of city when faced with misconduct, failing to refer matter to city's highest authority, and failing to advise high-level city officials that attorney's representation of city might be adverse to their interests); *In re DeMers*, 901 N.Y.S.2d 858 (App. Div. 2010) (per curiam) (disciplining zoning board's lawyer for violating Rule 1.13(b) by failing to take action in response to board's continuing violations of state law); *see also* Model Rule 1.13, cmt. [4] (in determining how to proceed when lawyer learns of violation, lawyer should consider seriousness of violation and its consequences, responsibility in organization and apparent motivation of person involved, and organizational policies); *Restatement*

(Third) of the Law Governing Lawyers § 96 cmt. f (2000) (lawyer should assess "the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations"); *Restatement (Third) of the Law Governing Lawyers* § 97 cmt. j (2000) (with respect to governmental client, lawyer may need to consider potential public and private injury, including injury to public interest in integrity of government and to nonproprietary rights, such as deprivations of right to vote or to be free from invidious discrimination); Mich. Ethics Op. RI-345 (2008) (explaining compliance with Rule 1.13 in situation in which high-level corporate officer intends to destroy discovery documents); *cf. FDIC v. Clark*, 978 F.2d 1541 (10th Cir. 1992) (lawyer may have duty to take action and not simply take at face value constituent's false or misleading assurances). *See generally* William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 Fordham L. Rev. 947 (Dec. 2005).

• *Climbing Corporate Ladder*

Unless the lawyer reasonably believes that the organization's best interests do not so require, the lawyer must report misconduct "up the ladder" to higher authorities in the organization, including, if necessary, "the highest authority that can act on behalf of the organization [under] applicable law." Model Rule 1.13(b). In a private organization, the highest authority will ordinarily be the corporation's board of directors or similar governing body. Model Rule 1.13, cmt. [5]; *see also Restatement (Third) of the Law Governing Lawyers* § 97 cmt. j (2000) (lawyer representing governmental clients may need to consider whether to refer matter "to allied governmental agencies, such as the government's general legal office, such as a state's office of attorney general").

If the company is public, the lawyer may be independently required by law to inform the company's highest authority of certain misconduct. The Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201) and the SEC regulations promulgated pursuant to it (17 C.F.R. §§ 205.1–205.7) require a lawyer to report evidence of a material violation of securities laws or a breach of fiduciary duty by the company or its agent to the company's general counsel or CEO and, if no adequate response is received, to the company's audit committee, independent directors, or board of directors. The lawyer can also fulfill the SEC obligation by reporting to the company's "qualified legal compliance committee," if the company has created one. *See generally* Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 Geo. J. Legal Ethics 1089 (Fall 2006); John M. Burman, *Non-SEC Whistle-Blowing Obligations of Lawyers Who Represent Organizations*, 46 Washburn L.J. 127 (Fall 2006); Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 Vill. L. Rev. 725 (2004); Beverley Earle & Gerald A. Madek, *The New World of Risk for Corporate Attorneys and Their Boards Post-Sarbanes-Oxley: An Assessment of Impact and a Prescription for Action*, 2 Berkeley Bus. L.J. 185 (Spring 2005); Caroline Harrington, Note, *Attorney Gatekeeper Duties in an Increasingly Complex World: Revisiting the "Noisy Withdrawal" Proposal of SEC Rule 205*, 22 Geo. J. Legal Ethics 893 (Summer 2009); Sung Hui Kim, *Gatekeepers Inside Out*, 21 Geo. J. Legal Ethics 411 (Spring

2008); Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. Rev. 455 (May 2006).

While the revised duties in Rule 1.13 are similar to the SEC's rules of practice, there are important differences between the two. For example, Model Rule 1.13(b) requires a lawyer to climb the corporate ladder when the lawyer "knows" of a violation of a legal duty "reasonably likely" to result in substantial corporate injury. Rule 205, in contrast, is triggered by "credible evidence, based upon which it would be unreasonable . . . for a prudent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." 17 C.F.R. § 205.2(e).

Subsection (c): "Reporting Out"

Pursuant to subsection (c), the lawyer is permitted to "report out"—that is, to "reveal information relating to the representation" outside the organization—if the lawyer (1) goes up the organizational ladder and informs the organization's highest authority of misconduct "that is clearly a violation of law" reasonably certain to result in substantial injury to the organization, and (2) the highest authority nevertheless fails to address the problem "in a timely and appropriate manner." *See, e.g.*, ABA Formal Ethics Op. 08-453 (2008) (law firm's ethics counsel may have duty to "disclose misconduct of a consulting lawyer to law firm management," and if that is ineffective, may have discretion to disclose misconduct "to external regulatory authorities").

Before the 2003 amendment to the rule, however, a lawyer in this position could only resign; there was no provision in the Model Rules allowing the lawyer to go outside the organization. *See* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2005*, at 292–94 (2006) (proposed reporting-out provision similar to Rule 1.13(c) was defeated in 1983); *cf.* 17 C.F.R. §§ 205.3(d)(2)(i)–(iii) (lawyer may report to SEC to extent necessary to (1) prevent company from committing material securities law violation likely to cause substantial financial injury to company or investors, (2) prevent company from committing or suborning perjury, or making false statements in SEC investigation, or (3) rectify consequences of material securities violation by company).

Note that the 2003 amendments to the confidentiality rule (Rule 1.6) do not permit disclosure—whether to prevent, rectify, or mitigate injury—unless the lawyer's services are being used to further the particular crime or fraud. *See* Model Rule 1.6(b)(2)–(3). Rule 1.13(c) contains no such limitation. *But see* Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* § 5.07 (4th ed. 2010) (containing critical discussion of subsections (b) and (c) of Rule 1.13 and arguing that Rule 1.13—even as amended—is still more protective of corporate fraud, as opposed to fraud by individuals addressed under Rule 1.6, because Rule 1.13 instructs corporate lawyer to act only to prevent "substantial injury to the organization" and to consider "best interests" of organization, as opposed to interests of others).

Subsection (d): Lawyer Investigating or Defending Claim Arising out of Corporate Wrongdoing

Rule 1.13(d) limits the "reporting out" authority contained in Rule 1.13(c). If the lawyer has been retained to investigate an alleged violation of law by the organization,

or to defend the organization or a constituent against claims arising out of an alleged violation of law, the lawyer does not have the option of reporting out under Rule 1.13(c). In these circumstances, it is thought, there is a compelling need to promote full and frank disclosure by organizational constituents without fear of disclosure by the lawyer to third parties. *See* Model Rule 1.13, cmt. [7]. The SEC rules make a similar exception. *See* 17 C.F.R. §§ 205.3(b)(6), 205.3(b)(7).

Subsection (e): Lawyer's Continuing Obligations upon Discharge or Withdrawal under Circumstances Governed by Subsections (b) and (c)

If a lawyer takes corrective action pursuant to subsections (b) or (c) and as a result is discharged or withdraws, Rule 1.13(e) requires the lawyer to take reasonably necessary steps to notify the organization's highest authority. *Cf.* 17 C.F.R. § 205.3(b)(10) (lawyer who reasonably believes he was discharged for reporting evidence of material violation of law may so notify corporation's board of directors or any committee thereof). Note that Rule 1.13(e) requires only reasonable steps to assure that the entity's highest authority is "informed of the lawyer's discharge or withdrawal," and is silent about whether the lawyer is also permitted to disclose the circumstances under which the withdrawal or termination occurred. *See* Model Rule 1.13, cmt. [8]. The ABA Task Force on Corporate Responsibility, whose report inspired Rule 1.13(e), clarifies that a broad reading was intended. *See* Report of the ABA Task Force on Corporate Responsibility (Mar. 31, 2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf ("[T]he lawyer's professional obligations to act in the best interest of the organization should require the lawyer to take reasonable steps to assure that the organization's highest authority is aware of the withdrawal or discharge, *and the lawyer's understanding of the circumstances that brought it about.*" (emphasis added)); *see also id.* proposed cmt. [8].

Before the 2003 amendments, Rule 1.13(c) simply permitted the lawyer faced with certain corporate misconduct to withdraw pursuant to Rule 1.16. It neither required nor authorized any disclosure or other remedial action.

Subsection (f): Lawyer Must Clarify Role If Constituent's Interests Adverse to Those of Organization

To protect constituents and the organization from problems that could result from confusion about the lawyer's role, Rule 1.13(f) requires the lawyer to clarify the identity of the client when *the lawyer knows or reasonably should know* that the organization's interests are adverse to those of a constituent. The italicized language was added in 2002, replacing the phrase, "it is apparent." *See Ariz. ex rel. Thomas v. Schneider*, 130 P.3d 991 (Ariz. Ct. App. 2006) (when interests of city and its officials may conflict, then pursuant to Rule 1.13(f), city attorney should inform city officials of "the scope of the attorney's representation so that those who might otherwise believe a confidential relationship exists do not compromise their legal interests"); D.C. Ethics Op. 269 (1997) (lawyer conducting investigation of possible wrongdoing by corporation and its employees must make clear that lawyer represents corporation and will divulge infor-

mation to it). *See generally* Ariana R. Levinson, *Legal Ethics in the Employment Law Context: Who Is the Client?*, 37 N. Ky. L. Rev. 1 (2010).

Rule 1.13(f) ordinarily should be read together with Rule 4.3 for a fuller understanding of potential "*Upjohn* warnings" in this context. *See United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (lawyers conducting internal corporate investigations may provide a "so-called *Upjohn* or corporate *Miranda* warning," which advises constituent "that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure"; citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)); Model Rule 1.13, cmt. [10] (listing standard warnings in situations in which lawyer should reasonably know that constituent's interests adverse to organization's interests). *See generally* Gary H. Collins & David Z. Seide, *Warning the Witness: A Guide to Internal Investigations and the Attorney-Client Privilege* (2010); Edward C. Brewer, *Ethics of Internal Investigations in Kentucky and Ohio*, 27 N. Ky. L. Rev. 721 (2000).

See the Annotation to Model Rule 4.3 (Dealing with Unrepresented Person) for further discussion.

FAILURE TO CLARIFY ROLE MAY RESULT IN LAWYER-CLIENT RELATIONSHIP WITH CONSTITUENT

When the lawyer does not clarify the nature of his or her role in representing the organization, a constituent may conclude that the lawyer represents the constituent as well as the organization. If this belief is reasonable, it may give rise to a lawyer-client relationship between the lawyer and the constituent. *See Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005) (by giving corporation's executive director legal advice about his employment agreement, corporation's lawyer established lawyer-client relationship with director: "If Nagin was truly working exclusively as [the corporation's] lawyer, he should have responded to Manion's questions by clarifying that he worked only for [the corporation] and suggested Manion seek outside counsel."); *Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861 (D.N.J. 2001) (corporation's law firm disqualified from representing it in suit over enforceability of CEO's severance agreement: "Given that the rapport between the Skadden Firm and [the CEO] . . . was a delicate one, the Skadden Firm should have taken precautions to clarify any ambiguity concerning its duty to represent [the corporation] as separate and distinct from its officers."); N.Y. State Ethics Op. 743 (2001) (lawyer for labor union who fails to inform employee that lawyer does not represent employee risks possibility of inadvertently creating lawyer-client relationship with employee in connection with disclosure of information that employee considers secret and does not want publicized); *cf.* D.C. Ethics Op. 328 (2005) (lawyer who represents constituent of organization should make clear to organization's nonclient constituents that his client's interests may differ from those of organization). *See generally* Mary C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 574 PLI/Lit 399 (1997); Jeffrey Willis & Jamie Heisler Ibrahim, *Avoiding Disqualification: 10 Tips When Representing Corporate Clients*, Ariz. Att'y, June 2009, at 34; Note, *An Expectations Approach to Client Identity*, 106 Harv. L. Rev. 687 (1993).

Subsection (g): Multiple Representation

Rule 1.13(g) permits a lawyer to represent both an organization and one or more of its constituents, subject to the Rule 1.7 provisions governing conflicts of interest. *See Guillen v. City of Chicago*, 956 F. Supp. 1416 (N.D. Ill. 1997) (city lawyer representing city and police officers in civil rights action not disqualified from also representing city paramedics at deposition); *Campellone v. Cragan*, 910 So. 2d 363 (Fla. Dist. Ct. App. 2005) (lawyer disqualified from representing both entity and majority shareholder in derivative action brought by minority shareholder alleging embezzlement, misappropriation of corporate assets, and breach of fiduciary duty by majority shareholder); *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 197 P.3d 1051 (Nev. 2008) (lawyers did not have conflict of interest in representing corporation and majority shareholder in dissolution action); *Campbell v. McKeon*, 905 N.Y.S.2d 589 (App. Div. 2010) (holding similar to *Campellone*); *see also* Cal. Ethics Op. 2003-163 (2003) (lawyer for corporation who represents constituent in unrelated matter may not advise corporation in matter adverse to client); Conn. Ethics Op. 99-19 (1999) (law firm may represent corporation in employment matters and one of its employees in unrelated matter, but may not represent either of them if corporation undertakes adverse action, such as firing employee); Conn. Ethics Op. 99-13 (1999) (lawyer employed by financial institution's trade association may represent individual member financial institutions, subject to conflict-of-interest provisions of Rule 1.7); N.Y. City Ethics Op. 2004-03 (2004) (advising government lawyers on possible conflicts of interest "(a) among government agency clients; (b) between a government agency and its constituents represented by the government lawyer; and (c) between an agency and unrepresented constituents"); N.Y. City Formal Ethics Op. 2004-02 (2004) (discussing factors lawyer should consider in determining whether and how to represent organization and its constituents when organization faced with government investigation); R.I. Ethics Op. 2003-02 (2003) (lawyer for corporation may not represent one of its shareholders in action for involuntary dissolution; representation would be adverse to corporation's interests and would be materially limited by lawyer's responsibilities to corporation). *See generally Restatement (Third) of the Law Governing Lawyers* § 131 cmt. g (2000) (in derivative actions against organizational client, lawyer ordinarily may not represent individual defendants unless "the disinterested directors conclude that no basis exists for the claim that the defending officers and directors have acted against the interests of the organization" and lawyer obtains "the effective consent of all clients"). Importantly, the organization's consent to a potentially conflicting dual representation must be given by a constituent other than one who will be represented by the organization's lawyer. Model Rule 1.13(g); *see, e.g., In re Shirley*, 930 N.E.2d 1135 (Ind. 2010) (lawyer disciplined in part for violating Rule 1.13(g) by failing to obtain consent of disinterested corporate official before engaging in conflicting dual representation of both corporation and its CEO).