Vermont Rules of Professional Conduct
Rule 1.13 – Organization as Client

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*This unofficial version was last updated on **November 14, 2022**.*

Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- *Rule 1.13 has not been amended since 2009*

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 reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b), or 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 is likely to result in substantial injury to the organization, then 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, unless the lawyer reasonably believes that

(1) a disclosure required by Rule 1.6(b) is necessary to prevent harm pursuant to that rule before a referral can be made or acted upon;

(2) a referral is otherwise not feasible in the circumstances, considering the best interests of the organization; or

(3) a referral is not necessary in the best interests of the organization.

(c) Except as provided in paragraph (d), if, 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 reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b) or is clearly a violation of law and is likely to result in substantial injury to the organization, and

(1) the lawyer reasonably believes that the action or refusal to act is reasonably certain to result in harm that would require a disclosure under Rule 1.6(b), then the lawyer must reveal the information, but only if and to the extent the lawyer reasonably believes necessary to prevent the harm; or

(2) the lawyer reasonably believes that the action or refusal to act is a violation of law that 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 requires or permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Except for disclosures required by Rule 1.6(b), 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 required or 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. However, different considerations arise when the lawyer knows that the action or inaction of an officer or other constituent of the organization may cause harm to a third party or to the organization. The lawyer may know that such action or inaction is reasonably certain to result in one of the harms to prevent which Rule 1.6(b) requires disclosure of information relating to the representation, or that the organization is likely to be substantially injured by such action or inaction that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization. In such a case, the lawyer must refer the matter to higher authority in the organization unless the circumstances set forth in subparagraphs (1)-(3) dictate otherwise. 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 in the organization would be necessary. When a harm requiring disclosure under Rule 1.6(b) is threatened, the lawyer may have to act rapidly to prevent the harm and may not be able to undertake such a referral. If rapid action is not required, or the constituent's action is a violation of law, 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 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 a 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, and feasible, 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 for 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 Rule 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this rule supplements Rule 1.6(c) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not otherwise modify, restrict or limit the provisions of Rule 1.6(b) or (c). Under paragraph (c) of this rule, unless Rule 1.6(b) harms are threatened, 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, Rule 1.6(b)(2) and 1.6(b)(3) may require 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, unless Rule 1.6(b) is involved, 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 those 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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.13 is amended to conform to changes in Model Rule 1.13 that were made by a 2003 amendment recommended by the Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility. That amendment was designed to clarify the lawyer's responsibilities to an organizational client in light of recent corporate scandals and the response of Congress and the SEC in the Sarbanes-Oxley Act of 2002 and related regulations. See ''Report of the American Bar Association Task Force on Corporate Responsibility,'' March 31, 2003, http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf. Amended V.R.P.C. 1.13, like the original Vermont rule, differs from the Model Rule where necessary to reflect the fact that certain disclosures of information relating to the representation may be required or permitted by V.R.P.C. 1.6 and not by Model Rule 1.6. See Reporter's Notes to 2009 amendment of V.R.P.C. 1.6.

V.R.P.C. 1.13(a) is unchanged and is identical to the Model Rule. It states the basic proposition that underlies the rule: The client to whom all of the lawyer's duties of loyalty run is the organization, not a constituent, such as the board of directors or management, or an individual officer or employee with whom the lawyer works. In most instances, it can be presumed that the interests of the client organization and of those constituents are identical, so the question of where loyalty is owed does not arise. Rule 1.13 prescribes a course of conduct to be followed by the lawyer when those interests diverge and the interests of the organization must be protected.
Throughout the rule, ''organization'' includes an unincorporated association or other entity. See Comment [1].

V.R.P.C. 1.13(b) adopts the most important change in the Model Rule: The lawyer now *must* ''go up the ladder'' from the officer or other constituent whose action or inaction threatens or has caused one of the harms described in paragraph (b) to ''higher authority within the organization,'' which if necessary could be the board of directors or other authority provided by law. See Comment [5]. Of course, neither the amended nor the original rule precludes such action on the part of the lawyer even when it is not required. See Comment [4].

In other respects, V.R.P.C. 1.13(b) departs significantly from the amended Model Rule in order to accommodate the requirement of V.R.P.C. 1.6(b) that client information be disclosed if the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm; or to prevent client fraud or crime, in which the lawyer's services have been used, that will cause reasonably certain substantial financial injury; or to prevent, mitigate, or rectify consequences of such client crime or fraud reasonably certain to result in substantial financial injury. If a lawyer ''knows,'' as that term is defined in V.R.P.C.

1.0(f), that the action or inaction of an officer or other constituent of an organization ''is reasonably certain to'' give rise to any of the harms that would require disclosure under V.R.P.C. 1.6(b), the lawyer must refer the matter to higher authority in the organization unless the lawyer reasonably believes that the immediate threat of harm would render such a referral moot; then Rule 1.13(b)(1) provides that the lawyer must make disclosure as necessary to prevent the harm without going to higher authority. Consistent with the purpose of V.R.P.C. 1.6(b) to prefer the public interest in
preventing certain harms over the interest in assuring client confidentiality, the lawyer's duties when such harms are threatened arise whether or not the threat is to the organization or a third party and whether or not the conduct in question could be imputed to the organization.

Other constituent actions that require the lawyer to refer a matter to higher authority are violations of law that could substantially injure the organization and could reasonably be imputed to the organization. Here, unless the action or inaction also involves an immediate threat pursuant to V.R.P.C. 1.6(b), the lawyer must refer the matter to higher authority, with two exceptions. If, after consideration of the best interest of the organization, the lawyer reasonably believes that referral is either not feasible or not necessary, that step need not be taken. If, for example, as Comment [4] suggests, the constituent has agreed not to take the threatened action, referral may serve no purpose. Similarly, if the threat of an action that does not require disclosure to forestall is immediate, the lawyer may have to take other preventive action before referral can be made or acted upon. The second and third sentences of V.R.P.C. 1.13(b) as originally adopted, which suggested factors to guide the lawyer's judgment in deciding how to proceed, are now incorporated in Comment [4]. The terms ''reasonable, ''reasonably,'' ''reasonable belief,'' and ''reasonably believes,'' as defined in Rule 1.0(h), (i), imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization, the circumstances at the time of determination are relevant.

V.R.P.C. 1.13(c) also adapts the Model Rule changes to the circumstances created by the required and permitted disclosures of V.R.P.C. 1.6(b) and (c). If the organization's highest authority declines or fails to act in the matter referred to it, under subparagraph (1) the lawyer must disclose any information required under V.R.P.C. 1.6(b) that has not been previously disclosed to meet an immediate threat. Under subparagraph (2), the lawyer may disclose any information reasonably necessary to prevent substantial injury to the organization, whether or not it is information that may be disclosed pursuant to V.R.P.C. 1.6(c). See Comment [6]. In both cases, the rule specifies that the disclosures must be limited to those necessary to achieve the purpose. The reference in the original rule to the lawyer's ability to resign under Rule 1.16 has been omitted in the amendment, but exists independently. See Comment [6].

V.R.P.C. 1.13(d) is a new provision making clear that the permissive disclosure provided in Rule 1.13(c) does not apply when a lawyer is acting on behalf of the organization to investigate or defend against a claimed violation of law. The paragraph differs from Model Rule 1.13(d) in making an exception for the disclosures required by V.R.P.C. 1.6(b). Again, the rule is consistent with the purpose of V.R.P.C. 1.6(b) to prefer the public interest in preventing certain harms over the interest in assuring client confidentiality.

V.R.P.C. 1.13(e) is a new provision identical to Model Rule 1.13. Both state that a lawyer who is discharged or withdraws because of activities under paragraphs (b) or (c) must take steps to inform the organization's highest authority.

V.R.P.C. 1.13(f), like Model Rule 1.13(f), is identical to former Rule 1.13(d), substituting ''the lawyer knows or reasonably should know'' for ''it is apparent.'' The purpose is conformity with the terminology of Rule 1.0 and usage elsewhere in the rules. See ABA Reporter's Explanation.

V.R.P.C. 1.13(g), like Model Rule 1.13(g), carries forward former Rule 1.13(e).

Comments [1] and [2] are unchanged and are identical to Model Rules Comments [1] and [2], with the exception of the addition of a reference to ''required'' disclosures in the last sentence of Comment [2].

Comment [3] incorporates changes from Model Rules Comment [3] with revisions to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b).

Comment [4] incorporates changes from Model Rules Comment [4] with revisions to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b). The Comment adapts language formerly found in Rule 1.13(b) and deemed more appropriate for the Comment. The language deleted from the Comment is no longer appropriate in light of the mandatory nature of the lawyer's obligation to refer the matter to higher authority. The final sentence makes clear what was implicit in the original rule, i.e., that it is not intended to preclude a lawyer from bringing to higher authority concerns other than those specified in the

rule.

Comment [5] incorporates changes from Model Rules Comment [5] reflecting the mandatory nature of the lawyer's obligation to refer the matter to higher authority.

Comment [6] incorporates changes from Model Rules Comment [6] with revisions to accommodate the required and permitted disclosures of V.R.P.C. 1.6(b) and (c) and the consequent changes in V.R.P.C. 1.13(c).

Comments [7] and [8] are new. They incorporate Model Rules Comments [7] and [8], with a reference in Comment [7] to accommodate the required disclosures of V.R.P.C. 1.6(b) and the consequent changes in V.R.P.C. 1.13(b).

Comment [9] (formerly Comment [6]) incorporates changes from Model Rules Comment [9] designed to reflect more accurately the state of the law concerning identity of a government client and to provide guidance for that determination. See ABA Reporter's Explanation.

Comments [10]-[14] (formerly Comments [7]-[11]) are unchanged and are identical to Model Rules Comments [10]-[14].

Reporter's Notes

This rule has no counterpart in the Vermont Code. It clarifies the lawyer's role when representing an entity and establishes a mechanism for operation within that role. The rule in section (a) makes clear that the entity, not its constituents, is the client. The constituents of the entity, its officers, directors, employees and shareholders, like the lawyer, merely act for the entity. In sections (b) through (e) the rule fleshes out the duties of the lawyer for the entity with regard to conflicts of interest within the entity, communications, and confidentiality.

The drafters modified the ABA's version of this rule by adding a clause to paragraph (c) to require or allow the lawyer for an organization to disclose the client-organization's intent to commit a crime as provided in Rule 1.6. The ABA version omitted such a provision.

ANNOTATIONS

1. City attorney. In a breach of fiduciary duty suit brought by a city manager against the city attorney, the trial court was correct in construing the city charter as obligating the city attorney to represent the city's interests only. Though the charter of Winooski, Vermont, designates the city attorney as legal advisor to the city manager, it is settled in Vermont and other states that the actual client of the city attorney is the municipality. Handverger v. City of Winooski, 2011 VT 134, _Vt._, 38 A.3d 1158.