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NEW RULES OF PROFESSIONAL CONDUCT

Rule 1.13, Organization as a Client

By John Stellini

On May 10, the California Supreme Court approved 27 amended Rules of Professional Conduct. The justices modified and authorized 42 more. Amongst those modified rules is Rule 1.13, which will replace current Rule 3-600, dealing with organizational clients, on Nov. 1, when the new rules take effect.

Rule 1.13(A) replaces the former Rule 3-600(A), which remained primarily intact through the rules revision process, and requires lawyers to conform their representation to the concept that the client is the organization itself.

Rule 1.13(B), which partially replaces the former Rule 3-600(B), states that where the lawyer 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 a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and likely to result in substantial injury to the organization, the lawyer shall refer the matter to higher authority in the organization.”

This modified rule is a sharp departure from the former Rule 3-600(B) in several respects. First, the former Rule 3-600(B) did not require lawyers to report such matters to higher authorities within the organization, but rather gave lawyers the discretion to do so. This subtle change to the language of the provision will require lawyers to take a more active role with their organizational clients, and in theory, should halt corporate misconduct before it happens.

Second, lawyers were previously given such a reporting option where the lawyer knew that a constituent “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.” Rule 1.13(B) requires the lawyer to know both that the constituent intends to violate a law that is imputable

to the organization and that such violation is likely to result in substantial injury to the organization. While the practical effect remains uncertain, it appears the modification was made at least in part as an attempt to narrow the scope of those situations requiring lawyers to escalate matters up the leadership chain, as frequent reporting between lawyer and high-ranking officials on questionable conduct has the potential to create distrust amongst lawyers and lower-ranking constituents of an organization.

Rule 1.13(C) incorporates a provision set forth in the former Rule 3-600(B) forbidding lawyers from revealing information protected by Business and Professions Code Section 6068, subdivision (e) in the circumstances described in the preceding paragraph. The modified rule does not contain any substantial changes.

Rule 1.13(D) integrates a provision set forth in the former Rule 3-600(C) allowing lawyers to exercise their right, and where appropriate, duty, to resign or withdraw where a corporation’s highest authority 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 a law reasonably imputable to the organization, and is likely to result in substantial injury to the organization. While the former Rule 3-600(C) stopped there, Rule 1.13 goes on to introduce an additional clause into the provision, emphasizing that when such circumstances exist, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The introduction of this clause highlights the principle that even in circumstances where a lawyer knows that an organization’s highest-ranking officials are in violation of the law, the lawyer’s duty to represent the organization zealously does not end unless there the lawyer terminates the attorney-client relationship.

A wholly new provision is introduced in Rule 1.13(E). The provision requires lawyers to “proceed as the lawyer reasonably believes necessary to assure that the organization’s

highest authority is informed” when a lawyer 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). The policy consideration behind this is clear: to prevent constituents within organizations from sweeping corporate misconduct discovered by its lawyers under the rug through termination. In theory, this provision will also act as a safe-harbor, encouraging lawyers to report corporate misconduct without fear of termination.

Section 1.13(F) replaces the former Rule 3-600(D). The modified Rule requires lawyers to 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 constituents with whom the lawyer is dealing. The former Rule 3-600(D) contained similar language, but also compelled lawyers to take action if the lawyer thought the organization’s interests might become adverse to those of the constituent with whom the member is dealing. While the modified Rule is slightly narrower in scope, its effect should largely remain the same.

Finally, Rule 1.13(G) replaces the former Rule 3-600(E). No material changes were made to the modified Rule, which allows a lawyer representing an organization to also represent any of its constituents provided consent by an appropriate constituent is given where required under other sections of the rules.

While Rule 1.13 did not undergo a complete overhaul, the intent of the drafters is clear: encourage transparency and reporting amongst legal professionals and their organizational clients.

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