

disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by § 11.106.

When constituents of the organization make decisions for it, the practitioner ordinarily must accept the decisions even if their utility or prudence is doubtful. The organization's constituents make decisions concerning policy and operations, including ones entailing serious risk. However, different considerations arise when the practitioner knows that the organization may be substantially injured by tortuous or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization or that might result in substantial injury to the organization. In such a circumstance, it may be reasonably necessary for the practitioner to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the practitioner to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a practitioner should encourage the formulation of such a policy. Even in the absence of organization policy, however, the practitioner may have an obligation to refer a matter to a higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the practitioner to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

*Relation to Other Rules.* Section 11.113 would not limit or expand the practitioner's responsibility under §§ 11.106, 11.108, 11.116, 11.303, and 11.401. If the practitioner's services are being used by an organization to further a crime or fraud by the organization, § 11.102(d) can be applicable.

*Government Agency.* Because the Government agency that employs the Government practitioner is the practitioner's client, the practitioner represents the agency or section within the agency acting through its duly authorized constituents. Any application of proposed § 11.113 to Government practitioners must, however, take into account the differences between Government agencies and other organizations. For example, statutes and regulation may define duties of lawyers employed by the Government or lawyers in military service. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the Government context. Although in some circumstances the client may be a specific agency, it is generally 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 Government as a whole may be the client for the purpose of this Rule. Moreover, in a matter involving the conduct of Government officials, a Government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

*Clarifying the Practitioner's Role.*

There are times when the organization's interest may differ from those of one or more of its constituents. This can occur, for example, where a constituent believes, incorrectly, that a practitioner is representing the constituent's interests, whereas the practitioner represents the interests of the organization. In such circumstances the practitioner should advise any constituent whose interest the practitioner finds differs from that of the organization, of the conflict or potential conflict of interest, that the practitioner's representation is limited to the client cannot permit the practitioner to represent such constituent, and that the constituent may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such divergent interest, the practitioner for the organization cannot provide legal representation for that constituent individual, and that discussions between the practitioner for the organization and the individual may not be privileged.

Whether the practitioner for the organization prudently should give such

a warning to any constituent individual will turn on the facts of each case.

*Dual Representation.* Paragraph (c) of § 11.113 recognizes that a practitioner for an organization may also represent a principal officer or major shareholder.

*Derivative Actions.* 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.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the practitioner'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 practitioner 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 practitioner's duty to the organization and the practitioner's relationship with the board. In those circumstances, § 11.107 governs whether practitioners who normally serve as counsel to the corporation can properly represent both the directors and the organization.

*Section 11.114* would introduce rules to address circumstances when a client is under a disability. The normal client-practitioner relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-practitioner relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, the Patent Statute draws no distinction based on age as to entitlement to a patent. Also, children as young as five or six years of age, and certainly those of ten or twelve, have been regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. Conversely, it is recognized that some persons of advanced age can be quite