The Ethical Duties of Common Interest Communities Counsel in the Age of Economic Distress: Charting the Uncharted Waters and Avoiding the Rocks

Robert S. Freedman
Carlton Fields, P.A.
Tampa, FL

Steven H. Mezer
Bush Ross, P.A.
Tampa, FL

Daniel Q. Orvin
Buist Moore Smythe McGee PA
Charleston, SC

The economic downturn has clearly resulted in significant problems for condominiums and subdivision developments - both in operation and sales - throughout the country. There have been condominium and subdivision development failures of an unprecedented scale and scope, hitting all segments of the market. As projects have failed and lenders have taken a variety of actions including foreclosure, taking over projects, selling their loans, or conveying units to third party bulk purchasers. As a result, the issues to be addressed by the practitioner have significantly changed. Within the context of one distressed project, the practitioner may be asked to provide advice and counsel on developer, lender, association or successor purchaser issues. It is imperative that the practitioner at all times be aware of the involved ethical obligations and requirements. This paper provides direction and advice regarding potential ethical dilemmas on the distressed project frontier.

1. **Who do you represent? Who is your client?**[1] The starting point for any representation discussion in any area, but particularly the distressed condominium arena, is to determine who is being represented and to make it clear who is not being represented. Counsel must always be cognizant of whose interests are being represented and to whom the duty of care is owed, as representation in a distressed asset situation often involves various interests and components.

As an example, assume that the client is a bulk purchaser of the developer's remaining condominium units, and the lender has not yet foreclosed. An attorney obviously must serve as counsel in the purchaser and sale transaction. However, what if the client is being assigned the

[1] See Appendix A for rules pertaining to representation of organizations, which may be of interest in connection with the representation of owners associations.

unclosed purchase contracts of the developer? Does this mean that the client becomes the developer for purposes of those contracts? If the client acquires enough units (and concomitant voting rights) to take control of the association, does the attorney, in advising his client, also become counsel to the association notwithstanding the fact that the client has not been assigned any of the developer's reserved rights under the condominium's governing documents? The question that really exists is, who is the client and who is the attorney advising? The possibility of a conflict of interest can arise very quickly in this arena, and it is important for the practitioner to recognize the potential issues and ensure that the proper representation is being provided at the appropriate time.

For purposes of this paper, we will focus on the ABA Model Rules of Professional Conduct ("**Model Rules**"), on which all states except California have based their professional rules, in whole or in part.

Rule 1.7 of the Model Rules addresses conflicts of interest with current clients as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide

competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The biggest, although not sole, challenge in a distressed condominium project often relates to the relationship between the bulk purchaser (be it the lender that has foreclosed or a third party bulk purchaser) and the condominium association. Often, it is unclear who is requesting and requiring the representation.

In a "normal" development scenario, there are a limited number of issues that the developer has to contend with in terms of owners association concerns. However, as more and more units or lots are conveyed to third parties, the duties of the developer in connection with the operation and oversight of the owners association increases. During the period of developer control of the owners association, the developer is entitled to appoint a majority of the members of the board of directors (at a minimum). These directors, often the employees of the developer, have a fiduciary duty to the members of the owners association. This clearly puts these directors in a conflict position. On the one hand, the director owes a duty of loyalty to the developer, being an employee, but on the other hand there is a fiduciary duty owed to the third party owners in the owners association. Similarly, the role of counsel can become clouded without specific action being taken.

In a distressed asset situation, the issues can become even more pronounced. As an example, a client takes title to 3/5 of the condominium units in a project, and in such role takes over control of the board of directors. Two weeks after taking over such control, the client receives a demand letter from counsel to a group of third party owners making a variety of demands, such as (1) the property is not properly maintained, (2) the assessments are too high,

(3) the landscaping is not being kept up, (4) there are leaks in the common area roof, (5) numerous owners are in arrears in their assessment obligations to the owners association and enforcement actions have not been commenced, and (6) the management company is not doing its job, to name but a few. The client emails the letter to the attorney and then calls the attorney to discuss the issues, and during that call asks the attorney to prepare a written response. Can the attorney do so?

The first question is whether the demand letter was sent to the client, or to the board of directors as controlled by the client. There is a significant difference between the two, although the end result may be the same. If the demand letter is sent to the client, it would seem obvious that a response letter can be sent by the attorney, with the response likely being that the issues raised should more appropriately be addressed to the owners association rather than the client (since the client took title as a bulk purchaser and not as the developer). Of course, this will result in a letter being sent to the owners association, and the owners will be angry since they have now had to pay for a second letter. It is likely that the client will then ask the attorney to respond, at which point the attorney now has a conflict of interest in providing representation for the owners association. While Rule 1.7 of the Model Rules allows for dual representation, and it could argued that the client has the same claims involving the project as do the owners, there are still inherent problems in providing the representation to the owners association, even with informed consent and the waiver of the conflict by both parties. One problem is that the consent is not really informed and proper, since the client controls the owners association. Another problem is that there are still obligations due and owing, at some point in time, from the client to the owners association, including turnover, and there is a potential liability (albeit more limited than for the original developer) for the client. As such, the attorney responding for the client in such a circumstance would not appear to be appropriate. The best means for ensuring that all interests are appropriately represented is for the owners association to obtain separate and independent legal counsel to respond to the demand letter. There is no obligation of the board of directors, as controlled by the client, to engage the bulk owner's attorney as association counsel, but the circumstances involved may make such engagement beneficial to the developer/bulk purchaser client. Obviously, separate

counsel is warranted for the owners association when the demand letter is addressed to the board of directors as controlled by the non-developer owners.

The failure to advise a client of a potential conflict of interest can have serious consequences. In re Crews, 389 S.C. 322, 698 S.E.2d 785 (2010), the South Carolina Supreme Court found an attorney's conduct warranted disbarment when the attorney, among other things, entered into a contract to purchase a condominium on behalf of a client where the seller of the unit was also a client, and failed to advise the purchasing client or the seller of the conflict in accordance with Rule 1.7 of the South Carolina Rules of Professional Conduct.

2. **Competent Representation**. In the distressed condominium arena, it is imperative that the practitioner provide competent and appropriate representation. The issues at hand are often complex and not for the faint of heart, and difficulties will most definitely arrive if the practitioner is not sufficiently competent to address the issues. Rule 1.1 of the Model Rules reads as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Can an attorney who has never been involved with a distressed project provide competent representation to this developer client? The answer is yes, but with a caution. In order to provide the representation that is necessary for the particular matter, the attorney must obtain the knowledge necessary to achieve the work at hand. It is not sufficient to think of a workout of a distressed project as "just another foreclosure," or to presume that current day foreclosure concepts are akin to those utilized 20 years ago during the last recession. Certainly, the foreclosure of a commercial loan has some similarities to the foreclosure of a condominium or subdivision development construction loan or permanent financing. However, there are numerous differences, differences that cannot be understood without study and observation. It may be necessary for the attorney to bring in co-counsel who is specifically trained in this area.

Comments [1] and [5] to Model Rule 1.1 provide further insight into what is "competent representation:"

> [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
>
> [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

It is thus imperative, and in fact required, for the attorney to understand the nature of the situation, understand and appreciate the context of the particular distressed condominium or subdivision project, and reach an agreement with the client on the scope of the representation and the client’s expectations. This should be done via a written engagement agreement countersigned by the client, or otherwise by email correspondence evidencing the client's understanding on the nature of the representation.

Comment [6] to Rule 1.1 provides further insight into the need for understanding the concepts involved with a distressed condominium or subdivision project:

> [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

A distressed asset has numerous and varied components and competing interests: (1) the developer trying to stay afloat and to avoid an attack on the personal guarantees that he gave for the construction loan; (2) the construction lender trying to find the right outcome for the asset while at the same time achieving as much payment on the loan as possible; (3) the mezzanine lender trying to determine whether to take over the developer entity; (4) the contractor trying to get payment for services rendered; (5) the owners association trying to make sure that the project is maintained while all of the development issues are worked out and to obtain the necessary monies from the owners and the developer; (6) the contract purchasers who have not yet closed and who are seeking to close at a lower purchaser price than originally agreed upon, to rescind their contract and receive a return of their deposit monies, or to walk away for the present time and return to fight another day; and (7) the existing unit owners. These are by no means the only potential groups that are involved in a distressed project, but is representative of the need to understand the nature of the issues involved. It is thus incumbent upon the practitioner to educate himself or herself in this arena, using all possible available resources.

There are significant consequences to failing to provide competent representation. For example, in The Florida Bar v. Springer, 873 So.2d 317 (2004), the Florida Supreme Court determined that it was appropriate to disbar an attorney who repeatedly failed to provide competent representation, among other failings. In The Florida Bar v. Klein, 744 So.2d 685 (Fla. 2000), the Florida Supreme Court held that an attorney's failure to obtain lender consent to an amendment to the association's bylaws constituted a lack of competent representation. This obligation cannot and should not be taken lightly.

3. **Exercise of Professional Judgment**. Counsel in a distressed asset realm has a duty to exercise professional judgment in advising his or her client of the nature of the issues involved. Rule 2.1 of the Model Rules reads as follows:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

The attorney has a duty of care to the client to provide honest and straightforward advice on the nature of the issues involved with the distressed asset, the strategies that can be employed in taking title to the units, and the potential stumbling blocks that may arise during the course of the workout. The attorney must be candid with the client on the nature of the project. For example, the lender that is foreclosing on the remaining units needs a clear understanding of how to take title to minimize liability from the unit owners and the owners association, while at the same time understanding the obligations that will exist to the owners association and the unit owners once the certificate of title is issued. Candor is a necessary component of the attorney's obligations to the client, both in terms of the issues involving the project as well as any problematic (legally, morally or ethically) plans that the client intends to employ for the project (this is not optional, it is mandatory).

4. **Scope of Representation**. A practitioner working in the realm of a distressed condominium regime must specifically and accurately define with the client the scope of the representation being provided. Rule 1.2 of the Model Rules reads as follows:

> Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to

> carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

So, for example, where the attorney is requested to provide representation to a bulk purchaser of distressed condominium units, is it sufficient to have an engagement letter which defines the scope of services as follows:

> It is our understanding that, in connection with this representation, we will provide advice and counsel to you on issues involving your purchase of condominium units from the lender that has taken title to such units through foreclosure.

While it is true that this description provides a general context of the work to be performed, it is open-ended and non-specific, and can lead an attorney into trouble. A client who executes such an engagement agreement may have an expectation that the attorney is handling any and all aspects of the transaction involving the purchase of the distressed condominium units, while the attorney has a different set of expectations. A better way to define the scope of

representation is as follows:

> It is our understanding that, in connection with this representation, we will provide advice and counsel to you on issues involving your purchase of condominium units from the lender that has taken title to such units through foreclosure. Specifically, we will (a) prepare the purchase and sale agreement and negotiate the terms of which with the lender, (b) represent you in the closing of the purchase of the units, (c) if required under the purchase and sale agreement, write the policy of title insurance pertaining to the units, (d) analyze the status of the condominium association's books and records and financial information (but please be advised that we will not undertake any underlying analysis of the association's finances, and you will be responsible for engaging an accountant or other professional to provide specific financial advice in this regard; we will, of course, be happy to work with such professional), and (e) prepare the form of purchase agreement for your use in selling the units to third party purchasers. As this matter progresses and given the ever-changing nature of a distressed condominium project, it is likely that additional services may be necessary, and in such regard, we will only undertake such work on your behalf following written agreement outlining the nature or scope of such additional services.

Expectations are an important component of working in the distressed condominium realm. Often, the client understands the business components of the transaction, but not the legal and regulatory aspects. It is thus imperative that the practitioner fully outline the services to be rendered and possibly the services that will not be offered by this representation. For example, it may be appropriate to expressly state that you will not be representing the owners association or will be doing so in a limited capacity such as the review of meeting notices.

5. **Communication**. The attorney must communicate effectively and appropriately with the client concerning the representation. Rule 1.4 of the Model Rules reads as follows:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

As counsel in a distressed project, the attorney must determine the appropriate level of communication with the client (and this should be set forth in the engagement agreement, so that both the attorney and the client have a clear understanding on this point). The degree of communication is directly connected to the degree of sophistication and prior experience of the client and its employees, as well as the nature of the project. For example, in this economy, many people are seeking to purchase distressed condominium projects for investment purposes. There is a significant difference between the casual purchaser and the client that has been involved many such transactions. The client who is a casual purchaser needs to be counseled on the obligations associated with purchasing distressed condominium units (payment of assessments vs. stepping into the shoes of the developer for purposes of the guarantee of assessments, election of directors and control of the association, obligations for association official records, and regulatory filing requirements, to name but a few). Communication in this regard is best undertaken through written memorandum or email

correspondence, laying out the options and attendant issues. A different level of communication is likely needed when dealing with the sophisticated purchaser of distressed units (although it is never a bad idea to still provide educational and guidance materials, as it is possible that a client does not truly understand a particular issue, such as the means by which reserves can be waived, as an example). It is thus important to understand who the client is and the client's experience in the field, and this is should be understood through the engagement process.

It is also important to agree with the client, at the commencement of the representation, on the manner in which communications will occur. With the advent of email as the preferred means of communication, many clients simply do not want to spend time on the telephone discussing issues and problems. This can often lead to a breakdown in communication, as is can be easy to misinterpret what is really being said in an email. Some clients advise that all materials will need to be sent back and forth through emails, and thus the client will not pay for any facsimile costs. The practitioner should also discuss with the client the anticipated frequency of communications. Obviously, in the distressed condominium project context, some matters may require frequent communications (e.g., contract negotiations for a bulk purchaser). However, if a client is involved in litigation in connection with its ownership of units in distressed condominium project, certain aspects of the litigation may not require constant communication. Nonetheless, a client should be informed of any upcoming court dates or other significant developments related to such litigation, and the failure to reasonably communicate with a client in such case may result in discipline. In the South Carolina case, In re Larkin, 320 S.C. 512, 466, S.E.2d 785 (1996), an attorney was publicly reprimanded by the South Carolina Supreme Court for failing to return phone calls for a two month period and to advise a client of the court date, in violation Rule 1.4(a) of the South Carolina Rules of Professional Conduct (which is virtually identical to the model rule). Therefore, it is important to understand the expectations at the start to avoid confusion in the future during the representation, and to state such expectations in the engagement agreement.

Appendix A

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.

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.

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.