

Who's the Client?

ACWA LEGAL AFFAIRS COMMITTEE CLE
OCTOBER 2, 2024 WEBINAR



Excerpts from Rule 1.13, Organization as Client (adopted 2018)

“A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, . . . or other constituents overseeing the particular engagement.” (Cal. R. Prof. Conduct 1.13(a), emphases added.)

“In dealing with an organization’s constituents, a lawyer representing the organization shall 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 constituent(s) with whom the lawyer is dealing.” (Cal. R. Prof. Conduct 1.13(f).)

“A lawyer representing an organization may also represent any of its constituents, subject to the provisions of rules 1.7 [Conflicts of Interest – Current Clients], 1.8.2 [Use of Current Client’s Information], 1.8.6 [Compensation from One Other Than the Client], and 1.8.7 [Aggregate Settlements].” (Cal. R. Prof. Conduct 1.13(g).)

Happy Valley Hypothetical

For several years, the board of Happy Valley Irrigation District has been litigating to defend a Proposition 218 challenge to a rate hike brought by a group of local landowners known as Fighting Unjust Stuff and Services (FUSS). The rate hike was unpopular with Happy Valley voters. In the last election, a candidate, Ms. Gladys Gadfly, campaigned and was elected to a board seat on a platform that called for ending the litigation. FUSS is a party to the litigation, but Ms. Gadfly is not a member of FUSS' litigation committee nor is she an individual plaintiff in the lawsuit.



Happy Valley Hypothetical

At the appropriate meeting following the certification of the election results, the new board member is seated and you, as general counsel, have provided Member Gadfly with instructions on basic Brown Act and ethics rules applicable to public officers.



A few months later, you ask the Chair to set a closed session meeting for you to discuss a settlement offer received from FUSS. The Board deliberates, discusses a procedural weakness in the case that the plaintiffs do not appear to know about (caused by the consultant who failed to consult you, grr!), and authorizes you to make a counter-offer to FUSS.

Questions about Happy Valley Hypothetical

- a. The General Manager asks you whether Member Gadfly can attend the closed session. What do you advise?
- b. What if Member Gadfly were one of the named Plaintiffs in the litigation?
- c. Following the closed session, the leader of FUSS contacts the General Manager and states that the District “would be wise to accept our settlement offer, given the procedural problem that you all know about.” How do you handle the apparent disclosure of this attorney-client privileged information that was shared only in closed session?
- d. BONUS question: What if FUSS and the District work out settlement deal points that would require the District to issue water rate refunds to ratepayers going back several years? All five of the District directors are ratepayers. Two stand to receive a significant (\$5,000+) refund if the settlement agreement is approved. Three directors, including Gadfly, stand to receive no refunds. Who can vote on approval of the proposed settlement?

Mar Pacifico Hypothetical

The Mar Pacifico Water District has a longtime board member, Pedro Viejo, who has been serving for more than 20 years. Over the years, Member Viejo has served a couple of terms as President of the Board, and you, as general counsel, have developed a very good relationship with him. When his partner retires, they decide to buy a house in the foothills on Lake Pleasant, which is outside the District's service area. In the summer of the last year of his current term, Member Viejo casually mentions to you that he and his partner intend to move and live full-time in Lake Pleasant.



- a. How do you react to Member Viejo's disclosure about the anticipated change of address?
- b. If Member Viejo then seeks your advice on running for re-election, what do you do?

General Manager's Contract Extension Hypothetical

General Manager Mimi Nguyen's three-year contract term will expire at the end of this year. Unbeknownst to you, Ms. Nguyen has been negotiating the terms of her contract extension directly with the Board members via a series of emails.



Questions About General Manager's Contract Extension Hypothetical

- a. When you discover the email negotiations, what do you advise?
- b. Ms. Nguyen has prepared the staff report to present her contract extension to the Board. You receive this as part of the agenda packet for your review and approval with only a few hours before the deadline to distribute it. What do you do?
- c. BONUS question: You discover Ms. Nguyen's negotiations have been conducted with only two of the five Board members, the Board President and Vice President. The Board President tells you the Board thinks the world of Ms. Nguyen and Ms. Nguyen is a finalist for a higher-paying General Manager position at a neighboring district. The Board President strongly believes Ms. Nguyen's contract extension needs to be approved tonight to make sure she does not leave. What do you advise the District to do at tonight's meeting? How about when Ms. Nguyen's contract extension next comes up?

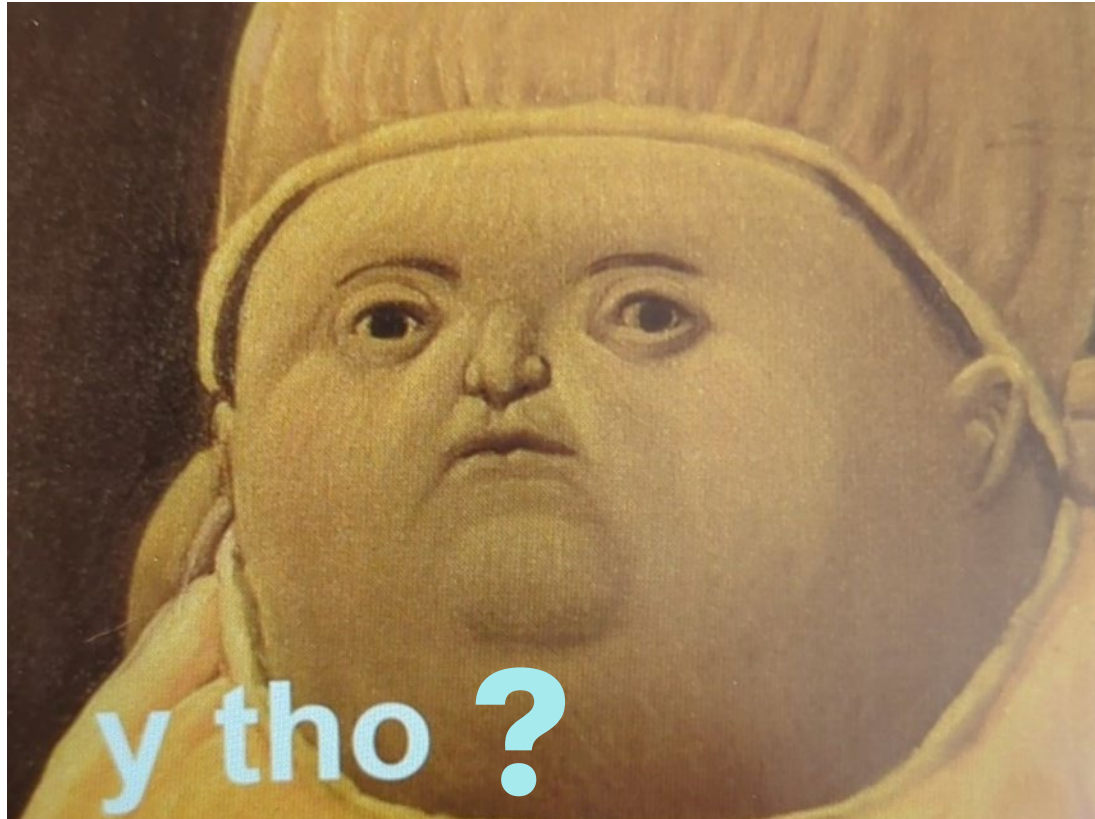
Citizens Group Hypothetical

In your county, a group known as Citizens Against Virtually Everything (CAVE) has a strong presence. CAVE is anti-government in all its forms and has recently been promoting candidates to “drain the swamp” from within. CAVE’s candidates successfully defeat two longtime board members in the election, creating a 3-2 split on the board. Since she can get along with all the factions, the new board chair installs veteran board member Dulce Sereno as President. President Sereno is a very calm and even-tempered person with a strong belief in the value of free speech and the First Amendment. This is her first term as President of the Board. After being installed, President Sereno immediately takes over as Chair and calls for the next agenda item, public comment. Members of CAVE then begin to speak critically of District staff.



Questions about Citizens Group Hypothetical

- a. The first speaker criticizes the District's new labor contracts and calls General Manager John Goodman, the District's lead negotiator, "a crook." The second speaker agrees and accuses Mr. Goodman of "lining his own pockets" at taxpayer expense because "we all know he's going to get the same raise he gives the employees." The third speaker angrily shouts expletives at Mr. Goodman and the board "who let this happen." The fourth speaker, visibly red in the face, says "I'm so mad about this! How can you do this to us poor taxpayers? You'd better hope you don't see me in the parking lot later, I'll show you just how mad I am!" As the District's counsel, when and how do you address any of these public comments?
- b. Encouraged by their fellow CAVE members, the new board members begin to speak. One CAVE-affiliated board member says she "doesn't understand how Mr. Goodman still has a job here." The other CAVE-affiliated board member states, "Everyone knows Mr. Goodman is a dirty rotten scoundrel." When one of the board members not affiliated with CAVE starts to defend Mr. Goodman, the CAVE-affiliated board member replies, "I'm not going to listen to you defend your boyfriend – we all know you are having an affair!" As the District's counsel, when and how do you address any of these Board member comments?



Questions?

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