

Model Rule 1.13 and Corporate Clients

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Monitoring, Remote Sensing, and
Data Gathering, Analysis and
Disclosure in Compliance and
Enforcement

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Working title:

▶ *Wait, Wait, Don't Tell Me:*

*Model Rule 1.13, Plausible
Deniability, and the Lawyer's
Duties in Advising Corporate
Clients in an Age of Enhanced
Monitoring*

Enhanced Monitoring

protecting long term interest of client
urging compliance with the law.

- ▶ *Background Principles*
 - * Lawyer's obligation to report up the ladder (including highest authority)
 - * Client (rather than the lawyer) determines objectives (1.2)
 - * Lawyer influence
- Model Rule 2.1-- independent professional judgment

- ▶ “other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.”

- ▶ *Representing the Organizational Client: Model Rule 1.13*
- ▶ Baseline: Generally, Model Rules of Professional Conduct apply to lawyers without regard to practice setting.

- ▶ Model Rule 1.13 provides an exception
- ▶ (an additional basis for exception to duty of confidentiality)

- ▶ “Organization as Client”
- ▶ “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- ▶ represents the organization rather than individuals

- ▶ “Organization as Client”
- ▶ “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- ▶ Client acts through “duly authorized constituents”

- ▶ *Confidentiality*
- ▶ Central norm of the legal profession

- ▶ 1.6 TIGHT OUTLINE (necessarily loses content)
 - (a) shall not
 - (b) Unless:
 - (1) *death* or substantial bodily harm;
 - (2) crime or fraud ... substantial injury [when L services]
 - (3) *prevent, mitigate or rectify* substantial injury [L services]
 - (4) legal advice
 - (5) L claim or defense
 - (6) law or court order; or
 - (7) resolve COI

- ▶ Model Rule 1.13 supplements Model Rule 1.6

- ▶ TIGHT OUTLINE (necessarily loses content) (focus on disclosure)
 - (a) L represents O acting through Constituents
 - (b) L knows officer, employee or other associated action [intends] related to the representation that is a violation of a *legal obligation* to O,
or violation of *law*
 - *reasonably might be imputed to O
 - *likely substantial injury to O,Then L shall proceed Best Interest
- ▶ [Default] shall refer UP
*L may reveal
whether or not Rule 1.6 permits ...
to prevent substantial injury to O*

- ▶ Analysis and commentary:
- ▶ (1) High standard of Knowledge:
*Knows

- ▶ Analysis and commentary:
- ▶ (2) Relationship: *Related to the representation

▶ 1.13

▶ *Knows

*someone in O (officer, employee or other person associated)

*intends to violate
(a) legal obligation

- ▶ Result of analysis:
- ▶ “shall proceed as is reasonably necessary in the best interest of the organization.”
- ▶ (always)

- ▶ Captures general principle
 - * Acting in the best interest of the client
- ▶ Muddy structure
- ▶ Studied Ambiguity

- ▶ 4 elements
2 different situations

- ▶ How:
 - 2 different types of violations
 - 2 different treatments

- ▶(1) Violation of legal obligation to O
- ▶(2) Violation of law

- ▶(1) Violation - to O
- ▶(2) Violation of law
- ▶Discontinuity of treatment

▶ Violation of legal obligation to O

▶ 2 elements:

L must “know”

Violation must be “related to the representation”

Violation of law (4 elements)

(1) L must “know”

(2) violation must be “related to the representation”

(3) violation might reasonably “be imputed to the organization.”

(4) violation “likely to result in substantial injury to the organization.”

- ▶ Consider
- ▶ rationale for different treatment for violation of law

- ▶ 2 of 4 elements appear not required
re: violation of obligation to O
- ▶ Argument that all 4 apply to both

- ▶ 2 of 4 elements appear not required
re: violation of obligation to O
- ▶ Example of Embezzlement
Nonsensical to require #3 and #4

- ▶ Comment to 1.13 suggests discretionary disclosure.

- ▶ Increased legal compliance with environmental laws
Civil and criminal sanctions
- ▶ (E.g., <5 years and <\$50,000 per day for knowing transport, storage, etc.

- ▶ Greater penalties for organizations
Cf. knowing endangerment (e.g.,
exporting a listed hazardous
substance)
- ▶ natural person = fine <\$250,000 <15
years, or both.
- ▶ Organization = <\$1,000,000

▶ EPA website
fiscal year 2014
*criminal fines, restitution, and court-ordered projects of \$80 million
*prison sentences >150 years

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court-

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