Model Rule 1.13 and Corporate Clients

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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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