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# RPC 1.13:
# Organizational Clients

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RPC 1.13 is entitled "Organization as Client." Although representing organizations is common for lawyers in a wide variety of practice areas, Washington did not have a professional rule specifically addressing entity clients until RPC 1.13 was adopted in 2006.[1] Washington's rule closely resembles its ABA Model Rule counterpart. While not a heavily litigated rule in either a regulatory or civil context, RPC 1.13 provides important guidance for Washington lawyers representing entities. The WSBA Ethics 2003 Committee that developed the Washington rule expressed the hope that "Rule 1.13 will significantly clarify a lawyer's role in representing an organization, enhance the ability of lawyers in the corporate context to discharge their duties and promote corporate compliance with law, provide guidance to lawyers in resolving the difficult ethical dilemmas that arise upon discovery of corporate crime or fraud, and will inure to the overall benefit of organizational clients and the public."[2] Nearing two decades later, the Ethics 2003 Committee's hope for the rule has largely proven true.

In this column, we'll look at three central aspects of RPC 1.13. First, we'll examine the heart of the rule that generally defines the organization itself as the lawyer's client. Second, we'll survey conflicts that can, nonetheless, arise in the organizational context. Finally, we'll outline the difficult reporting issues that

follow when a lawyer for an entity discovers serious misconduct within the organization.

***Defining the Client***

RPC 1.13(a) states the simple but essential precept underlying the rule: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Comment 1 to RPC 1.13 notes that the term "organization" applies to a wide variety of entity forms—including unincorporated associations. Comment 2, in turn, explains that although a lawyer representing an entity deals with the client through its "constituents"—such as officers, directors and employees—the client ordinarily is the entity alone (absent other circumstances that we'll discuss in the next section).[3] RPC 1.13(f) puts the responsibility for explaining this distinction on the lawyer when the interests of the organization are, or may become, adverse to a constituent.[4] Sometimes euphemistically called "*Upjohn*" or "corporate *Miranda*" warnings in recognition of these seminal United States Supreme Court decisions, explanations consistent with RPC 1.13(f) can avoid inadvertently creating attorney-client relationships with the individual involved and warn that the constituent does not hold a personal attorney-client privilege.[5]

Although RPC 1.13(a) provides sufficient certainty in most circumstances, there are nuances that are prudently clarified in engagement agreements in the organizational setting.

First, representation of one affiliate within a larger corporate group may—or may not—constitute representation of the larger corporate group depending on the circumstances. Comment 34 to RPC 1.7, which addresses current client conflicts, notes that "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." Both ABA and WSBA advisory opinions, however, caution that a broader representation may be implied from the circumstances, if, for example, a parent and a wholly-owned subsidiary share common legal affairs management.[6] To avoid uncertainty, a law firm can define the client in the engagement agreement for the matter concerned.[7] In the same vein, firms should carefully review "corporate counsel guidelines" provided by a prospective client to determine whether they define the client more broadly than the firm is comfortable with and negotiate that point as appropriate.[8]

Second, under RPC 1.13(h), which is a Washington addition not found in the ABA Model Rule, an outside lawyer who "represents a discrete governmental

agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part" unless there is a controlling written agreement or the governmental entity gives notice to the contrary.[9] Despite the utility of this facet of the rule, firms (and their clients) gain further clarity if the client is defined specifically in an engagement agreement.[10]

***Conflicts***

Entity representation can involve the same kinds of current or former client conflicts that can occur when representing individuals.[11] The entity setting, however, can spawn particular conflicts that are addressed in RPC 1.13 and its accompanying comments.

First, RPC 1.13(g) notes that entity counsel may also represent other organizational constituents subject to the current client conflict rule—RPC 1.7. For example, a law firm representing a corporation might do estate planning work for the CEO. However, the law firm would have a conflict if, while the estate planning work was ongoing, the corporation wanted advice on terminating the CEO. Although this outcome might be avoided through an advance waiver as a condition of taking on the estate planning work,[12] another approach would be to refer the CEO to separate estate planning counsel. Common risks of unwaived

conflicts in this scenario range from regulatory discipline for the individual lawyers involved to disqualification of their law firm.[13]

Second, Comments 13 and 14 to RPC 1.13 address shareholder derivative litigation. Comment 13 notes that derivative litigation typically involves allegations by a shareholder nominally on behalf of a corporation against the directors contending that management has not acted in the organization's best interests. Comment 14 then counsels that although some derivative cases may not pose conflicts for corporate counsel representing the directors and officers, others may when there are serious charges of wrongdoing against management. While not drawing a bright line, these comments suggest careful analysis by corporate counsel before taking on the additional representation of individual directors and officers.[14]

***Reporting***

The reporting elements reflected in RPC 1.13(b) through 1.13(e) were developed against a very specific historical backdrop. The ABA's comprehensive review of the Model Rules in the early 2000s coincided with the unfolding Enron financial scandal and associated questions about the role of lawyers in the run-up to Enron's collapse.[15] That historical confluence produced the reporting "up" and "out" approach reflected in the rule.[16]

RPC 1.13(b) counsels that a lawyer who discovers serious misconduct within an organizational client must report it "up" to a level within the entity that can take appropriate action:

> 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.

Because reporting "up" under RPC 1.13(b) remains within the organizational client, confidentiality under RPC 1.6 and related attorney-client privilege and work product protection ordinarily remain intact.[17]

RPC 1.13(c), in turn, addresses reporting "out" if the highest authority within the organization refuses to take appropriate action:

> [I]f (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.[18]

RPC 1.13(c) does not specify the outside authority to which the lawyer should report misconduct. Rather, that will depend on the circumstances.[19] RPC 1.13(d) notes that external reporting under RPC 1.13(c) does not apply when a lawyer has been retained by an organization to investigate or defend alleged misconduct.

RPC 1.13(e) concludes the reporting subsections by authorizing a lawyer who reasonably believes the lawyer was discharged (or has been forced to withdraw) in retaliation for the lawyer's reporting misconduct to inform the organization's highest authority.

***Summing Up***

RPC 1.13 continues to provide critical guidance to corporate counsel in an environment that has only grown more complex since the WSBA Ethics 2003 Committee recommended its adoption nearly two decades ago.

## ABOUT THE AUTHOR

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[1] *See generally* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 829-830 (1986) (noting that Washington did not adopt a state equivalent of ABA Model Rule 1.13 when it moved to the RPCs in 1985); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 164-66 (2004) (*Reporter's Memorandum*) (discussing the recommendation to adopt an entity client rule when the Washington RPCs were comprehensively reviewed in the early 2000s) (on file with author). When the RPCs were originally adopted in Washington in the 1980s, the task force that reviewed the then-new ABA Model Rules felt that entity representation was best left to case law development. *Reporter's Memorandum, supra,* at 165; January 18, 1985, Letter from WSBA to Supreme Court at 4 (WSBA Archive). The anticipated development did not occur and, therefore, the Ethics 2003 Committee recommended adoption of RPC 1.13 patterned on the ABA Model Rule. *Reporter's Memorandum*, *supra*, at 164-66. Corresponding LLLT RPC 1.13 is simply listed as "reserved" and is accompanied by the following comment: "At present, the authorized scope of LLLT practice does not contemplate representation of an organization." Although not an exact

parallel, Sections 96, 97 and 131 of the Restatement (Third) of the Law Governing Lawyers (2000) also address entity representation.

[2] *Reporter's Memorandum*, *supra*, at 165. For a history of ABA Model Rule 1.13, *see generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, at 309-336 (2013) (*ABA Legislative History*).

[3] On a related point, the "client" for purposes of the attorney-client privilege is ordinarily the entity rather than the specific constituent with whom the lawyer has consulted on behalf of the entity. *See generally* Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in* Washington §9.05[6] (rev. 5th ed. 2021) (discussing corporate attorney-client privilege); *Upjohn Co. v. United States*, 449 U.S. 383, 389-397, 101 S. Ct. 677, 66 L. Ed.2d 584 (1981) (discussing privilege in the entity context); *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 776-783, 381 P.3d 1188 (2016) (same). For purposes of the "no contact" rule, RPC 4.2, entity directors, officers, other senior managers and "speaking agents" under Washington evidence law are considered to fall within entity counsel's representation. *See* RPC 4.2, cmt. 10; *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984).

[4] *See also* RPC 1.13, cmts. 10-11 (discussing this point).

[5] *See, e.g., Youngs v. PeaceHealth*, 179 Wn.2d 645, 676, 316 P.3d 1035 (2014) (Stephens, J., concurring in part and dissenting in part) (using these terms). *See also Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (test for determining existence of attorney-client relationship); *United States v. Graf*, 610 F.3d 1148, 1159-1161 (9th Cir. 2010) (federal test for determining whether personal privilege arose in corporate context).

[6] *See* ABA Formal Op. 95-390 (1995); WSBA Advisory Op. 2199 (2009) (citing the corresponding ABA opinion approvingly). *See, e.g., REC Solar Grade Silicon, LLC v. Shaw Group, Inc.*, 2010 WL 11561252 (E.D. Wash. Nov. 5, 2010) (unpublished) (disqualifying law firm opposing affiliate of corporate group while representing another affiliate of the same corporate group).

[7] *See, e.g., Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1004 (W.D. Wash. 2007) (quoting from engagement agreement that defined the client).

[8] *See, e.g., Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished) (disqualifying law firm for opposing affiliate included within definition of "client" under corporate counsel guidelines provided in another matter law firm was handling for another member of same corporate group).

[9] This provision, which was adopted in 1995 and was formerly at RPC 1.7(c), has no direct counterpart in the ABA Model Rules. *See Reporter's Memorandum*, *supra*, at 166 (discussing history of this provision); *see also* RPC 1.13, cmt. 15 (same).

[10] *See Goldmark v. McKenna*, 172 Wn.2d 568, 580 n.5, 259 P.3d 1095 (2011) (noting that the parties can define the "client" for a specific matter under RPC 1.13(h)). Comment 9 to RPC 1.13 addresses governmental representation and offers further guidance for what are sometimes imprecise circumstances.

[11] *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (analyzing current and former conflict issues for corporate counsel in disqualifying law firm).

[12] *See* RPC 1.7, cmt. 22 (advance waivers).

[13] *See, e.g., In re Goldstein*, 18 D.B. Rptr. 207 (Or. 2004) (disciplining corporate counsel for unwaived conflict arising from personal work for executive while the lawyer's firm was offering corporation advice on the executive's termination); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, 2007 WL 4014992 (W.D. Wash. Nov. 15, 2007) (unpublished) (law firm disqualified on finding that it represented corporate officer individually and later represented another party against officer's interest).

[14] *See Hicks v. Edwards*, 75 Wn. App. 156, 163-66, 876 P.2d 953 (1994) (discussing the lack of a bright line under the corresponding ABA Model Rule).

[15] For historical context on Enron's collapse, *see generally* Bethany McLean and Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (2003); *In re Enron Corp. Securities, Derivatives & ERISA Litigation*, 235 F. Supp.2d 549 (S.D. Tex. 2002).

[16] *See ABA Legislative History*, *supra*, at 324-332; *see also Reporter's Memorandum*, *supra*, at 165.

[17] For discussions of the difficult practical issues on the duty to inquire when a lawyer suspects the lawyer is being consulted to further a planned or ongoing crime or fraud and associated considerations under the crime-fraud exception to the attorney-client privilege, see, respectively, ABA Formal Op. 491 (2020) and *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996). *See also* RPC 1.13, cmts. 4-5.

[18] Unlike RPC 1.6(b)(3), which shares historical roots with the amendments to RPC 1.13 influenced by the Enron scandal, reporting "out" under RPC 1.13(c) is not dependent on the client having used the lawyer's services to further the conduct being reported. *See* RPC 1.13, cmt. 6; *see generally ABA Legislative History*, *supra*, at 329; *Reporter's Memorandum*, *supra*, at 165.

[19] *Id*., cmts. 6-8.