



BATON ROUGE BAR ASSOCIATION • JULY 27-29, 2017
HILTON SANDESTIN BEACH GOLF RESORT & SPA

SURVIVOR: PROFESSIONALISM

SPEAKERS:
HARRY J. "SKIP" PHILIPS
AND
JOHN FENNER

THURSDAY, JULY 27, 2017 • 2:30 - 3:30 PM

2017 BATON ROUGE BAR ASSOCIATION BENCH BAR CONFERENCE

A VIEW FROM THE INSIDE:

**LOOKING AT THE PROFESSIONAL
RELATIONSHIP BETWEEN
IN-HOUSE COUNSEL AND OUTSIDE
COUNSEL**

John H. Fenner

Turner Industries Group, Corporate General Counsel,
Chief Ethics & Compliance Officer

Harry J. "Skip" Phillips, Jr.

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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. ...



Rule 1.13. Organization as Client

(b) continued

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



Rule 1.13. Organization as Client

(c) continued

- (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.



Rule 1.13. Organization as Client

- (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.



Rule 1.13. Organization as Client

- (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.



Who Are "Constituents"?

- Officers of Corporation
- Partners in a Partnership
- Members/Managers of a Limited Liability Company
- Person Authorized to Obligate Entity
- In-House Counsel
- Others



Attorney as Constituents – What's Different?

- Contrast with Non-Attorney Employees/Constituents:
 - Admitted to Practice in Louisiana
 - Fiduciary Relationship with Client/Employer
 - Bound by Rules of Professional Conduct
 - Officers of the Court

But ...



What's Not Different?

- Management Team/Executive of Organization
- Non-Legal Roles and Functions
 - Corporate Secretary
 - Ethics Advisor
 - Compliance Officer
- Employment Contract



Privileges

Attorney Client Privilege and Work Product Immunity Apply to In-House Counsel as to:

- Confidential Communications
- Facilitating Rendition of Professional Legal Services to Client

What About:

- Business Advice
- Other Communications
- Copying Lawyer on Routine Communications to Shroud in "Privilege"



Expectation of Outside Counsel

- Competence in Area of Representation
- Know Organization's Business Model and Structure
- Understand Relationship Between In-House Counsel and Client
- Make In-House Counsel's Job Easier



Issues to Ponder

- Outside Counsel Representation of Organization's Constituents Individually
- Representation of Organization Employees Individually – at Request of Employer – and Reporting/Privilege Concerns
- Disclosures Required by Rule 1.13 and Whistleblower Issues
- Criminal Investigations/Upjohn Notices
- Ancillary Concerns
 - Insurance
 - Conflicts of Interest/Waivers



QUESTIONS, COMMENTS, THOUGHTS?

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