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SYMPOSIUM ON LEGAL ETHICS FOR THE TRANSACTIONAL LAWYER

ARTICLES

NOTES

NKU SALMON P. CHASE COLLEGE OF LAW

WHEN YOUR CLIENT IS AN ORGANIZATION – SOME OF THE PROBLEMS NOT RESOLVED BY RULE 1.13

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More often than not, transactional attorneys have an organization, rather than a natural person, as their client. Kentucky Supreme Court Rule 1.13[1] sets forth particular ethical rules that apply when the client is an organization. However, the balance of the ethical obligations of an attorney, as set forth in the Kentucky Rules of Professional Conduct ("Rules"), remains applicable.[2] These Rules, as far as they go, can provide guidance. The problem is that the Rules are incomplete and often fail to provide clear guidance for counsel attempting to conscientiously discharge their obligations to that organizational client. A multitude of questions continue to exist including:

- Who is the client when the organization is to be formed?
- Is the non-organization an organizational client?
- To what extent must counsel warn an organization client about the possibility that constituents may inspect attorney-client communications?
- When do the organization's counsel obligations run to the organization's constituents? and
- How can counsel limit the effect upon the attorney-client privilege when new management assumes control of an organizational client?

Let me be clear at the outset: this paper will not conclusively answer any of these questions. These issues are going to arise under highly fact-specific circumstances. Accordingly, the issues will require resolution on a highly fact-specific basis. Instead, this paper will highlight the existence of ambiguities in the existing Rules by examining common fact patterns and with the objective of creating sensitivity to the issues that require resolution. It is better to know that you have a problem needing resolution than to be unaware that you have a problem whose resolution is then, of necessity, ignored.[3]

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1. KY. REV. STAT. ANN. S. CT. R. 3.130(1.13) (West 2009) [hereinafter SCR].
2. *See, e.g.*, SCR 3.130(1.13) cmt. 6 (West 2009).
3. *See also* Donald Rumsfeld, Press Conference at NATO Headquarters, at Brussels, Belgium (June 6, 2002), *available at* http://en.wikiquote.org/wiki/Donald_Rumsfeld (last visited Apr. 21, 2013).

I. KENTUCKY SUPREME COURT RULE 1.13

For purposes of this review, the primary focus is on subsections (a), (f) and (g) of Rule 1.13. Subsections (b) through (e) of Rule 1.13 focus upon the lawyer's responsibility when an organization's constituent violates either the organizational client's legal obligations or applicable law and how lawyers can remedy those situations.[4] While certainly not meaning to minimize the importance of these Rules, they are not the focus of this article.

Rule 1.13(a) sets forth the rule for organizational clients. It states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[5] This Rule is drafted against the background of the corporate form. The official comment suggests that the rule applies to unincorporated associations, but it does not give any explanation as to applicable taxonomy.[6] The official comment provides that:

> (1) An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons for organizational clients that are not corporations.[7]

Returning to the body of Rule 1.13, a pair of paragraphs address the relationship of the organization's attorney to its constituents and the lawyer's ability to maintain a distinct relationship with one of those constituents:

> (f) In dealing with an organization's directors, officer, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know

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> Now what is the message there? The message is that there are no "knowns." There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know. So when we do the best we can and we pull all this information together, and we then say well that's basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.

Id.

4. SCR 3.130(1.13).
5. SCR 3.130(1.13)(a).
6. *See* SCR 3.130(1.13) cmt. 1.
7. *Id.*

> that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.[8]
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> (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.[9]

The Rules contemplate that both the organizational client and one of its constituents may be concurrent clients, subject to the other applicable rules.[10] Also implicated here, Rule 1.6 governs the confidentiality of information related to a client's representation. It provides in part that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[11] This is of particular importance here because subparagraph (b) of Rule 1.6 authorizes an attorney to reveal information relating to the client representation "to comply with other law or a court order."[12] These provisions, to the extent they allow for "up the ladder" reporting of possible violations, supplement the otherwise generally applicable rules of Rule 1.6.[13]

Official comments (10) and (11) to Rule 1.13 provide that:

> (10) There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent

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8. SCR 3.130(1.13)(f).
9. SCR 3.130(1.13)(g).
10. *See generally* SCR 3.130(1.7).
11. SCR 3.130(1.6)(a).
12. SCR 3.130(1.6)(b)(4). *See also infra* notes 46 through 74 and accompanying text.
13. *See* SCR 3.130(1.13) cmt. 6. It needs to be recognized, however, that these rules are entirely "inward-looking"; they require reporting up within an organization to its ultimate authority in the effort to achieve compliance with the law and do not suggest or sanction reporting outside the organization. *See also* 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 17.2, 17-6 (3d ed. 2001 & Supp 2012).

> individual, and that discussions between the lawyer for the organization and the individual may not be privileged.[14]
> (11) Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.[15]

Official comment (12) to Rule 1.13 provides:

> (12) Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder . . . .[16]

The Rules also provide for several issues dealing with "derivative actions." These Rules are in part based upon, as is considered below, a flawed understanding of various issues of organizational law.[17] These comments provide:

> (13) Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.[18]
> (14) The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyers [sic] relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.[19]

II. THE ORGANIZATIONAL CLIENT BEFORE ITS ORGANIZATION

Rule 1.13(a) raises an important question because it provides that a lawyer employed by an organization may represent that organization. Thus, the question becomes, what is the significance of those steps that are required to bring the organization into legal existence? In the case of a corporation, the organization will not exist until the Secretary of State files its Articles of

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14. SCR 3.130(1.13) cmt. 10.
15. SCR 3.130(1.13) cmt. 11.
16. SCR 3.130(1.13) cmt. 12.
17. *See* SCR 3.130(1.13).
18. SCR 3.130(1.13) cmt. 13.
19. SCR 3.130(1.13) cmt. 14.

Incorporation.[20] Similarly, a limited liability company (LLC) is created when the Secretary of State files its Articles of Organization.[21] In either instance, the Secretary of State's filing of the document initiates the organization's legal existence.[22] Before the effective time and date of that filing, neither a corporation nor an LLC exists that is capable of serving as the attorney's organizational client.[23] How, then, is a lawyer to act when approached by one or more individuals who desire to organize a business entity?

While it is true that most business organizations can now be brought into existence quite promptly, including by electronically-filed documents with the Secretary of State, it is not true that negotiating the organic documents of a venture (for example, the shareholder buy-sell agreement in the case of a corporation or the operating agreement of an LLC) can be quickly resolved. These documents are often complex, resolving zero-sum issues between the constituents, and require negotiation between the parties. Who is the client when the attorney is retained, on behalf of a yet unformed organization, to effect its organization?[24] This is not a settled question.

Imagine that Laura, Micah, and Charlsey appear at counsel's office door, asking her to represent them in the formation of a business entity. After an appropriate analysis, the attorney determines that an LLC is the appropriate form of entity. They agree with her assessment and she prepares an operating agreement. With Laura, Micah, and Charlsey's consent, she files Articles of Organization with the Secretary of State. The LLC is now legally recognized.[25] But is the LLC now the attorney's client? Recall that it was three individuals, Laura, Micah, and Charlsey, who appeared at her office door seeking legal representation with respect to the formation of a business entity. The LLC did

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20. KY. REV. STAT. ANN. § 271B.2-030(1) (West 2009). *See also id.* § 14A.2-070(1)(a).

21. KY. REV. STAT. ANN. § 275.020(2) (West 2009). *See also id.* § 14A.2-070(1)(a).

22. *See, e.g.*, KY. REV. STAT. ANN. § 14A.2-070(1) (West 2012) (effective time and date of filing); *see id.* § 271B.2-030(1) (for corporations); *see also id.* § 275.020(2) (for LLCs). *See also id.* § 386A.2-010(1) (statutory trust formed upon filing by the Secretary of State of the certificate of trust); *id.* § 272A.3-010(2) (limited cooperative association formed upon filing by the Secretary of State of the articles of association).

23. The issue with partnerships can be even more complicated. While the Secretary of State's filing of the Articles of Incorporation or Articles of Organization clearly indicate the point in time in which the organization comes into existence, no similar state filing is required for the organization of a general partnership, even one that intends to (or even has) filed a Statement of Qualification or Statement of Registration pursuant to which it will be a limited liability partnership. *See* KY. REV. STAT. ANN. §§ 362.1-202(1), 362.175 (West 2012).

24. *See also* HAZARD, JR. ET AL., *supra* note 13, at § 17.2, 17-5 ("Once the client is properly identified as the entity only, and once the lawyer determines as best he can what the interests of the client are, those interests take precedence, as would be the case with respect to any other client.").

25. REV. UNIF. LTD. LIAB. CO. ACT § 201(d)(1), 6B U.L.A. 456 (2008); REVISED PROTOTYPE LTD. LIAB. CO. ACT § 201(b)(1), 67 BUS. LAW. 117, 142 (Nov. 2011); KY. REV. STAT. ANN. §§ 14A.2-070, 275.020 (West 2012).

not exist at the time the attorney-client relationship came into existence. With the LLC now in existence, is the attorney's client: each of Laura, Micah, and Charlsey; the LLC; or each of Laura, Micah, Charlsey, and the LLC?

Some jurisdictions follow the "incorporation rule," under which, when the organizers consult an attorney regarding the formation of a business entity, the attorney-client relationship shifts upon its formation to the newly formed organization.[26] However, in other jurisdictions, the attorney-client relationship does not shift to the organization; a continuing attorney-client relationship exists between the attorney and the individuals who sought to organize the business venture.[27] In some states, at least in the context of an unincorporated business organization, counsel to the organization constitutes representation of all members of the association.[28] However, the majority of precedent supports the contrary.[29]

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26. *See, e.g.*, Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (providing that with an organization as client, an attorney represents merely the entity and not the entity's constituents and providing that this rule applies retroactively "where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated . . . ."); Manion v. Nagim, No. 02-370-ADM/RLE, 2004 U.S. Dist. LEXIS 1776 (D. Minn. 2004), *aff'd*, 394 F.3d 1062, 1068-69 (8th Cir. 2005) (confirming the holding in *Jesse v. Danforth*, that once the entity is formed the attorney's duties shift to the entity and apply retroactively so that no duties are owed to the incorporator); Hopper v. Frank, 16 F.3d 92, 98 (5th Cir. 1994) (stating that "the formation of Gulf Coast [limited partnership] preempted any prior relationship with Hooper and Sanderson with respect to the delivery of final public offering documents [for the limited partnership]").

27. *See* United States v. Edwards, 39 F. Supp. 2d 716, 734 (M.D. La. 1999) (finding an attorney-client relationship with the founder and the corporate entity); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding the attorney represented individual shareholders of the corporation on whose behalf consultation was made).

28. It does not appear the reasoning of these decisions was conditioned upon the participation of the members in the organization. *See, e.g.*, Pucci v. Santi, 711 F. Supp. 916, 927 n.4 (N.D. Ill. 1989) (holding that attorney for partnership also represents each general partner); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31, 32 (S.D.N.Y. 1954) (holding that each member of unincorporated association is a client of the association's attorney); Margulies v. Upchurch, 699 P.2d 1195, 1201 (Utah 1985) (holding that facts supported finding that lawyer for partnership also represented individual partners).

29. *See, e.g.*, Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994) (holding that counsel retained to represent limited partnership in sale of assets represented the partnership and not the individual partners); Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259, 263 (W.D. Pa. 1986) (holding that indirect benefit flowing to limited partnership from services performed by attorney for limited partnership and its general partner held not sufficient to create attorney-client relationship between attorney and limited partner), *aff'd*, 813 F.2d 398 (3d Cir. 1987) (unpublished table decision); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1242 (S.D.N.Y. 1984) (holding that attorney representing either the general partner of a limited partnership or the limited partnership itself is not, in the absence of an affirmative assumption of a duty, the attorney for the limited partners); Johnson v. Superior Court, 45 Cal. Rptr. 2d 312, 320 (Cal. Ct. App. 1995) (holding that on facts presented, lawyer for limited partnership owed no ethical duty to limited partners); Zimmerman v. Dan Kamphausen Co., 971 P.2d 236, 241 (Colo. App. 1998) ("In Colorado, the fact that an attorney represents a partnership does not, standing alone, create an

Let us assume that the attorney has anticipated this quagmire in her engagement letter, and agreed to a joint representation of Laura, Micah, and Charlsey until the organization of the business entity, and thereafter representation of only the entity.[30] An agreement of this nature adds clarity only if the engagement letter addresses both the full implications of joint-representation and the effects of terminating representation of the individuals. For example, as to the first issue, the engagement letter should make clear the attorney's inability to maintain in confidence information learned from another party to the joint representation. As to the second point, and simply by way of example, may the attorney represent the LLC against a member for an alleged breach of the operating agreement?

Assume the operating agreement provides that six months after the date of organization each member will contribute an additional $10,000 to the LLC. This obligation is spelled out in the operating agreement and in promissory notes each member delivers to the company. Charlsey refuses to perform. If the attorney who assisted Charlsey, Laura, and Micah in the organization of the LLC undertakes the representation, how the court looks at the pre-organization work is crucial. If, even before its formation, the expected LLC was the client, then the representation adverse to Charlsey may be appropriate. However, if before the LLC's organization there was an attorney-client relationship with each anticipated constituent and a shifting of the relationship to the LLC at the time of its formation, then Charlsey may be a former client of the attorney. As that representation almost certainly included the LLC's capitalization, our attorney might find herself acting against Charlsey as to the subject matter of the prior representation. However, doing so is not permitted absent informed consent confirmed in writing.[31] Consequently, whether the relationship begins with the

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attorney-client relationship with each of the partners."); Chaiken v. Lewis, 754 So. 2d 118 (Fla. Dist. Ct. App. 1994) (holding that lawyer for partnership is counsel to the partnership and not the individual partners); *In re* Owens, 581 N.E.2d 633, 636 (Ill. 1991) (holding that lawyer who represented only the partnership did not violate prohibition on business dealings with clients by transactions with individual partners); Williams v. Roberts, 931 So. 2d 1217, 1220 (La. Ct. App. 2006) (holding that attorney hired by one member to organize LLC and prepare operating agreement was not counsel for other members); New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 1986-2 (1986).

30. *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-361(1991) (discussion on treating a partnership as an entity separate from its owners). *See generally* Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389 (1995).

31. SCR 3.130(1.90)(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

to-be-formed organization or later shifts to it materially impacts the attorney's obligations.

Therefore, Rule 1.13 should be modified to expressly provide for the rule set forth in *Jesse v. Danforth*.[32] When an attorney is retained to organize an entity, the entity rule should apply retroactively so the pre-organization activities do not give rise to any individual attorney-client relationship with any of the constituents.[33] This modification would provide much-needed clarity.[34]

III. THE NON-ORGANIZATION AS AN ORGANIZATIONAL CLIENT

The use of the term "organization," implying legal separation from its constituents, leads to problems of taxonomy. There are situations that do not have the benefit of creation of a legal entity distinct from its constituents. Therefore, they can present problems of a different nature.

For example, consider the situation in which a group of homeowners jointly approach counsel to represent them in a suit against a homeowners' association.[35] No organization exists that the attorney can view as being her client; no "partnership" exists among the various homeowners upset with the assessments at issue.[36] In this situation, counsel is compelled to undertake the representation on a joint basis.[37] Before 2009, Rule 2.2 set forth particular parameters and requirements of a joint representation.[38] However, in 2009, Kentucky Supreme Court Rule 2.2 was deleted and replaced with Rule 1.7.[39] Setting aside the structural complexities in providing an effective joint representation,[40] each of the individual homeowners constitutes a client of the

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32. 485 N.W.2d 63, 67 (Wis. 1992).

33. *Id.*

34. *See generally* D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313, 316 (2006).

35. This hypothetical is based upon one set forth in HAZARD, JR. ET AL., *supra* note 13, at § 17.4, 17-12.

36. *See* KY. REV. STAT. ANN. § 362.175(1) (West 2012) (one of the elements of a partnership being that it be "for profit"); *id.* § 362.1-202(10). *See also* THOMAS E. RUTLEDGE & ALLAN W. VESTAL, RUTLEDGE & VESTAL ON KENTUCKY PARTNERSHIPS AND LIMITED PARTNERSHIPS 50-51 (2010).

37. *See, e.g.*, City of Kalamazoo v. Michigan Disposal Serv. Corp., 125 F. Supp. 2d 219, 234 (W.D. Mich. 2000), *aff'd*, 151 F. Supp. 2d 913 (W.D. Mich. 2001).

38. SCR 3.130(2.2).

39. SCR 3.130(1.7).

40. *See, e.g.*, Hopper v. Frank, 16 F.3d 92, 98 (5th Cir. 1994) (stating that "the formation of Gulf Coast [limited partnership] preempted any prior relationship with Hooper and Sanderson with respect to the delivery of final public offering documents [for the limited partnership]"); Manion v. Nagim, No. 02-370-ADM/RLE, 2004 U.S. Dist. LEXIS 1776 (D. Minn. 2004), *aff'd*, 394 F.3d 1062, 1068-69 (8th Cir. 2005) (confirming the holding in Jesse v. Danforth, that once the entity is formed the attorney's duties shift to the entity and apply retroactively so that no duties are owed to the incorporator); Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (providing that with an

attorney.[41] Without an organization that can be identified as the client, the attorney will not have the benefit of an attorney-client relationship within a legally cognizable organization, even in states allowing the attorney-client relationship to be initiated without creating an attorney-client relationship between the attorney and the anticipated constituents of the venture.[42] This will be true even if the homeowners agree to form a "steering committee" to serve as the point of communications between the attorney and the homeowners.[43]

But should that be the rule? Where a collective will is to be represented as a collective that is not a legal entity, Rule 1.13 should permit the treatment of the collective as an organization.[44] While our group of homeowners is not a partnership or other business organization, it nonetheless is an organization of constituents who have come together for a common purpose. Treating representation of that common purpose as a Rule 1.13 "organization" would avoid many of the difficulties and limitations of representing each constituent jointly. At the same time, the uncertainties of a joint representation, such as a falling out between co-clients, can be minimized and perhaps eliminated.[45] In such a circumstance, a constituent may withdraw from the "organization" while the representation is not negatively impacted by counsel's obligation under the existing rule to treat the withdrawn client as a former client having an interest in the current dispute and from whom confidential information might have been received.

IV. PRIVILEGE VS. ENTITY LAW DOCUMENT INSPECTION RIGHTS

Where the client is an organization, it is the attorney's obligation to hold in confidence the organization's confidential information.[46] Those who exercise

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organization as client, an attorney represents merely the entity and not the entity's constituents and providing that this rule applies retroactively "where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated . . . ."). *See also* United States v. Edwards, 39 F. Supp. 2d 716, 734 (M.D. La. 1999) (finding an attorney-client relationship with the founder and the corporate entity); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding the attorney represented an individual of the corporation).

41. *See* Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046, 1050 (D. Colo. 1999) (stating when a group is not a class action or single legal entity, the attorney has an attorney-client relationship with each member of the group).

42. *See id.*

43. A partnership must be "for profit," and the steering committee here is not. *See* KY. REV. STAT. ANN. § 362.175(1) (West 2012).

44. SCR 3.130(1.13).

45. *See also* City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 234-38 (W.D. Mich. 2000) (finding that an attorney-client relationship existed between each individual defendant in environmental litigation and the attorney who served as common counsel for all defendants under a joint-defense agreement).

46. SCR 3.130(1.6)(a).

control over the organization may waive the attorney's obligation of confidentiality.[47] Waiver can also come about by court order or pursuant to other law.[48] This discussion focuses on that last principle.

Under Rule 1.6(b)(4), an attorney may reveal information related to a client's representation "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order."[49] What is too often forgotten is that under many business organization statutes, the constituent owners of the venture are afforded an opportunity to inspect and copy venture records.[50] For example, in Kentucky, a shareholder in a Kentucky corporation is entitled to, upon request, review certain corporate records.[51] Upon showing proper purpose, a shareholder may review additional records.[52] In contrast, Kentucky's partnership, limited liability company, and nonprofit corporation statutes, do not limit the records that may be inspected by, respectively, a member of the nonprofit corporation,[53] partner[54] or member of a LLC.[55]

Under the Kentucky adoption of the Uniform Partnership Act, no provisions indicate whether the partnership agreement may limit a partner's right to access partnership records.[56] In contrast, the Kentucky Revised Uniform Partnership Act (2006) allows the partnership agreement to impose reasonable limitations on the access and use of the partnership records.[57] In the case of a limited liability company, a written operating agreement may limit the access to and use of company records.[58] Here arises counsel's quandary. His or her client is an organization, and as its counsel the attorney is obligated to act with diligence and promptness.[59] As a component thereof, the attorney must communicate to the

47. SCR 3.130(1.2)(a), (1.6)(a).
48. SCR 3.130(1.6)(b)(4).
49. *Id.*
50. *See* KY. REV. STAT. ANN. § 271B.16-020(1) (West 2006).
51. *Id.*
52. *Id.* § 271B.16-020(2).
53. *Id.* § 273.233. The right of a member to inspect and copy the records of a nonprofit corporation is not subject to limitation in either the articles of incorporation or the bylaws. *Id. See also* Thomas E. Rutledge, *The 2010 Amendments to Kentucky's Business Entity Laws*, 38 N. KY. L. REV. 383, 417 (2011).
54. KY. REV. STAT. ANN. § 362.240 (West 2006) ("Every partner shall at all times have access to and may inspect and copy any" partnership book.); *id.* § 362.1-403(2) ("A partnership shall provide partners and their agents access to its books and records.").
55. *See id.* § 275.185(2) ("Upon reasonable written request, a member may, at the member's own expense, inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location.").
56. *Id.* § 362.240 ("The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.").
57. *See id.* §§ 362.1-103(2)(b), 362.1 -402(4).
58. *Id.* § 275.185(5) (as amended by 2013 Ky. Acts, ch. 160, § 7).
59. SCR 3.130(1.3).

client information the client needs to make informed decisions and to direct counsel.[60] In doing so, the attorney must avoid inadvertent disclosure and protect against that risk.[61]

Must counsel condition communications with representatives in light of the possibility that the information will be disclosed to shareholders/partners/members that are not part of the control body? Assume, for example, that ABC, LLC is considering terminating Daniel's employment; he, a vice-president and a member in the LLC, is working under the terms of a written employment agreement. The LLC wants to terminate his employment "for cause" as defined in the agreement. The LLC contacts its counsel to review the agreement and draft a letter about whether the LLC may terminate Daniel "for cause." Counsel carefully drafts a letter that comprehensively reviews the contract, the facts, and the applicable law, concluding that while certain issues militate the other way, the LLC may terminate Daniel "for cause." The LLC then terminates Daniel, and he sues for breach of contract. When Daniel's discovery request to review counsel's letter is denied, he responds by requesting to review the LLC's records, specifically all communications from counsel regarding his employment agreement.[62] Daniel might well prevail.

Recall that under Rule 1.6(b)(4) the attorney's obligation of confidentiality is qualified by other law.[63] The General Assembly has frequently afforded the constituent owners of an organization either limited or complete access to company books and records.[64] The communications received from counsel are

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60. SCR 3.130(1.4).

61. *See, e.g.*, Kathryn A. Thompson, *The Worlds of Ethics and Technology Collide – The Ethical Rules for Electronic Communication that Paralegals Need to Know*, PARALEGAL TODAY (Sept./Oct. 2005), http://paralegaltoday.com/issue_archive/features/feature1_so05.htm; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (Mar. 10, 1999) (*Protecting the Confidentiality of Unencrypted E-Mail*); Jennifer Smith, *Lawyers Get Vigilant on Cyber Security*, WALL STREET JOURNAL (June 25, 2012); Joel A. Osman, *Technology and the Challenge of Maintaining Client Confidences*, 25 LOS ANGELES CNTY. BAR UPDATE 9 (Oct. 2005), *available at* http://www.lacba.org/showpage.cfm?pageid=5867 ("Just because it is possible to conduct telephonic business in an airport waiting room or at the deli counter of the local market does not mean that it is a good idea to do so. The question of appropriate mobile phone etiquette is one on which society as a whole needs to work; the necessity of maintaining client confidences makes the issue of immediate concern to lawyers."). *See also* United States v. Mathis, 96 F.3d 1577, 1583 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 723 (1990); Edwards v. Bardwell, 632 F. Supp. 584, 589 (M.D. La. 1986) (no reasonable expectation of privacy in conversation held over radio telephone where the communication could be accessed by anyone using a scanner or radio phone tuned to the same frequency).

62. *See* KY. REV. STAT. ANN. § 275.185(2) (West 2012) ("Upon reasonable written request, a member may, at the member's own expense, inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location.").

63. SCR 3.130(1.6)(b)(4).

64. *See, e.g.*, KY. REV. STAT. ANN. § 273.233 ("The member's right of inspection shall not be abolished or limited by the corporation's articles of incorporation or bylaws."); *id.* § 275.185(2) (West 2010) ("Upon reasonable written request, a member may, at the member's own expense,

company books and records,[65] and the Kentucky Supreme Court has held that the common-law right of inspection extends to all correspondence that relates to the business affairs of the corporation if the shareholder has a proper purpose.[66] Looking to law outside of Kentucky, in *McCain v. Phoenix Resources, Inc.*,[67] the court concluded "that absent any restriction by statute or the partnership agreement, a limited partner has the right to inspect all documents and papers affecting the partnership, including those held by the partnership's attorney."[68] In *Burton v. Cravey*[69] the court found a non-profit condominium association's attorney's files that related to the association were "books and records" available for inspection.[70]

In this hypothetical Daniel is not attempting to reach into the attorney's file maintained on behalf of the organization, an act that these cases would indicate is permissible, but rather only to what is of record with the LLC. Kentucky's statutes do not allow an organization to declare that certain records are confidential and exempt them from inspection. Absent a permissible private

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inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location."); *id.* § 362.240 (West 2006) ("Every partner shall at all times have access to and may inspect and copy any" partnership book.); *id.* § 362.1-403(2) ("A partnership shall provide partners and their agents access to its books and records."). *See also* Rutledge, *supra* note 53, at 417.

65. "Books and records" have been given a broad construction so as to "extend to all records, contracts, paper, and correspondence to which the common-law right of inspection of a stockholder might properly apply." 18A AM. JUR. 2D *Corporations* § 330 (2013). *See also* Meyer v. Ford Indus., Inc., 538 P.2d 353, 358 (Or. 1975) (holding "books and records of account" was not limited to books and records of account "in any ordinary, literal or otherwise limited sense, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply."); State v. Malleable Iron Range Co., 187 N.W. 646, 647-48 (Wis. 1922) ("The right of a stockholder to examine the records and books of account of a corporation extends to all papers, contracts, minute books, or other instruments from which he can derive any information which will enable him to better protect his interest and perform his duties.").

66. Otis-Hidden Co. v. Scheirich, 219 S.W. 191, 194 (Ky. 1920) ("At common law the right of inspection covers all the books and records of the corporation . . . [b]ut the word 'record' is not used in the narrow sense of minutes of official action taken by the board of directors, but has been held to include the documents, contracts, and papers of the corporation . . . We therefore conclude that all of the correspondence in question, which relates to the business affairs of the corporation, is subject to inspection by plaintiff, who has an interest to protect, and whose purpose is not shown to be improper or unlawful . . . .") (citations omitted).

67. 230 Cal. Rptr. 25, 26 (Cal. Ct. App. 1986).

68. *Id.*

69. 759 S.W.2d 160, 162 (Tex. App. 1988).

70. *But see* Milroy v. Hanson, 875 F. Supp. 646, 652 (D. Neb. 1995) (minority shareholder and director denied access to attorney-client communications and records in direct and derivative suit).

agreement to the contrary,[71] an attorney's communication to an organizational client may be accessed by its constituents.

In light of this possibility, what is counsel to do? Should counsel knowingly under-inform the client? Doing so would likely violate Rule 1.4.[72] Should counsel provide a letter that is limited to the arguments that support the decision-maker's desired outcome? Doing so would require counsel to state that the advice is limited.[73] Could the attorney satisfy his or her obligations by delivering the limited letter and making an oral presentation setting forth the nature of the letter's limitations and explaining the counter-arguments to the determination that "for cause" has been satisfied? Perhaps. That assessment is open to debate. At minimum, is counsel to any organization required to warn its management group that communications with the attorney may be subject to Rule 1.6?

V. PRIVILEGE AND REPRESENTATION OF A CLIENT ADVERSE TO A CONSTITUENT THEREOF

As previously noted, when the client is an organization, the attorney does not represent its constituents.[74] Rule 1.3 requires the attorney to represent the interests of the client "diligently."[75] Rule 1.6 obligates the attorney to protect the client's confidential information.[76]

The recent Kentucky case of *Lach v. Man O'War*[77] involved the restructuring of a limited partnership into a LLC.[78] Before the restructuring,

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71. *See, e.g.*, KY. REV. STAT. ANN. § 275.185(5) (West 2012) (permitting a written operating agreement to limit the right to access company records); *id.* § 362.1-403(4) (allowing the partnership agreement to impose reasonable limitations on access to and use of partnership records); *id.* § 362.1-103(2)(b) (cannot unreasonably restrain). In contrast, both the business corporation and nonprofit corporation acts preclude limitations in either the articles of incorporation or the bylaws upon the right to access company records. *See id.* §§ 271B.16-020(4) (business corporations), 273.233 (non-profit corporations).

72. SCR 3.130(1.4) (West 2009).

73. While reliance upon advice of counsel is at times sanctioned by statute, that reliance must be reasonable. *See, e.g.*, KY. REV. STAT. ANN. §§ 271B.8-300(4), 386A.5-060(2) (West 2012). The author posits it would be difficult to establish reasonable reliance upon a report that is self-described as being less than comprehensive.

74. *See supra* note 5 and accompanying text.

75. SCR 3.130(1.3) (West 2009). In 1978 the charge to "zealously" represent the client became "diligently." The word "zeal" does appear in the Supreme Court's comment to SCR 3.12(1.13) (West 2009). *See also* Paul C. Saunders, *What Ever Happened to 'Zealous Advocacy'?*, 245 N.Y. L.J. (2011); Ohio Prof. Cond. Rule 1.3, Comparison to former Ohio Code of Professional Responsibility ("Neither Model Rule 1.3 nor any of the Model Rules on advocacy states a duty of "zealous representation.").

76. *See* SCR 3.130(1.6)(a) (West 2009).

77. 256 S.W.3d 563 (Ky. 2008).

78. *Id.* at 566.

there was a dispute among the incumbent partners as to who would be a successor general partner.[79] As a result, the partners were unable to achieve the necessary unanimous approval for the designation of a new general partner.[80] The incumbent general partners, allied with certain of the limited partners, consulted with the partnership's counsel and investigated various means to restructure the relationship so Lach would not continue to have a blocking position.[81] The partners ultimately settled upon a contractual sale of assets and interest exchange of the limited partnership into a LLC.[82]

Further, as part of that reorganization, any partner in the limited partnership who did not sign off on the transaction was precluded from having voting rights in the LLC.[83] In the prior limited partnership, Lach had held more than a twenty-seven percent interest.[84] After the transaction's consummation, Lach sued on a number of bases, most importantly because the reorganization violated the general partner's fiduciary obligations.[85]

Under the controlling limited partnership statute, a general partner had no authority to "do any act which would make it impossible to carry on the ordinary business of the partnership."[86] Working from the notion that "the doing of an act proscribed by [law] is a breach of [the general partner's fiduciary] duty,"[87] and having determined that reorganizing the limited partnership into an LLC made it impossible for the limited partnership to carry on its business, the reorganization was impermissible. The powers afforded the general partners "can be not construed to allow them the power to transform the partnership into a limited liability company, in order to favor a majority of the partners in their selection,

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79. *Id.*

80. *Id. See also* KY. REV. STAT. ANN. §§ 362.690 (repealed), 362.235(7) (West 2012). This limited partnership, formed in 1986, was governed by Kentucky's 1970 adoption of the 1916 Uniform Limited Partnership Act and, consequent to linkage, the Kentucky adoption of the Uniform Partnership Act.

81. *Lach*, 256 S.W.3d at 565.

82. The merger of the existing limited partnership into a newly-created LLC was not an option in that limited partnership of this milieu did not have the capacity to engage in a merger transaction. A conversion of the limited partnership into an LLC was precluded by the requirement that any such conversion would require the unanimous approval of all of the partners. KY. REV. STAT. ANN. § 275.370 (West 2012). An effort by Lach to have the transaction set aside as a de facto conversion for which the required minimum construction was not given was rejected.

83. *Lach*, 256 S.W.3d at 566.

84. *Id.* at 565.

85. *Id.* at 566.

86. KY. REV. STAT. ANN. § 362.490(2) (West 2012) (repealed). While no longer set forth in KRS, this Act governs limited partnerships organized on or after June 18, 1970 and prior to July 15, 1988 that have not elected to be governed by a subsequent limited partnership act. *See also* RUTLEDGE & VESTAL, *supra* note 36, at § [3.2]. The 1970 Kentucky adoption of the 1916 Uniform Limited Partnership Act is reproduced therein in appendix 8.

87. *Lach*, 256 S.W.3d at 569 (quoting Gundelach v. Gollehon, 598 P.2d 521, 523 (Colo. App. 1979)).

or substitution of the general partners/managers of the business, without the approval of all the limited partners."[88]

However, that was not the end of the case.[89] The plaintiff sought access to the communications between the general partners and the attorneys who structured the reorganization.[90] Because the general partners' breach of fiduciary duty, for purposes of privilege analysis, constituted fraud,[91] and because the attorney-client privilege does not apply with respect to future actions contemplating fraud, the court held that the general partners could not use the attorney-client privilege to protect the requested documents from review and inspection.[92]

Likewise, in *Steelvest, Inc. v. Scansteel Service Center, Inc.*,[93] the Kentucky Supreme Court famously (a) defined a (nearly insurmountable) standard for granting summary judgment[94] and (b) classified a breach of fiduciary duty as constituting fraud.[95] For our purposes, the more important aspect of the decision is that aimed at Tom Scanlon's legal counsel. While an employee of Steelvest, Scanlon initiated efforts to organize a new and competing venture.[96] In doing so, Scanlon breached his fiduciary obligations as a director and officer of the corporation.[97] The Kentucky Supreme Court held that the attorney-client privilege did not protect the communications between Scanlon and his legal counsel from discovery.[98]

These outcomes present problems to counsel advising a business entity that is considering actions adverse to the interest of a constituent. Even when, by private ordering, the constituent has no right to inspect the company records that include communications with counsel,[99] those communications may be

88. *Id.* at 571.
89. *Id.*
90. *Id.*
91. *Id.* at 572 (citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 487 (Ky. 1991)).
92. *Id.* As already noted, Lach should have prevailed on a request to review those documents based upon his right, as a partner, to review partnership records. *See* KY. REV. STAT. ANN. § 362.500(1)(a) (West 2006) ("A limited partner shall have the same rights as a general partner to (a) have the partnership books kept at the principal place of business of the partnership, and at all time to inspect and copy any of them.").
93. 807 S.W.2d 476 (Ky. 1991).
94. *Id.* at 482.
95. *Id.* at 487 ("Accordingly, we determine, as a matter of law, that a breach of fiduciary duty is equivalent to fraud.").
96. *Id.* at 479.
97. *Id.* at 483-84.
98. *Id.* at 488.
99. *See* KY. REV. STAT. ANN. § 275.185(5) (West 2012) (permitting a written operating agreement to limit the right to access company records); *id.* § 362.1-403(4) (allowing the partnership agreement to impose reasonable limitations on access to and use of partnership records); *id.* § 362.1-103(2)(b) (cannot unreasonably restrain). In contrast, both the business

ultimately discoverable if those in control of the venture violated a fiduciary duty to a constituent.[100] In light of this possibility, what is counsel to do? Assuming that no attorney would advise a clear violation of a client's fiduciary duties, it still may be necessary to counsel the client that all communications may be discoverable.

VI. WHEN THE ORGANIZATION'S COUNSEL'S OBLIGATIONS RUN TO THE ORGANIZATION'S CONSTITUENTS

Even when the client is an organization, an attorney's diligent representation can impose a duty to act on behalf of someone other than the organization or expose the attorney to liability to someone other than the organizational client.[101] Both of these circumstances fly in the face of Rule 1.13 and its definition of the organization as the client.[102] The Restatement (Third) of the Law Governing Lawyers provides that:

> For purposes of liability under § 48,[103] a lawyer owes a duty to use care within the meaning of § 52[104] in each of the following circumstances:
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> * * *
>
> (4) to a nonclient when and to the extent that:
>
> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
>
> (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to a nonclient, where (i) the breach is a crime or a fraud or (ii) the lawyer has assisted or is assisting the breach;
>
> (c) the nonclient is not reasonably able to protect its rights; and
>
> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[105]

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corporation and nonprofit corporation acts preclude limitations in either the articles of incorporation or the bylaws upon the right to access company records. *See id.* §§ 271B.16-020(4) (business corporations), 273.233 (nonprofit corporations).

100. *Steelvest*, 807 S.W.2d at 488.

101. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000).

102. *See* SCR 3.130(1.13) (West 2009).

103. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000).

104. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000) provides in part:

> (1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.

The application of these rules in the context of an organizational client has not yet been fully explored. That lack of certainty is a basis for concern. While Restatement section 51and its comments are written in terms of the fiduciary duties that arise in traditional donative trust and probate contexts,[106] the term "fiduciary" applies in the context of organizational clients when particular actors stand in a fiduciary relationship with the organization, its constituents, or both.[107]

In the context of the *Lach v. Man O'War* dispute we could see these rules play out, perhaps to the unappreciated risk of the attorneys.[108] The general partners of the Man O'War limited partnership stood in a fiduciary relationship with each limited partner, including Lach;[109] in consequence, element (4)(a) of Restatement section 51 is satisfied. The reorganization implemented by the attorney constituted a breach of fiduciary duty and therefore a fraud;[110] so, element 4(b) of Restatement section 51 is satisfied. The lawyer can act, without significantly impairing any obligations to the client, by not implementing a plan that constitutes a breach of fiduciary duty by the client; so, element 4(d) of Restatement section 51 is satisfied because an attorney cannot assist a client in

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105. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000). It bears noting that it can be argued that § 51 of the Restatement is not applicable as here described (reliance being made upon comment h) thereto, it providing that:

> The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51, cmt. h (2000). This comment, however, is restricted by its terms to inter-se relationships among the constituents of a business organization, and is open to debate whether it applies vis-à-vis obligations of the organization to a constituent.

106. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51, cmt. h (2000) ("The duty recognized under Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries – trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships."); *id.* ("The scope of a client's fiduciary duties is limited by the law governing the relationship in question (*see, e.g.*, RESTATEMENT (SECOND), TRUSTS §§ 169-185.")).

107. *See, e.g.*, KY. REV. STAT. ANN. §§ 271B.8-300(1)(a)-(c) (West 2006) (stating that fiduciary duties of corporate directors are owed to the corporation); *id.* §§ 273.215(1)(a)-(c) (stating that fiduciary duties of directors are owed to the corporation); *id.* §§ 275.170(1) (stating that duty of care is owed to LLC and the other members; *id.* §§ 275.170(2) (stating that duty of loyalty is owed to LLC and not to other members); *id.* § 362.1-404(3) (stating that duty of care owed by each partner to the partnership and other partners); *id.* § 362.1-404(2) (stating that duty of loyalty owed by each partner to the partnership and the other partners).

108. *Lach v. Man O'War*, 256 S.W.3d 563, 571-72 (Ky. 2008).

109. *See* KY. REV. STAT. ANN. §§ 362.690 (repealed), 362.490 (authority of partners), 362.250 (partner as fiduciary) (West 2012).

110. *Lach*, 256 S.W.3d at 572.

effecting a fraud.[111] That leaves element 4(c), whether the non-client beneficiary of the fiduciary obligation is "reasonably able to protect its rights."[112] Ultimately, Lach was able to do so, but only after a case was appealed to the Kentucky Supreme Court.[113] At what point does the cost of litigation, which may ultimately not be subject to recovery from the disloyal fiduciary,[114] constitute a bar to the beneficiaries' capacity to protect their rights? Alternatively, are any costs incurred by the beneficiary of a fiduciary acceptable?

It is beyond the scope of this discussion to resolve this issue.[115] However, recognize that attorneys representing organizational clients may have obligations to protect the interests of the organization's constituents, notwithstanding the limitations of Rule 1.13.

VII. CHANGE OF CONTROL OF AN ORGANIZATIONAL CLIENT

The attorney's obligation to maintain privilege with respect to client information is a right and asset of the organization.[116] The organization may waive that privilege as it sees fit.[117] However, the attorney has no right to keep information from the client; the attorney does not have any right of privilege.[118]

These rules can create troubling situations when control of an organizational client changes because a different group of actors will have the right and capacity to control both the disclosure of confidential information and disclosure back to the organization. Consider the following hypothetical. Holding Co., Inc. is the sole shareholder of ABC, Inc. ABC, Inc. will be sold pursuant to a stock sale to XYZ, LLC. Upon the consummation of the stock purchase agreement, XYZ, LLC is the sole shareholder of ABC, Inc. The LLC's management, desiring to gain the maximum information possible in connection with the final adjustments to the purchase price, directs ABC, Inc.'s legal counsel to disclose to them all information concerning the negotiation of the stock purchase

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111. SCR 3.130(1.2)(d) (West 2009). The author does not in this example mean to suggest that counsel to the Man O'War limited partnership had a conscious appreciation that they were engaged in a breach of fiduciary duty owed to Lach. While the author believes the ultimate ruling in the case to have been normatively correct, the dissent by Justice Abramson is ample proof that reasonable minds can differ on the point.

112. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4)(c) (2000).

113. *Lach*, 256 S.W.2d at 572.

114. *See* Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 63 ARK. L. REV. 473, 498 (2010) (discussing recovery of attorney's fees in successful action for breach of the duty of loyalty).

115. It is as well way above the pay grade of this author.

116. SCR 3.130(1.6) (West 2009).

117. *Id.*

118. *See* SCR 3.130(1.4) (West 2009).

agreement that might be helpful in their efforts to reduce the ultimate purchase price.[119]

Cases of this nature present particular problems, and there is little direction as to the appropriate outcome. Further, the available guidance is troubling. For example, dicta in *Commodity Futures Trading Commission v. Weintraub*[120] stated that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."[121] Lower courts have interpreted this statement as a substantive rule.[122] *In re Cap Rock Electric Cooperative, Inc.*[123] observed, "[t]he attorney-client privilege extends to corporate entities as well as to individuals. When a corporation passes to new management, the authority to assert the privilege passes as well."[124] *Tekni-Plex v. Meyner & Landis*[125] stated:

> Weintraub establishes that, where efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company's operations. It follows that, under such circumstances, the prior attorney-client relationship continues with the newly formed entity.[126]

Applying these principles with respect to the sale of a subsidiary, the court in *Medcom Holding Co. v. Baxter Travenol Laboratories*, Inc.[127] wrote:

> It is reasonable then to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its attorney-client privilege. The parties are free to vary this rule by agreement. For example, if the selling parent will have a continuing interest after the sale in contracts, assets or liabilities of the subsidiary the parent can negotiate for special access or control to protect that interest. Similarly, if the attorneys who present a corporate parent also represent its subsidiary in the sale of the subsidiary's stock they run the resulting risk that after the acquisition subsidiary management will waive the privilege with respect to its communications with those attorneys. A

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119. There are, under scenarios such as this, complicated questions of whether there is a joint-representation/client. *See* SCR 3.130(1.7) (West 2009). Those issues, while of crucial importance, are beyond the scope of this article.

120. 471 U.S. 343 (1985).

121. *Id.* at 349.

122. *See, e.g.*, Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663 (N.Y. 1996); *In re* Cap Rock Electric Coop., Inc., 35 S.W.3d 222 (Tex. App. 2000).

123. *In re Cap Rock Electric*, 35 S.W.3d at 222.

124. *Id.* at 227.

125. *Tekni-Plex*, 674 N.E.2d at 663.

126. *Id.* at 668.

127. No. 87 C 9853, 1988 WL 33826 (N.D. Ill. Apr. 7, 1988).

> seller who wishes to avoid that result can do so by agreement with the purchaser or by employing separate counsel for the subsidiary and limiting to the parent's own attorneys those communications which the parent wishes to protect.[128]

Counsel for organizational clients undertaking a negotiated acquisition need to be aware of these rules and plan necessary limitations.

VIII. CONCLUSION

We are admonished by Albert Einstein that "everything should be made as simple as is possible, but not simpler."[129] In light of the significant questions and ambiguities that exist in its application, it can be safely concluded that Rule 1.13 violates Einstein's admonition.

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128. *Id.* at *4.

129. *Collected Quotes from Albert Einstein*, STANFORD UNIV., http://rescomp.stanford.edu/~cheshire/EinsteinQuotes.html (last visited Apr. 22, 2012).