

# PRIVILEGE AND ETHICS ISSUES

*UT LABOR AND EMPLOYMENT  
LAW CONFERENCE 2018*

## Who is the Organizational "Client"?

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- ABA Model Rule 1.13
  - A lawyer employed by or retained by an organization represents the organization acting through its duly authorized constituents.

## Who is the Organizational "Client"?

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### Interviews with Individual Corporate Employees/Officers:

- Explain that the client is the organization (unless a joint representation situation)
- Give warnings regarding confidentiality and privilege
- Dispel any misunderstanding about separate attorney-client relationship

### Good Examples:

*In re Grand Jury Subpoena* (4<sup>th</sup> Cir. 2005)

*United States v. Ruehle* (9<sup>th</sup> Cir. 2010)

### Not So Good Examples:

*Commonwealth v. Spanier* (Pa. 2016) (failure to clarify who in-house counsel represents)

*Estate of Paterno* (Pa. 2017) (engagement with subgroup of entity)

*Nester v. Textron, Inc.* (W.D. Tex. 2015) (representation of subsidiary by parent's in-house attorney)

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- Talking to Individual Employees/Officers: ABA Model Rule 1.13(f):
  - In dealing with an organization's directors, officers, employees 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.

## Conflicts Involving "Virtual" Clients

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- Former HR Managers/Employer Representatives as Plaintiffs
  - Unless law firm individually represented corporate constituent, there is no express attorney-client relationship/disqualification (*See Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373 (10th Cir. 1994))
  - However, attorney-client relationship can be implied by conduct, especially where lawyer is not sufficiently clear with constituent as to whom firm represents (*See Home Care Industries v. Murray*, 154 F. Supp. 2d 869 (D. N.J. 2001))
  - Note: Former corporate constituents may carry with them "property" of the employer (attorney-client privilege information, trade secrets, etc.)

## Conflicts Involving Insurance

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- Texas Ethics Op. No. 670 (March 2018)

If an insured fails to communicate with a lawyer who is retained to defend insured, lawyer may withdraw from representation. However, without insured consent, lawyer may not disclose to insurer or to the court the reason for the withdrawal.

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