

Up the Ladder or Up the Creek?

On March 31, 2003, the ABA Task Force on Corporate Responsibility (the “Task Force”) issued its final report.¹ One of the more interesting proposals made by the Task Force is the proposed amendment to ABA Model Rule 1.13(b), which presently reads as follows:

“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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

“(1) asking for reconsideration of the matter;

“(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

“(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.”

The proposed amendment would instead provide:

“If a lawyer for an organization knows facts from which a reasonable lawyer, under the circumstances, would conclude that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in

¹ The full text of the report can be found at <http://www.abanet.org/buslaw/corporateresponsibility>.

a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which 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, the highest authority that can act on behalf of the organization as determined by applicable law.”

Unlike the still more far-reaching “up the ladder” regulations adopted by the Securities Exchange Commission pursuant to the Sarbanes-Oxley Act of 2002, the proposed amended version of ABA Model Rule 1.13(b) would apply to lawyers representing privately held companies, not only to lawyers representing public companies. This proposed amendment, along with others in the Task Force report, will come before the ABA House of Delegates for a vote this summer. If the amendment is adopted there, individual states will then have to decide whether to amend their rules accordingly. Oregon presently has no equivalent to ABA Model Rule 1.13(b), but, whether as a matter of the duty of competent representation under DR 6-101 or otherwise, Oregon courts would be likely to consider ABA Model Rule 1.13(b) to be a part of Oregon law already.²

The proposed amendment would make two primary changes. First, a lawyer could not refuse to act because the lawyer did not “know,” but merely should have known, about wrongful conduct. Cf. OSB Legal Ethics Op No 1991-95 (duty to inform bar of another lawyer’s wrongdoing under DR 1-103(A) requires, inter alia, that lawyer have actual knowledge of wrongdoing). A lawyer will have to take action to protect the entity-client whenever a reasonable lawyer would conclude that wrongdoing has been, is or will be present. The importation of “mere” negligence standards into disciplinary rules often represents overkill. See, e.g., In re Robert Neil Gygi, 273 Or 443, 541 P2d 1349 (1975) (isolated instances of ordinary negligence do not warrant discipline under DR 6-101(B)). Accord, In re Magar, 335 Or 306, 66 P2d 1014 (2003) (noting, inter alia, the difference between negligence and neglect). Nonetheless, the question whether a negligence-based duty should be placed on lawyers in this particular instance may be worth considering as long as the punishment does not exceed the crime.³ In fact, one could argue that as a matter of civil damage liability, which is probably a far greater risk than discipline, lawyers are already held to a negligence standard in this regard.

² The present version of ABA Model Rule 1.13(b) is among the rules on which the Oregon State Bar House of Delegates will vote this fall when it considers the general replacement of our DR-based system with the more modern, more widespread and more desirable ABA Model Rules-based system.

³ Alternatively, perhaps a gross negligence standard might provide a more appropriate basis for discipline.

The second change places much greater emphasis on a lawyer going “up the ladder” rather than simply relying upon remonstrations with the allegedly wrongdoing individual. This clearly does make sense. Serious past, present or future wrongdoing requires a serious response.