

NATIONAL INSTITUTES

False Claims Act and Qui Tam Trial Institute 2022

April 25-27, 2022 ▶ Miami, FL



THE PREMIER SOURCE FOR CLE

3:00-4:00pm – *CLE Credit*

Ethics Chat

Fred Wahrlich, *Shareholder, Munsch Hardt Kopf & Harr [Moderator]*

Thad Bereday, *former General Counsel WellCare*

Jack E. Fernandez, *Partner, Zuckerman Spaeder*

WELLCARE HEALTH PLANS: ETHICAL CONSIDERATIONS

ABA False Claims and Qui Tam Trial Institute 2022

April 25–27, 2022

InterContinental Miami, FL

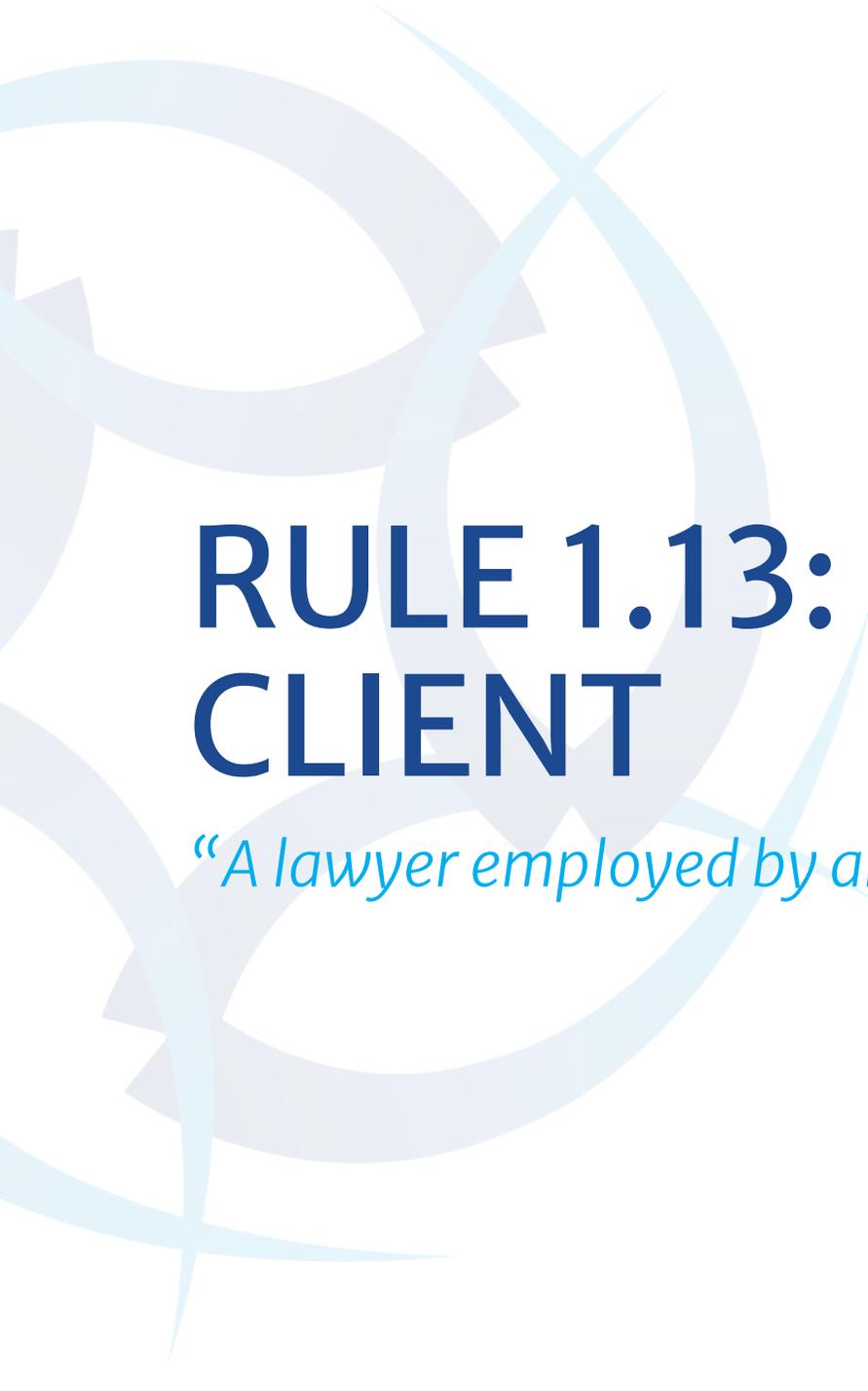


THAD BEREDAY
FROM INMATE TO ADVOCATE

**MUNSCH
HARDT** /



ZUCKERMAN
SPAEDER



RULE 1.13: ORGANIZATION AS CLIENT

“A lawyer employed by an organization represents the organization...”

TO WHOM ARE DUTIES OWED?

- Rule 1.13 makes clear that the lawyers' duties in the context of corporate representation are owed to the corporation, not to third parties.
- Like all officers, corporate general counsel are required to act in the best interests of the corporation.
- Rule 1.13(b) requires counsel to escalate to the “highest authority that can act on behalf of the organization” if an authorized agent is acting improperly unless the lawyer “reasonably believes that in the best interests of the organization it is not necessary to do so.”
- Otherwise, decisions made by officers “ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.” [Comment 3]
- In practice, these matters often judged with 20/20 hindsight.

RULE 1.13 APPLIED TO WELLCARE

- At the time, counsel believed that the company's interpretation of the law was reasonable and defensible.
- Thus, WellCare's officers were seen as acting with authority in the best interests of the corporation. No duty to escalate to higher authority (board of directors).
- Further, disclosure of the company's strategy to regulators (adverse party in arms-length contract) would violate Rule 1.13 and lawyer's duty of confidentiality (Rule 1.6).
- Business people are responsible for business decisions. Lawyers make legal decisions. [See Comment 3]
- CAUTION: did not work in WellCare.



RULE 1.3: DUTY OF ZEALOUS ADVOCACY (DILIGENCE)

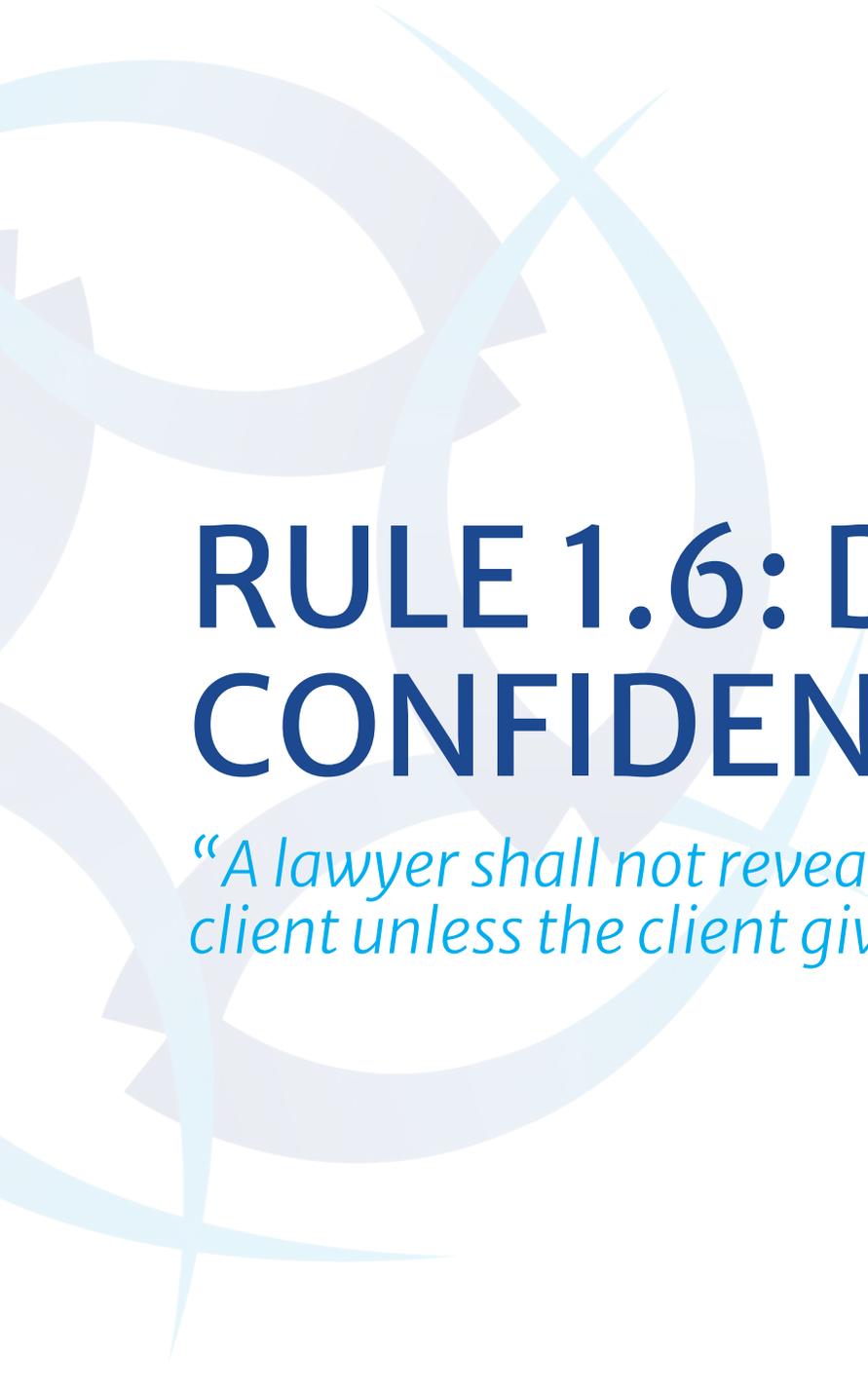
“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.” [Comment 1]

STANDARD OF “REASONABLE DILIGENCE”

- A lawyer must “take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.” [Comment 1]
- But the lawyer need not “press for every advantage” and can “exercise professional discretion” as to what means should be pursued.
- Question: How to interpret in context of communications with regulators in highly complex regulated industry?
- Answer: see rule about 20/20 hindsight.
- Do NOT “roll the dice” regarding prospect of enforcement. In practice, many practitioners do.
- “You takes your chances, you pay the price.” (Paraphrased, see [here](#).)

RULE 1.3 APPLIED TO WELLCARE

- Challenging circumstance when counsel views a legal interpretation as reasonable, but federal prosecutors do not.
- Federal prosecutors will likely win.
- 98% of federal criminal cases settle (via plea bargain) due the trial penalty, stigma, costs, asymmetric discovery, disproportionate resources of parties, etc.
- Do not litigate civil controversies via the criminal justice system.
- Don't forget about the criminal system when formulating business strategies.
- In-house counsel are at risk!



RULE 1.6: DUTY OF CONFIDENTIALITY

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”

DISCLOSURE TO REGULATORY AUTHORITIES

- Rule 1.6(b) exception permits breaking confidentiality where necessary “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury...”
- Despite the “fundamental principle in the client-lawyer relationship” (Comment 2) to preserve client confidences, duties may become less clear in regulatory context, particularly where criminal charges are alleged.
- The Eleventh Circuit decision in WellCare held that the CEO’s “insistence on secrecy was evidence from which a reasonable jury could infer fraudulent intent.” (p. 89)
- The exception allowing disclosure adverse to the client is designed to prevent “serious abuse of the client-lawyer relationship.” (Comment 7)
- This abuse does not occur where the lawyer believes the client’s conduct is reasonable.

RULE 1.6 APPLIED TO WELLCARE

- In context of criminal proceeding, likely little deference given to model rules for in-house counsel charged with criminal conduct.
- At same time, these issues were not fully tested due to the health issues that caused in-house counsel to be severed from the original trial, followed later by a plea.
- Expert witness was prepared to testify as to application of model rules in context of in-house general counsel, but this testimony never occurred.
- Vagaries of litigation generally are exacerbated – with much higher risks (e.g., loss of liberty) – in context of criminal proceeding.
- DO NOT discount the likelihood of criminal prosecution for conduct that counsel might ordinarily perceive as civil dispute.
- Recent changes in DOJ policy likely prevent prosecution on same facts as WellCare, where an ambiguous regulatory interpretation has not gone through rule & comment.



THANK YOU FOR JOINING US!

Please submit questions:

thad@4redemption.com

jfernandez@zuckerman.com

fwahrlich@munsch.com

NATIONAL INSTITUTES

False Claims Act and Qui Tam Trial Institute 2022

April 25-27, 2022 ▶ Miami, FL



THE PREMIER SOURCE FOR CLE