Wait, Wait, Don't Tell Me: Accountability, Plausible Deniability, Model Rule 1.13, and the Role of Corporate Counsel in an Age of Enhanced Monitoring

Irma S. Russell*

The U.S. Environmental Protection Agency ("EPA") Next Generation Program and other innovations are heralding a new age of accountability and compliance in environmental law.[1] Technological innovations, such as electronic reporting and big data analysis of reports, mean that governmental agencies can monitor regulated entities in ways previously unimagined, even achieving compliance without direct enforcement action.[2] For example, EPA credits the Toxic Release Inventory for reducing toxic discharges by public oversight rather than specific agency enforcement.[3] Other advances such as remote monitoring of discharges, data retrieval and analysis, and sophisticated enforcement strategies all appear to offer game-changing progress for sustainability. The EPA's AirNow program provides the public with web access to real-time measurements of particulate levels in U.S. cities[4] and regional air quality forecasts. It also publicizes air quality data in other countries.[5] The result of greater public access seems to enhance public participation, or at least the opportunity for participation in government[6] and greater agency accountability.[7]

Such stunning developments suggest that universal accountability and environmental compliance are just around the corner. The reality is more complex and less certain, however. Assessment of incentives without recognition of barriers, trump cards, and escape available in the legal system as a whole may present merely the illusion of account-

* *Professor of Law and Edward A. Smith Chair, the University of Missouri-Kansas City School of Law.* *The Author gratefully acknowledges the exchange of ideas with colleagues at the University of Missouri-Kansas City School of Law and, additionally, the insights on earlier drafts from Joan MacLeod Heminway, The W.P. Toms Distinguished Professor of Law at The University of Tennessee College of Law. The Author also thanks professors at the University of Missouri-Kansas City School of Law for their helpful comments and insights on a presentation of this Article, particularly Dean Ellen Suni and Professor Barbara Glesner-Fines.*

1. For examples of EPA generation compliance efforts, see generally *Enforcement Goals*, U.S. Envtl. Protection Agency, http://www2.epa.gov/enforcement/enforcement-goals (last updated Mar. 16, 2015) (noting goals of making regulations clear, using advanced monitoring technologies, shifting to electronic reporting, and expanding transparency of compliance information); David Hindin, *Next Generation Compliance and States: Improving Compliance Through Regulatory Structure and Advanced Technology*, U.S. Envtl. Protection Agency (June 3, 2014), http://www.epa.gov/sbo/pdfs/next_gen.pdf.
2. Even when agencies face budget cuts, future implementation of enhanced enforcement strategies and the revival of past initiatives seem likely. Professor Joel Mintz has explored and evaluated enforcement approaches the EPA has used in the past or might effectively initiate, including more prominent publicity on significant enforcement actions to enhance the effectiveness of its Office of Enforcement and Compliance Assurance. *See* Joel A. Mintz, *Shaping Next Generation Compliance at EPA: Lessons From the Agency's Past and Some Post-Workshop Thoughts*, *in* Next Generation Environmental Compliance and Enforcement 323, 330 (Leroy C. Paddock & Jessica A. Wentz eds., 2014).
3. *See generally Toxics Release Inventory (TRI) Program*, U.S. Envtl. Protection Agency, http://www2.epa.gov/toxics-release-inventory-tri-program (last updated Oct. 8, 2015) (emphasizing the need for increased community awareness of local toxic releases).
4. *See Map Center: Hourly PM AQI*, AirNow, http://airnow.gov/index.cfm?action=airnow.mapcenter&mapcenter=1 (last visited Oct. 18, 2015) (click on "Current PM" tab).
5. Secretary of State John F. Kerry and EPA Administrator Gina McCarthy announced on February 18, 2015, plans to install "air-quality monitors outside embassies in numerous foreign cities, starting with diplomatic posts in India and then moving to Vietnam, Mongolia and other countries" with the goal of providing reliable health information to Americans in China and, additionally, to provide the same information to local populations. Joby Warrick, *U.S. Embassies Are Measuring Other Countries' Air Quality. Surprise: They Don't Like It Much*, Wash. Post (Feb. 19, 2015), http://www.washingtonpost.com/news/energy-environment/wp/2015/02/19/u-s-embassies-are-measuring-other-countries-air-quality-surprise-they-dont-like-it-much/ (reporting decision of United States to increase monitoring in other countries around the world, history of electronic monitoring at the U.S. Embassy in China beginning in 2008 with the effect of eventual reduction in smog in China).
6. EPA uses the web and communication technology to engage the public on its mission and particular initiatives. *See, e.g.*, U.S. Envtl. Prot. Agency, *I Choose Clean Water,* Thunderclap, https://www.thunderclap.it/projects/16052-i-choose-clean-water (last visited Oct. 18, 2015) (showing EPA as organizer of the Thunderclap poll).
7. Information now available on regulations.gov is a treasure-trove for helping governmental agencies gain awareness of what other agencies are doing as well as offering information for interest groups and the public. *See generally* Regulations.gov, http://www.regulations.gov (last visited May 2, 2015).

ability. The effectiveness of balancing enforcement and voluntary compliance in environmental law is the subject of ongoing debate and research.[8] Effective regulation and improved compliance demands scrutiny of each component in the regulatory system—including the laws themselves, their intended incentives, and the accountability or deniability of decisionmakers. Without an intentional analysis of accountability and the barriers to accountability, the regulatory system will continue a flawed and piecemeal approach to environmental regulation.

This Article explores the accountability and deniability continuum in environmental regulation, focusing on the responsibilities of corporate counsel under the *Model Rules of Professional Conduct*. Specifically, the Article addresses the responsibilities of corporate counsel who know a constituent of the client is violating environmental laws. The central thesis of this Article is that accountability is a crucial piece of the compliance puzzle and, thus, the continuum of accountability to deniability of corporate actors deserves study. The major impact of corporate actors on the environment makes accountability in this context particularly important and suggests that scrutiny of the attributes of the corporate form of doing business can provide keys to achieving compliance.[9] Within that structure, the role played by corporate legal counsel in advising the corporate entity, and urging compliance with the law, is an integral and often overlooked component of compliance. Without a holistic picture of the law—including corporate structure, governance, and relevant ethical norms—more data and even better incentives will not lead to a cleaner or safer environment.[10] All incentives, whether positive or negative, are part of a larger program of factors and provide reliable influence only to the extent that decisionmakers are accountable and other factors do not trump the incentive at issue. Effective laws depend on more than the incentives they create and, indeed, on more than enforcement mechanisms.[11]

Part I of this Article identifies important background principles relating to the operations of corporate entities, including the pervasive duty of all actors to comply with the law, and provides examples of incentives for compliance and accountability in environmental law. Part II explores principles of legal ethics in relation to both corporate and individual clients. Part III focuses on Model Rule 1.13, which gives lawyers guidance on representing organizational clients, including corporations. Specifically, Part IV explores the elements and structure of Model Rule 1.13 in relation to known violations of law. By parsing the language of the rule, this Part considers the guidance and influence the rule imparts to lawyers facing circumstances of exigency such as violations of law that create environmental hazards. Part V concludes with a discussion of the need for clearer guidance on the lawyer's role in advising the corporate entity.

I. Legal Principles Relating to the Corporate Entity

Corporations are fictional entities, creatures of the law. State statutes and judicial opinions establish corporate existence and governance principles, including recognition of for-profit, nonprofit, and benefit corporations.[12] Today more than ever, corporations, some small and some mammoth, impact the modern world with far-reaching consequences on human health and safety.[13] Dischargers, developers, and transactional parties do business as corporations and collective groups such as unions, trade associations, and other nongovernmental organizations. The prevalence of corporations in the environmental arena means lawyers practicing environmental, energy, and resource law must understand the principles of corporate governance and of rules of ethics relating to lawyers representing the corporate entities.[14]

The corporate form of doing business undergirds the U.S. and world economies. Corporate budgets often exceed that of the EPA and even the budgets of some countries.[15] The political, economic, and even public relations clout of a given corporation can outstrip government agencies—even without consideration of the new realm of influence endorsed by *Citizens Untied v. Federal Election Commission*[16] in the arena of political contributions.[17] Without corporations, the gross national product of the United States would diminish dramatically. Indeed, a global economy would be impossible without financial power and networks for multinational corporate entities to marshal large scale industry and marketing. One example of the influence of corporations in our economy is found in the outsourcing and offshoring of manufacturing and services in the last two decades, which is traceable in significant part to corporations pursuing cheaper labor and lower environmental standards in third world countries that result in lower costs and increased profits.[18] Corporate focus on the goal of economic efficiency can distort decisionmaking to ignore public goods such as a healthful environment.

8. *See, e.g.*, David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. Rev. 1, 1 (2014) (noting enforcement as an essential component of regulation and proposing a "three-layered conceptual framework for considering options for structuring the administrative agency enforcement and compliance promotion function").
9. The spectacular failures of corporate governance in the financial context have significance here since the same structure of decisionmaking operates with regard to financial and environmental decisions.
10. *See* Carolyn Heinrich, *Outcomes-Based Performance Management in the Public Sector*, 62 Pub. Admin. Rev. 712 (2002).
11. *See id.*
12. *See generally* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 Am. U. Bus. L. Rev. 1 (2012) (examining various aspects of social enterprise entities and statutes).
13. *See* Brian Roach, Corporate Power in a Global Economy (2007).
14. *See* Career Dev. Office, *Environmental Law*, Yale L. Sch. (2014), http://www.law.yale.edu/documents/pdf/CDO_Public/CDO_Environmental_Law_Public.pdf.
15. U.S. Envtl. Prot. Agency, EPA-190-R-14-002, Fiscal Year 2015 Justification of Appropriation Estimates for the Committee on Appropriations ii (2014); Sarah Anderson & John Cavanagh, *Of the World's 100 Largest Economic Entities, 51 Are Now Corporations and 49 Are Countries*, Corp. Accountability Project, http://www.corporations.org/system/top100.html (last modified Jan. 3, 2002).
16. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
17. *Id.* at 319 (holding that government suppression of political speech on basis of the speaker's corporate identity violates First Amendment).
18. *E.g.*, *Trade and International Labor Standards*, Globalization 101 (Jan. 1, 2012), http://www.globalization101.org/trade-and-international-labor-standards/.

The spectacular failures of major corporations in recent years are well known.[19] Self-dealing by corporate constituents has been documented in the press and court cases, making many remember the words of Judge Sporkin, "Where were [the lawyers] . . . ?"[20] Inflated corporate earnings reports of WorldCom, Enron, and other corporations spurred investigations and prosecutions for criminal fraud, resulting in further scandals and losses.[21] Last year, according to the criminal indictment, the major law firm of Dewey & LeBoeuf collapsed as a result of a scheme to defraud clients.[22] While the negative effects on the economy of the failure of large entities are clear,[23] prosecutions have been unsuccessful in most cases.

Nevertheless, compliance with environmental laws seems to have increased over the last generation. Changes in law and enforcement have resulted in a changed ethos. Though the cause of any trend amounts to speculation, education of clients by legal counsel and statutory provisions seeking greater accountability are likely playing a role in this trend.[24] Congress has sought to enhance corporate accountability and restore investor confidence with corporate disclosure requirements under the Sarbanes-Oxley Act[25] and other laws.[26] Additionally, all major environmental statutes include both criminal sanctions and civil fines and penalties.[27] Moreover, the likelihood of enforcement is real. For example, criminal penalties have been assessed against corporations and their officers and employees for corporate conduct in violation of environmental laws.[28] These penalties may be applicable to the individuals who make decisions for business entities as well as to the organization itself.[29] The EPA website shows that enforcement actions for the 2014 fiscal year resulted in criminal fines, restitution, and $80 million in court-ordered environmental projects.[30] The same report indicates the imposition of aggregate prison sentences in excess of 150 years in 2014.[31] In some cases, federal law prescribes different penalties for organizations than those prescribed for individuals. For example, a natural person convicted of knowing endangerment of another person by prohibited conduct (e.g., exporting a listed hazardous substance) is subject to "a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both."[32] The statute authorizes imposition of a significantly larger fine for a violation by a defendant that is an organization.[33] Part of the lawyer's advice to clients who are considering courses of action and the potential consequences of actions, is existence of civil and criminal penalties for specific violations.[34]

Like all actors within the scope of a law, corporations have a duty of compliance with the law. The concept of observation of law is axiomatic in any legal system; the law applies to all, without regard to the type of entity involved absent exclusions or exceptions.[35] This important principle of corporate governance is highlighted in the *Principles of Corporate Governance* published by the American Law Institute ("ALI"). Section 2.01 of the *Principles of Corporate Governance*[36] states that a corporation "is obliged, to the same extent as a natural person, to act within the boundaries set by law."[37]

19. *See* James H. Cheek III, Report by the ABA Task Force on Corporate Responsibility (2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119c.authcheckdam.pdf (noting the "Spectacular Failure" of Enron and other corporations).
20. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) ("Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? . . . What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching . . . ."); *see also* Mike France, *What About the Lawyers?*, Bus. Wk., Dec. 23, 2002, at 58; Richard A. Oppel Jr., *Lawyer Warned Enron Officials of Dubious Deals*, N.Y. Times (Feb. 7, 2002), http://www.nytimes.com/2002/02/07/business/07LAWY.html (noting that lawyer Jordan Mintz proposed several ways to correct problems at Enron nearly a year before the company collapsed).
21. Now some corporations are seeking tax refunds because the taxes they paid on inflated earnings were naturally greater than what they would have paid if the corporation's income had been accurately reported. *See* Rebecca Blumenstein et al., *After Inflating Their Income, Companies Want IRS Refunds*, Wall St. J. (May 2, 2003), http://www.wsj.com/articles/SB105182734713122400.
22. *See* James B. Stewart, *The Puzzle in the Dewey & LeBoeuf Indictments*, New Yorker, Apr. 6, 2014, http://www.newyorker.com/business/currency/the-puzzle-in-the-dewey-leboeuf-indictments.
23. The causes of the current corporate problems are the subject of intense speculation. *See, e.g.*, John Cassidy, *The World of Business: The Greed Cycle*, New Yorker, Sept. 23, 2002, at 64, http://www.newyorker.com/magazine/2002/09/23/the-greed-cycle.
24. *See id.*
25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in titles 11, 15, 18, 28, and 29 of the U.S. Code).
26. *Id.* § 205(d)(2).
27. *See, e.g.*, 33 U.S.C. § 1319(c) (2012) (authorizing criminal penalties for negligently or knowingly violating specific sections of the Clean Water Act); 42 U.S.C. § 9603(b)(3) (2012) (authorizing criminal penalties under the Comprehensive Environmental Response, Compensation, and Liability Act of up to three years imprisonment or up to five years for subsequent conviction for knowingly submitting false or misleading information regarding a release of a hazardous substance); 42 U.S.C. § 11045(b)(4) (2012) (authorizing criminal penalties for knowing and willful failure to provide required notice under the Emergency Planning and Community Right-to-Know Act).
28. *See, e.g.*, *Scotts Miracle-Gro Will Pay $12.5 Million in Criminal Fines and Civil Penalties for Violations of Federal Pesticide Laws*, U.S. Envtl. Protection Agency (Sept. 7, 2012), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/38045218faa33abe85257a72006bef1c!opendocument (reporting producer of pesticides fined $4 million for criminal violations of Federal Insecticide, Fungicide, and Rodenticide Act and $6 million in civil penalties, and $2 million for environmental projects); *Sinclair Tulsa Refining Company, Two Managers Plead Guilty to Felony Pollution Charges—$5 Million Criminal Penalty, Plus Half Million Community Service Payment*, U.S. Envtl. Protection Agency (Dec. 15, 2006), http://yosemite.epa.gov/opa/admpress.nsf/932ebdd332b4e74c85257359003d480e/9b69e12f47f3742b85257245005d5fad!opendocument.
29. The EPA routinely files enforcement actions under environmental laws against individuals and organizations. *See, e.g.*, 15 U.S.C. § 2615(a) (2009) (establishing criminal penalties for use of listed toxic substances); 33 U.S.C. § 1319(c) (establishing criminal penalties for pollution of navigable waters).
30. *FY 2014 Enforcement and Compliance Annual Results*, U.S. Envtl. Prot. Agency 11 (Dec. 18, 2014), http://www2.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results-charts-12-08-14.pdf#page=11.
31. *Id.*
32. 42 U.S.C. § 6928 (2012).
33. *Id.*
34. In some cases, federal law imposes up to five years of imprisonment and up to $50,000 per day in fines for knowing conduct (including transport or storage) involving a listed hazardous waste without the required permit. *See id.* (providing higher penalties of not more than $1,000,000 for a violation by a defendant that is an organization).
35. *See, e.g.*, *Elephant Lumber Co. v. Johnson*, 202 N.E.2d 189 (Ohio Ct. App. 1964) (holding contract void when it cannot be performed without violation of statute).
36. Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (Am. Law Inst. 1994).
37. *Id.* (noting that the principle inheres even "if corporate profit and shareholder gain are not thereby enhanced").

Indeed, envisioning a system of law that exempts corporations from the obligation of compliance with law shows the problems inherent in this approach. Absent a commitment to comply with the law, the corporate structure is exquisitely tailored to establish plausible deniability and to frustrate compliance with the law. Moreover, such an approach inevitably creates a competitive advantage for corporate entities over individuals doing business as individuals. Corporations, as fictional entities, act only through human individuals. The volume of information, contracts, and data handled routinely by corporate entities means that multiple offices and divisions are expected, and no one office or individual is likely to have all the information or purposes relating to a given transaction or a given law. This framework makes sequestration of information necessary and typical, unlike the operation of individuals running a business. Add to the operation's multiple offices the principle of limited liability for the corporate entity and the competitive advantages of doing business as a corporate entity, and the advantages are obvious.[38] A system that empowers corporate ignorance inevitably leads to regulatory failure in all areas. Because of the dominance of corporations in the environmental arena, exempting corporations from compliance would put the environmental goals of the major canon of laws at risk.

Information, data, and plans typically reside in different offices within the corporate entity. The corporation and perhaps top officials may effectively avoid the factual evidence necessary for showing a violation of law and, thus, escape accountability, no matter how severe the sanctions for the conduct may appear in the text of the law.[39] To the extent that information and knowledge (including guilty knowledge) of schemes and enterprises can be sequestered in different offices of a corporation, corporate entities easily outmaneuver businesses run by natural persons.[40] The natural person has first-hand knowledge (and little opportunity to distance himself from) information relevant to the business. Similarly, the attorney-client privilege has the potential for sequestering information in the office of corporate counsel, whether counsel serves as in-house or retained counsel.[41]

Despite the foundational nature of the concept of compliance with the law articulated by the ALI, the point is not expressly articulated by the leading bodies of statutory law guiding lawyers who represent corporate clients and courts that decide controversies over corporate action. Most state laws have adopted the framework provided in the Model Business Code or Delaware law.[42] The result is opacity in terms of the responsibilities of corporate constituents, including lawyers. Deciphering the puzzle of accountability in the corporate context requires a comparison of multiple incentives, including the corporate form of business and the role of corporate counsel in advising the client on the law. Advances in data, technology, and science provide progress, but are not sufficient to ensure incentives reach their intended audience.[43]

II. Principles of Legal Ethics

The *Model Rules of Professional Conduct*, which are drafted by the American Bar Association, provide a model for state law.[44] These rules do not apply to any lawyer. Rather, they are provided as a guide to state bar associations, which regulate lawyer conduct as a matter of state authority. The Preamble to the *Model Rules of Professional Conduct* acknowledges the duty of lawyers to balance duties within the justice system when it states, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself . . . . Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance . . . ."[45] Although the state rules apply to all lawyers, different types of legal representation present different issues. For example, the duty to advise a client is somewhat different in the corporate setting as opposed to the representation of individual clients.[46]

Model Rule 1.2 indicates that lawyers "shall abide by a client's decisions concerning the objectives of representation,"[47] subject to limitations of scope and the duty not to assist a client in crimes or frauds.[48] Rule 1.2 also recognizes "the limits imposed by law and the lawyer's professional obligations,"[49] stating that a lawyer must not assist or counsel a client when the lawyer knows that the conduct is a crime or fraud.[50] This

38. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (finding that attorney-client privilege has purpose of encouraging "full and frank communication between attorneys and [ ] clients" to "promote broader public interests in observance of law and administration of justice").
39. *See* John Sexton, *A Post Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 477–78 (1982).
40. *Id.*
41. *Id.* at 478.
42. Most public companies are Delaware corporations. *See generally* Jeffrey Gorris et al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & Contemp. Probs. 107 (2011).
43. *See generally* Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 Temp. L. Rev. 659, 660–61 (2005).
44. Model Rules of Prof'l Conduct (Am. Bar Ass'n 2013).
45. *Id.* at pmbl., paras. 13–16.
46. Additionally, the in-house lawyer is more economically dependent on his single client (his employer) than a lawyer representing numerous clients. More than with outside counsel, corporate in-house counsel may be faced with a moral dilemma between ethical norms and the client's interest, since in-house counsel is dependent on one employer to provide his or her livelihood and career success. An in-house attorney faced with a choice between the demands of an employer and the requirements of an ethical code has an even greater claim to judicial protection than a non-attorney employee. Gen. Dynamics v. Superior Court, 876 P.2d 487, 502–03 (Cal. 1994). In difficult economic times, the dependent nature of the in-house counsel on his employer is even greater.
47. Model Rules of Prof'l Conduct r. 1.2(a).
48. *Id.* r. 1.2(d). While it is the client that properly determines the objectives of a representation, the lawyer has discretion in several ways. First the lawyer may decline to represent the client without explanation. Second, the lawyer has significant discretion in whether they continue to represent the client. *See id.* r. 1.16. Model Rule 1.16 gives lawyers substantial leeway in deciding to terminate the attorney-client relationship with the proviso that the lawyer can withdraw without material adverse effect on the client's interests. *Id.* r. 1.16(b)(1). It also presents numerous cases in which the lawyer is required to decline to represent a client, or to withdraw from representing a client. *Id.* r. 1.16(a)(1)–(3).
49. *Id.* r. 1.2 cmt. 1.
50. The rule expressly notes the ability of the lawyer to "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." *Id.* r. 1.2(d).

point provides the crux of issues relating to communications regarding violations of environmental laws.

The line between advising the client about the law and assisting in a crime can be difficult to ascertain. When a client asks a lawyer about the likelihood of prosecution, the truth may be that the likelihood of any enforcement is extremely low. Such information about the law may help a client in determining whether to violate a law. Nevertheless, this communication of information apparently falls on the protected side of the line drawn by Comment 9, if the rule is read literally.[51] It should also be noted, however, that lawyers are not exempt from the law. Lawyers do not get a "free card" of immunity from laws based on their status as lawyers.[52] Like others, lawyers must comply with laws and regulations, including the common law, statutes, and regulations.[53]

Counterbalancing the rule on client decisionmaking, Model Rule 2.1 makes clear lawyers must provide independent advice rather than telling the client what he or she wants to hear. It mandates that lawyers "shall exercise independent professional judgment and render candid advice,"[54] making clear the lawyer's job is to provide advice on compliance with the law. The client's best interest—long-term as well as short-term—in making informed and lawful decisions requires the lawyer's input and candid evaluation of the propriety and risks of a course of action.[55] Additionally, Rule 2.1 announces the right of the lawyer to refer to more than the letter of the law, noting that it is appropriate for the lawyer to advise the client of "other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[56] The relationship between the lawyer and their corporate or organizational client varies on a case-by-case basis. However, the principles of the lawyer's fiduciary relationship and professional responsibilities are the same for corporate attorneys in their many roles.

Another important tenet of the lawyer-client relationship requires that the lawyer keep the client informed about the representation.[57] This duty of communication is central to the discussion of the role of corporate counsel in representing companies that impact the environment. Model Rule 1.4 states that the lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished"[58] and "keep the client reasonably informed about the status of the matter."[59] It states that the lawyer should provide the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation."[60]

The comments to Model Rule 1.4 raise questions as well as provide interpretations on what is a reasonable communication. Comment 1 to Model Rule 1.4 states the foundational point that "reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."[61] Additionally, Comment 4 provides a reasonableness standard for judging the adequacy of communication, noting that adequacy "depends in part on the kind of advice or assistance that is involved."[62] The comments also give examples from the area of negotiation and litigation to explain the point:

> [W]hen there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.[63]

Comment 5 to Rule 1.4 clarifies the principle that clients "should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."[64] The examples turn on the reasonableness of the need to bring the client up to speed. In this clinical discussion, however, there is no indication that a client would be interested in correcting a violation of the law by a constituent.

Comment 6 to Model Rule 1.4 notes the intersection of this rule with the rule on organizational clients. It sets the stage with the ordinary case of the individual client who is "a comprehending and responsible adult."[65] Additionally, it notes the variation from this usual case in three situations: (1) when the client is a child, (2) in the case of diminished capacity of a client, and (3) when the client "is an organization or group."[66] The last of these is relevant to the corporate client.

On this point, Comment 6 states that a lawyer for an organization should direct his or her communications to the proper official of that group.[67] The comment suggests a truism. Even without a rule, lawyers would unanimously agree that "ordinarily, the lawyer should address communications to the appropriate officials."[68] The phrasing of the comment

51. *See id.* r. 1.2 cmt. 9. The Securities and Exchange Commission's Part 205 Rules, passed pursuant to the Sarbanes-Oxley Act, limit the scope of this comment and, thus, make the agency more like a tribunal in terms of the balance of interests struck in favor of disclosure. *See* 17 C.F.R. § 205.3(b) (2015); Model Rules of Prof'l Conduct r. 3.3.
52. Lawyers can be held subject to tort liability for knowingly assisting in their client's tortious acts. *See* Restatement (Second) of Agency § 348 (Am. Law Inst. 1958).
53. *See, e.g.*, Bennett v. Berg, 710 F.2d 1361, 1363–64 (8th Cir. 1983) (refusing to dismiss a Racketeer Influenced and Corrupt Organizations Act claim against lawyers).
54. Model Rules of Prof'l Conduct r. 2.1.
55. David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. Cal. L. Rev. 1147, 1175 n.127 (1993) (noting that "despite the permissive language in [M]odel [R]ule 1.13, a lawyer who believes that the officers of a corporate client are defrauding the company has an obligation to bring the matter to the attention of the board as part of his or her general duty to provide competent and effective service").
56. Model Rules of Prof'l Conduct r. 2.1.
57. *See id.* r. 1.4.
58. *Id.* r. 1.4(a)(2).
59. *Id.* r. 1.4(a)(3).
60. *Id.* r. 1.4 cmt. 5.
61. *Id.* r. 1.4 cmt. 1.
62. *Id.* r. 1.4 cmt. 5.
63. *Id.*
64. *Id.*
65. *Id.* r. 1.4 cmt. 6.
66. *Id.*
67. *Id.* (citing Model Rules of Prof'l Conduct r. 1.13 (2013)).
68. *See id.*

seems to raise the odd question of whether inappropriate officials should be contacted in out-of-the-ordinary cases. The generality of the statement seems to make the exceptional case, included within the statement, without recourse to another rule. The question of determining the appropriate officials in a given case, such as a violation of law, is an important and difficult question. It is dealt with by Model Rule 1.13.

III. Model Rule 1.13: Representing the Organizational Client

Model Rule 1.13, entitled "Organization as Client," regulates representations of all organizational clients, including corporate clients. Generally, the *Model Rules of Professional Conduct* regulate and guide lawyer conduct in all representations, whatever the subject or type of representation. Model Rule 1.13 presents a special rule relating to the organization and, in particular, communications with the client and within the client organization. Like other clients, the organizational client must have information about the law in order to comply with the law while seeking to achieve its business purposes. Model Rule 1.13 presents a separate rule for lawyers representing organizational clients, modifying the requirement that the lawyer keep the client informed about the representation noted in Model Rule 1.4. In the context of representing an organization, the duty to communicate with the client is changed to a duty to communicate within the chain of command of the organizational client.[69] Comment 6 to Rule 1.4 states that in representing the organizational client, it is important for the lawyer to "address communications to the appropriate officials of the organization."[70] This seems to state a truism: talk to the right people and do not talk to the wrong people.

The rule sets up both a commonsense precept and, additionally, a predicate for plausible deniability.[71] The chain of command is important in corporations and other entities. The lawyer should not disrupt the chain of command and communication.[72] On the other hand, the chain of command should not circumvent the obligation of compliance with the law. Lawyers owe the organizational client, like all clients, a fiduciary duty.[73] Additionally, in representing corporations, lawyers deal with individuals such as directors, who may also owe fiduciary duties to the corporate entity and the duty of care under applicable state law. Lawyers must hold in confidence information about a client, except as provided in Model Rule 1.6[74] and Model Rule 1.13 in the case of organizational clients.[75] In the corporate context, setting and evaluating goals in light of the legal consequences should be integral parts of one cohesive process. Thus, corporate counsel should be an integral part of the business decisionmaking, assisting the client in clarifying and prioritizing goals in light of the law.[76] Model Rule 1.13 states that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[77]

Subsection (a) to Model Rule 1.13 states two points of great importance. The first is that the lawyer employed or retained by an organization represents that organization rather than the individuals who hired her.[78] The second is that the organization acts "through its duly authorized constituents."[79] An organizational client's actions are undertaken by human constituents. The organization cannot act except through its duly authorized constituents who are, of course, people. The constituents make the decisions necessary for carrying out the purpose of the organization, and the lawyer often will develop a relationship with these real humans.

The rule recognizes that the corporate setting presents complicating factors relating to objectives and communications with the corporate client. Comment 6 to Model Rule 1.4 notes the specific needs of the organizational clients: "When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization."[80]

The lawyer's advice is essential to give the client the knowledge necessary to make informed and lawful decisions. In some cases of a decision not to comply with the law, the lawyer's duty under Model Rule 1.13 can include an obligation to report the violation to the board of directors.[81] The directors, the duly authorized officers, and other constituents of a corporation need legal advice in order to carry out their decisionmaking duties for the organization. As an advisor about the law, the lawyer often will have influence in setting the culture of an organization. In fact, the culture of any corporation or organization evolves over time, sometimes with a pendulum swing of altering views and typically with persistent disagreement among the constituents regarding numerous issues of the business, including the level of legal compliance. Although the constituents are not the client, they are decisionmakers of the client, and advising the client should be accomplished within the corporate structure without disruption of the chain of command created by the corporate entity.

69. *Id.* r. 1.13(b).
70. *Id.* r. 1.4 cmt. 6.
71. *Id.* r. 1.13 cmts. 3–4.
72. *Id.* r. 1.13 cmt. 4.
73. *Id.* r. 1.13 cmt. 10.
74. Model Rule 1.6 permits the disclosure of client confidences in certain limited circumstances, including

> to prevent reasonably certain death or substantial bodily harm; . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; . . . [and] to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Id. r. 1.6(b). State professional responsibility rules as to these exceptions vary significantly.
75. *See infra* Part IV.
76. Model Rules of Prof'l Conduct r. 1.13(b)–(d).
77. *Id.* r. 1.13(a).
78. *Id.*
79. *Id.*
80. *Id.* r. 1.4 cmt. 6.
81. *Id.* r. 1.13(b).

Subsection (b) of Model Rule 1.13 deals with the important and difficult situation in which a lawyer is permitted to disclose client information within the organizational structure of the client. Specifically, subsection (b) sets forth guidance for the lawyer who:

> 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.[82]

This provision does not make things easy. The twists and turns and the momentum of the rule challenge lawyers and grammarians alike, requiring a diagramed sentence and comparison of imponderables in order to determine the permitted action. Some close analysis and parsing is required. While the subsection captures the general principle that the lawyer is required to act in the best interest of the client, it gives ambiguous guidance. First, it includes two significantly different situations in one sentence.[83] Second, it sets forth four separate elements in the same sentence.[84] Additionally, two of the four elements apply to one situation and all four apply to the other situation.[85]

The result is confusing guidance for lawyers. The two situations spoken to in this sentence are (1) a violation of an obligation to the organization, and (2) a violation of law.[86] Two of the four elements relate to both situations and must be found before the lawyer has discretion to act. The first of these two is that the lawyer "knows" of a violation. The standard of knowledge used here is the highest—the lawyer must have "actual knowledge" of the violation or knowledge "inferred from [the] circumstances."[87] This goes beyond having reasonable information that leads a lawyer to reasonably believe that a violation has been committed.[88] The second is that the violation is related to "the representation."[89] This element can present problems of interpretation.[90] When a lawyer finds these two elements are met, she must consider whether reporting is in the best interest of the client. When the lawyer knows of the second type of violation (a violation of law), however, the rule requires more. It requires that the lawyer find two additional elements before making a determination on whether to report. Specifically, the lawyer must evaluate whether the violation of law reasonably might be imputed to the organization and whether the violation is likely to result in substantial injury to the organization.[91]

When the applicable elements are met in either of the two situations, Rule 1.13(b) directs the lawyer to "proceed as is reasonably necessary in the best interest of the organization."[92] Thus, the end result of this difficult assessment of subjective elements leads to a simple conclusion—acting in the best interest of the client. This is an odd construction since it involves significant analysis leading to no new duty. This is the lawyer's standing obligation. He had this duty when he came to work and will have it the next day. He had it before pondering the difficult factors today. The natural response to an obstacle course of factors is that the mandate at the end of the analysis should be something definite.

The risk in the universe of Model Rule 1.13(b) is that the lawyer has no basis to speak to the client about violations of law of the non-client constituent. The lawyer's judgment regarding the best interest of the client is not triggered if these elements have not been met.[93] The likely effect of this rule is silence regarding violations of law if the lawyer concludes that it is unlikely that an enforcement action would be brought against the client.[94] Model Rule 1.13 endorses providing information to the client about violations of law only in a constrained set of violations of law. Thus, Model Rule 1.13 ensconces the lawyer as gatekeeper between management and the board of directors, guiding the lawyer to serve as a filter of information about management to the board. Although corporate counsel should not make business decisions, she has a central role in advising the corporate client about the law, including the legality of different courses of action, and the possible consequences of those choices.

Once the obstacle course of factors of Rule 1.13 is passed, subsection (b) endorses reporting the violation up the corporate ladder. It states:

> 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.[95]

The mandatory statement that the lawyer "shall refer the matter to higher authority," is hedged in the language of the rule.[96] The rule's mandate applies "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization."[97] The comment to the rule also softens this mandate.

Moreover, disclosure is appropriate "only if and to the extent the lawyer reasonably believes necessary to prevent

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* r. 1.0(f) (defining "knows").
88. Urland *ex rel.* Urland v. Merrell-Dow Pharm., Inc., 822 F.2d 1268, 1281 (3d Cir. 1987) (explaining that actual knowledge is a "higher knowledge standard than should have known") (internal quotations omitted).
89. Model Rules of Prof'l Conduct r. 1.13(b).
90. For example, read literally, the section leaves a question regarding whether a lawyer who represents a corporate client in matters relating to the Clean Air Act ("CAA") is empowered to report a constituent from a division not involved in the CAA who is embezzling from the client. Comment 4 to the rule gives the lawyer discretion to report up the ladder in cases of sufficient seriousness, raising the question of whether a more general rule of discretion would serve the client better. *Id.* r. 1.13 cmt. 4.
91. *Id.* r. 1.13(b).
92. *Id.*
93. *Id.*
94. *See id.*
95. *Id.*
96. *Id.*
97. *Id.*

substantial injury to the organization."[98] The disclosure is subject to a further exception. Subsection (d) provides that the disclosure duty set forth in subsection (c) is not applicable when a representation was created "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."[99]

The comments to Model Rule 1.13 clarify the meaning of the rule in some respects and, additionally, raise confusion in other respects. For example, Comment 1 makes the point clear that the organizational client "cannot act except through its officers, directors, employees, shareholders, and other constituents."[100] Comment 2 introduces the reader to the zen puzzle that necessarily informs the relationship of corporations and their constituents. It states that:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.[101]

This example draws on the situation scrutinized by this Article, noting the application of the principle of confidentiality to this area. It highlights the relationship of a constituent who provides information under the protection of Model Rule 1.6 and the client. Even though the constituent is not the client, the information is treated as a matter of confidentiality as if the individual constituent were the client. Focusing on the fact that the constituent is not the client makes it seem obvious that the lawyer could always voice concerns to others about unlawful conduct of this non-client. The overall result of the rule is far from straightforward, however.

Comment 3 also provides insights into the mindset of the drafters. It states, "When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful."[102] This comment puts the lawyer in the backseat on policy and operations decisions.[103] Moreover, it does not indicate any other categories of decisions, emphasizing the technocratic function of the lawyer rather than the advisory role of the lawyer to the client.[104] This comment is unlikely to be problematic in the ordinary course of business. The lawyer gives advice and the client, acting through its constituents, makes the decisions. The logic falters, however, when a constituent is in violation of the law or an obligation. This is the context of the rule under consideration. Nevertheless, no province of the lawyer is recognized, and deference to the (non-client) constituent is center stage. Comment 3 seems to include risks of harm to others in addition to other types of risks (such as risks of loss of profits for the corporation).[105] Although Model Rule 1.6 has bearing on the question of disclosure of client information to those other than the client, it does not speak to the issue of concern here—reporting up the ladder. Although Comment 3 refers to the rule on reporting up the ladder, it confuses the elements to be considered. It states:

> Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.[106]

This discussion pulls one of the two elements that apply to violations of the law under the text of Rule 1.13 and applies it to the circumstance of a violation of an obligation to the organization.[107] This point requires a close look. In the sentence quoted above, the lawyer "must proceed as is reasonably necessary in the best interest" of the organization when she "knows that the organization is likely to be substantially injured by . . . a constituent that violates a legal obligation to the organization."[108] This statement is true. Nevertheless, it muddies the water of analysis for lawyers seeking advice, suggesting that the "substantial injury" element is relevant to the analysis of a violation of an obligation to the organization.[109]

Comment 4 to Model Rule 1.13 focuses on the situation of the lawyer who needs to report, softening the mandatory nature of the norm announced in the text of the rule itself. The rule states that the lawyer "shall refer" the matter to a higher authority in some circumstances.[110] As noted above, this duty is hedged in the rule by its qualification that the mandate applies "unless the lawyer reasonably believes that it is not necessary in the best interest of the client."[111] The comment softens the mandatory report up the ladder duty further by stating that in this situation "the lawyer should give due consideration to the seriousness of the violation and its consequences, 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."[112] This sentence apparently applies to all violations, including criminal law violations. It suggests that the lawyer consider five factors and an open-ended catchall of "other relevant considerations."[113] Insofar as the

98. *Id.* r. 1.13(c)(2).
99. *Id.* r. 1.13(d); *see also id.* r. 1.13 cmt. 2 (noting that interviews by lawyer assigned or retained to investigate allegations of wrongdoing are subject to the duty of confidentiality).
100. *Id.* r. 1.13 cmt. 1.
101. *Id.* r. 1.13 cmt. 2.
102. *Id.* r. 1.13 cmt. 3.
103. *See id.*
104. *Id.*
105. *See id.*
106. *Id.*
107. *See id.*
108. *Id.*
109. *See id.*
110. *Id.* r. 1.13(b).
111. *Id.*
112. *Id.* r. 1.13 cmt. 4.
113. *Id.*

sentence applies to criminal law, it puts the lawyer in the position of second guessing the legislative mandate since the legislature sanctioning the conduct necessarily evaluated factors such as the seriousness of the violation, consequences, and other factors in proscribing the conduct.[114] Consideration of an organization's policies also suggests a trump card for the organization over legislated decisionmaking. Keep in mind, on this point, that the lawyer facing this issue is already in the situation of the highest kind of knowledge. She "knows" of the violation.[115]

Comment 4 reminds the reader of the default of reporting up the ladder with its statement that "[o]rdinarily, referral to a higher authority would be necessary,"[116] and follows up with a general example of avoiding the default of reporting up the ladder in an easily resolved matter of a "constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice."[117]

As noted above, Comment 4 also provides for discretionary reporting in some cases. It states:

> Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.[118]

In discussing the relationship of Model Rule 1.13 to other rules, Comment 6 says that Rule 1.13 is concurrent with other rules.[119] Specifically, it notes that Model Rule 1.13 does not limit or expand the lawyer's responsibility under certain rules.[120] Unfortunately, it does not clarify the relationship of Model Rule 1.13 with Rule 1.4, which is the foundational principle of communication with the client.[121]

Subsection (e) of Rule 1.13 addresses the rights of a lawyer after termination of the representation of an organizational client in circumstances when the client discharged the lawyer or the lawyer withdrew based on a violation at issue under the rule. This subsection deals with the case of a lawyer acting as a result of a violation. It applies to a lawyer "who reasonably believes that he or she has been discharged" because of the lawyer's actions pursuant to the rule, or who has withdrawn "under circumstances that require or permit the lawyer to take action" under Rule 1.13.[122] The rules provide substantial discretion to lawyers in deciding to withdraw from a representation.[123] In this context, subsection (e) declares that the lawyer "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.[124] The remaining subsections of Model Rule 1.13 explain common sense contextualization of other rules to the organizational context.[125]

IV. Plausible Deniability

If the factor of "best interest" is taken to mean short-term best interest, the rule seems to mean that clients have no right to expect lawyers to disclose violations of the law that are not likely to be discovered by enforcement officers.[126] Thus, the rule offers unnecessarily confusing guidance to lawyers who may be reading the rule in situations of exigency and concern about violations of law. The structure of discretion to report up the ladder (to the client) only after the difficult elements are met seems to suggest to the lawyer that constituents prefer blindness when it comes to violations of the law, perhaps to give those constituents plausible deniability.[127]

Under this rule, the lawyer's discretion to consider the best interest of the client is recognized only after determining that the two elements (knowledge and relation to the representation) are met (in the case of a violation to the organization) and all four are met in the case of a violation of law.[128] Moreover, unlike Model Rule 1.6, the focus of Model Rule 1.13 is the client rather than those who might be harmed by client action. Thus, Rule 1.13 puts the lawyer in the back seat even with regard to legal issues. The substantial injury standard creates a risk that the lawyer will sit silently and mention violations of law to no one.[129]

Similarly, considering Model Rule 1.13 as a disciplinary rule reveals puzzles and problems. Read literally, a disciplinary action could arise either from (1) a failure to report, or (2) reporting.[130] A client charging that the lawyer's disclosure about a violation of law should not have been revealed within the organizational client presents an unlikely (and potentially embarrassing) claim. Such a claim is tantamount to asserting that the lawyer deprived the client of the defense of ignorance or plausible deniability. It urges a finding of violation for the conduct of providing information to corporate officials.

To put this analysis in the context of environmental violations, consider the possibility that a violation of an environmental law is unlikely to be discovered. Should the lawyer report such a violation up the ladder to the corporate authorities under the direction of Model Rule 1.13? Read literally, the rule suggests that the primary consideration for the law-

114. *See id.*
115. *Id.* r. 1.13(b).
116. *Id.* r. 1.13 cmt. 4.
117. *Id.*
118. *Id.*
119. *Id.* r. 1.13 cmt. 6.
120. *Id.*
121. *See id.*
122. *Id.* r. 1.13(e).
123. *See id.* r. 1.13. Similarly, the decision of whether to accept a representation is essentially unlimited. *See* Nathan M. Crystal, *Developing a Philosophy of Lawyering,* 14 Notre Dame J. L. Ethics & Pub. Pol'y 75 (2000).
124. Model Rules of Prof'l Conduct r. 1.13(e).
125. *See id.* r. 1.13(f) (placing burden on the lawyer to make clear to constituents that the lawyer represents the corporation in cases in which the constituent's interests may be adverse to the organization); *Id.* r. 1.13(g) (indicating lawyer may represent both organization and constituent if allowed by Model Rule 1.7).
126. *Id.* r. 1.13 cmt. 3.
127. *Id.* r. 1.13(b).
128. *Id.*
129. A lawyer who relies on the general duty to advise a client may be discouraged from going forward with advice to the corporate client because the axiom of construction that specific mandates control over general rules suggests that Model Rule 1.13 trumps Model Rule 1.4 on advising the client on developments concerning a representation.
130. *See* Model Rules of Prof'l Conduct r. 1.13(c).

yer is the best interest of the client.[131] Whether, in fact, a client will see a report of the violation as in its best interest is debatable. Though the long-term best interest of the client may be in reporting, the constituents may take a short-term perspective, especially if they believe that detection or enforcement is not likely. From a short-term perspective, the client may prefer not to know. While environmental laws do not respect willful ignorance, the *Model Rules of Professional Conduct* provide a potential rationale for silence in the face of environmental violations.[132]

V. Conclusion

As a way of providing perspective on the larger issue of compliance, this Article considers accountability and deniability in relation to environmental regulation, focusing on the corporate entity and the responsibilities of corporate counsel under the *Model Rules of Professional Conduct*. Although advances in monitoring and enforcement suggest compliance is more likely today than in the past, the goal of full compliance with environmental laws requires ongoing considerations of accountability and deniability.

Next generation compliance programs seem to promise robust compliance with environmental laws. Enforcement programs seek to convince the regulated community that the risks of noncompliance are severe and certain. Fulfillment of the promises of next generation compliance depends on more than technical or scientific information and more agile enforcement however. It turns in significant and discernable part on advice of legal counsel and the philosophy of the regulated entity.

Lawyers play an integral role in the communication of risks to clients. The lawyer's involvement in explaining compliance and the risks of noncompliance provides a necessary predicate for next generation compliance success. Without this role, the message of enforcement, deterrence, and compliance is unlikely to reach its intended recipients. A culture of commitment to more than profit—and certainly more than short-term profit—is required for advancement of these goals. Taken seriously, principles of lawyer ethics contribute to the effort of compliance with the law. Indeed, the rules of professional responsibility are founded on the belief that lawyers serve the public good.[133] Recognizing that the long-term interest of clients is to operate in accordance with the law may mean that lawyers must act in the best interests of their clients—under the limitations of the law.[134] Advising the corporate entity about violation of laws in general (and of environmental laws in particular) serve this purpose. The importance of this role suggests that clearer articulation of the landscape of the lawyer's duties is worth the effort in furthering the central tradition of compliance with the law.

131. *See id.* r. 1.13(b).
132. *See id.* r. 1.13(b)–(c).
133. *Id.* at pmbl., para. 2 (noting that the legal profession's relative autonomy and "responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar").
134. *See generally id.* at pmbl.