



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am an in-house lawyer for a privately held construction company that has recently completed a successful private placement. The CFO came to me with a problem. Shortly before the private offering memorandum was finalized, he received a report from the team on a large international project, labeled as "Preliminary" but indicating that progress was outstanding and projecting substantial profits. The CFO provided the report to the CEO without the "Preliminary" label. Conclusions from the report were used in the offering memorandum.

The CFO says he knew there was some risk in doing this, but also knew the company needed the private offering to be successful and did not believe that the results would materially change. It now appears that those results had been substantially overstated to coincide with our compensation schedule and to pump up bonuses of project management leadership. The CFO says that given a little time the project may well be managed to profitability and an on-time completion. But, he is concerned that he may be fired or exposed to liability and wants my advice as to how he can best stay out of hot water. What are my ethical obligations here?

A: First and foremost, you must be clear, both in acting and in communicating with the CFO, about the identity of your client. Under Model Rule 1.13(a), as counsel for an organization, you represent the organization, not any of its constituents. Therefore, you cannot advise the CFO how to keep himself from getting in trouble with the company, nor can you maintain what he has told you in secret from the company you represent.

Second, if you believe, as is likely, that continued concealment of this information could lead to additional or greater exposure to the company, or that disclosure to higher authority within the company is otherwise in the best interests of the company, then you must make that disclosure (or advise the CFO to do so and then confirm it). Rule 1.13(b). Considering the financial harm that may have occurred already, or that may be realized if the project does not come in as projected, you will then have the task of determining the company's obligations under other law to make corrective disclosures. Rule 1.13 (b) and (c) provide guidance for you if others above the CFO refuse to act in accordance with the law and interests of the organization.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.