LAWYER FOR THE ORGANIZATION: AN ESSAY ON LEGAL ETHICS

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When an ethical law of the form “Thou shalt . . .”, is laid down, one’s first thought is, “And what if I do not do it?”

-Ludwig Wittgenstein

No doubt this thought has occurred to many attorneys who have consulted the rules of legal ethics, with or without the benefit of philosophical reflection. Even attorneys who are not tempted to violate the rules may be genuinely concerned about what they mean, how to comply with them, and with what the consequences of a violation are. But without an adequate answer to the

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last question, the first two are likely to go unanswered, because nothing turns on answering them correctly. Without the prospect of effective sanctions, the rules of ethics are in danger of being simply ignored under the competitive pressure on the practice of law today. Concerns such as these led to the passage of the Sarbanes-Oxley Act, 2 § 307 of which requires the Securities and Exchange Commission to issue regulations governing corporate counsel under the federal securities laws. Together with associated changes in Model Rule 1.13, which is the central provision on organizational representation under the Model Rules of Professional Conduct, 3 these reforms have provoked an intense debate over the duty of corporate counsel to report wrongdoing within a corporation and the appropriate sanctions for failing to do so. 4

Both sides in this debate, however, presuppose a basic principle of corporate representation codified in a provision of the Model Rules, one that has remained unchanged through the current round of reforms and that dates back to the earlier Model Code of Professional Responsibility. 5 In language now adopted in virtually every state, Model Rule 1.13(a) provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This provision does not contain a command, create a duty, or establish an obligation of any kind, yet it invites us to consider what happens when a lawyer fails to represent an organization “acting through its duly authorized constituents.” By its own terms, Model Rule 1.13(a) offers only a partial answer to this question, but one that reveals much about the fundamental structure of legal ethics—a structure that determines the limits of any plausible reform of the rules on corporate representation.

The greatest virtue and the clearest signal sent by Model Rule 1.13(a) is negative: it tells the lawyer that the individuals within the organization are not the client; only the organization is. The rule does not pierce, but instead respects, the organizational veil. This respect extends beyond corporations to all organizations, whether incorporated or not, and more generally, the rule respects the law governing the organization in other ways as well, by making the ability of

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individuals to speak for the organization dependent on their status as “duly authorized constituents.” The rule does not purport to add to or subtract from the authority conferred by the law of corporations, partnership, or other entity, but to take it as given in the analysis of organizational representation. The rule aspires to be part of the proverbial “seamless web” of the law.

This appeal beyond legal ethics as a self-contained body of law would be unexceptional, except that the virtue of such an ecumenical approach also has the corresponding vices. Model Rule 1.13(a) does not tell the lawyer who exactly does speak for the organization, since the organization, unlike an individual client, cannot speak for itself. If the lawyer does not represent the directors, officers, or partners as individuals, how does the lawyer represent them as “duly authorized constituents” of the organization? The rule leaves the lawyer with a research project instead of a definite answer to this question. In this respect, it is hardly better than the rule on protecting client confidences, which contains a catch-all exception allowing disclosure of client confidences “to comply with other law or court order.” The need to reconcile the rules of legal ethics with other sources of law is perhaps obvious, but a cross-reference falls far short of effective ethical guidance. The rules seem to leave all the crucial questions to be resolved elsewhere.

On a more fundamental level, the pervasive dependence of the Model Rules on external law raises the question of whether legal ethics can make any distinctive contribution to the analysis of ethical problems. Part I of this Essay begins by addressing this general question, distinguishing the several different senses in which legal ethics involves “ethics” properly so called. This section distills a prohibition against complicity in client wrongdoing as a core principle that animates the ethical rules on organizational representation, both for the profession as a whole and for individual lawyers. A necessary corollary, that the lawyer must act only on a reasonable interpretation of the law, in the organizational context, one that protects the legitimate interests of all the constituents of the organization. Part II brings this general analysis to bear on the representation of organizations under Model Rule 1.13(a), using it to explain the dependence of the rule on other sources of law to define the duties owed by counsel to different constituents of the organization. Part III then considers two well-known cases of corporate representation, one involving securities violations by a publicly traded corporation and the other concerning a breach of fiduciary obligations in a closely held corporation.

6. MODEL RULES R. 1.6(b)(6).
I. THE INHERENT AMBIGUITY OF LEGAL ETHICS

The relationship between professional ethics and ethics generally, or morality as it is more usually called, has been much discussed. The two kinds of norms are plainly related, and just as plainly they are also distinct. They share the common features of norms of all kinds, as standards of conduct whose violation justifies criticism and formal or informal sanctions. They also share additional features signaled by the use of the term “ethics” to refer to both: in setting both minimum standards and aspirational ideals, in depending upon practices that resist codification in a set of definite rules, and in offering a critical perspective on other legal norms.

The first of these features was most apparent in the structure of the Model Code of Professional Responsibility, which divided its provisions among general canons, mandatory disciplinary rules, and advisory ethical considerations. Only a violation of the disciplinary rules could result in sanctions under the Model Code. The same division of norms appears in the Model Rules although mostly in the contrast between prohibitions and provisions permitting lawyers to do the right thing, such as disclose client confidences in order to prevent death or substantial bodily harm.

Such permissive provisions invite lawyers to look to the uncodified norms of professional practice, the second respect in which legal ethics resembles ethics generally. From mundane issues of custom and routine in the local courthouse to intense disputes over legal liability, lawyers rely on what other lawyers do to determine the standards of acceptable conduct. This reliance appears explicitly in the standards for legal malpractice, dependent as they are on the prevailing practice among lawyers in the same community or area of expertise. Even when lawyers look to codes or authoritative opinions for guidance, these sources appeal to previously uncodified practices, which are themselves complex. Attorneys do not simply conform unquestioningly to uniform patterns of conduct; rather, they engage in criticism, evaluation, and revision of current practices no matter how pervasive those practices may be. The same is true of morality generally, where elaborate codes of conduct can only be found within religious traditions, and even there, the rules do not purport to cover the entire range of situations that generate moral questions. These are, instead, addressed

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9. MODEL RULES R. 1.6(b)(1).
through an open-ended process of reasoning from general principles, particular cases, and specific rules.

The variable and uncertain pedigree of such norms allows them to be invoked in criticizing existing law—the third common feature of legal ethics and ethics generally. Ethics in both senses can be used as a vantage point from which the deficiencies of existing law can be identified and proposals for reform advanced. The independence of ethical judgment comes at the cost, however, of acknowledging that its demands are not backed by the force of law—that what the law ought to be departs from what the law is. Thus one of the few explicitly aspirational provisions of the Model Rules concerns pro bono legal services, yet it is also one of the few exempt from the usual sanctions for professional misconduct. Even for the profession as a whole, advocacy of law reform appears to be less an obligation than a necessity. Yet this obligation, too, is enforced only by the sanction of public opinion. The legal profession cannot passively acquiesce in legal regimes widely perceived to be inefficient or unfair without losing whatever esteem it has in society at large.

The similarities between ethics and legal ethics do not, of course, dissolve the differences between them. As legal ethics is distilled into specific rules that establish the minimum standards for acceptable professional conduct, they also become open to general moral criticism. The rules, for instance, on protecting client confidences are often criticized as preserving the prerogatives of the legal profession, as are many of the positions that the organized bar takes on questions of law reform. To the extent that the rules of legal ethics are legally enforced, it is always possible to hold them up to the same forms of moral criticism as any other set of legal rules. It is only an apparent paradox to assert that rules of legal ethics are themselves unethical. Regardless of what the law or legal ethics requires, a lawyer can still ask the question whether, all things considered, it is right to conform to those requirements. As applied specifically to Model Rule 1.13(a), no purely moral principle requires a lawyer for an organization always to act as instructed by “its duly authorized constituents.” Ethics in this sense requires lawyers to look beyond the law governing the organization and beyond legal ethics itself.

Equivocation over the sense of “ethics” in legal ethics often leaves debates over the subject in the uneasy middle ground between regulation of the profession through law and criticism of the profession on moral grounds. To the extent that ethical rules create legal obligations, they become subject to moral

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criticism like any other source of law. But if they impose no such obligations, or those obligations prove to be unenforceable, they compromise their status as law. They are "legal" only in the sense that they are addressed to the legal profession. The equivocal status of legal ethics seems to leave it without any independent significance and force, making it either an inferior form of law or an inferior form of morality. Like the Holy Roman Empire which was said to be neither holy nor Roman nor an empire, legal ethics might be thought to be neither law nor ethics.

Nowhere is this more evident than in the legal ethics of organizational representation where the latest corporate or government scandal provides the template for each new wave of regulation. Each decade seems to have its paradigmatic scandals, from the "go-go" market of the 1960s, the Watergate scandal of the 1970s, the savings and loan crises of the 1980s, and Clinton scandals of the 1990s, and the Enron bankruptcy in the current decade. Instead of firmly closing the gate after the horses have left the stable, it might have been better to anticipate how similar problems could arise in the future. After one form of misconduct has been discovered and prohibited, it is not likely to be repeated again, but instead, to be replaced by innovative forms of misconduct. In a seemingly endless cycle, moralistic reform based on direct translation of ethics into law is followed by laissez faire advocacy insisting that legal regulation must be kept separate from ethical aspirations.

The failure of such continual equivocation is in using the ethical dimension of legal ethics alternatively as a lever or as an excuse to avoid legal reform. As a lever, it insists on the highest standards for organizational representation, trying to force attorneys to fully protect the interests of those, such as shareholders, who are typically unrepresented in the day-to-day management of a corporation. As an excuse, liability is limited to professional discipline which is seldom imposed on large law firms engaged in complicated corporate transactions. The alternative of civil liability would be effective, but is thought to be altogether too effective, deterring unequivocal legal advice on difficult questions of law.

The only way to avoid the resulting stalemate is to return to the core principles of the subject, one of which is the prohibition against complicity in client wrongdoing. This prohibition is both legal and ethical: legal because it

Lawyer for the Organization draws on well-developed principles of accomplice liability and independent standards of client conduct, and ethical because it requires the attorney to be at fault for assisting in the client’s wrongdoing. It reflects the minimum content of legal ethics: the attorney’s duty to the client is in keeping him or her (or it, in the case of an organization) out of legal trouble, not in getting them further into it. This duty is not at all aspirational, but embodies minimum standards for the profession, enforceable through a range of legal sanctions, from professional discipline to civil and criminal liability.

This duty is also minimal in another sense as well. It leaves the attorney with the latitude to advise the client, whether an individual or an organization, to take any course of conduct that can reasonably be construed to be in compliance with the law. Avoiding complicity in the wrongful acts of another is a principle so widely accepted that its role in legal ethics might appear to be altogether unexceptional. The Model Rules themselves codify this prohibition and repeat it in various forms at different points.\[15\] It is also embodied in different forms of accomplice liability in criminal and civil law.\[16\] Yet it constitutes a significant restraint on legal representation because lawyers are expected to aid their clients in avoiding legal liability, either arising from past conduct for which lawyers provide an adversary defense, or from future conduct for which lawyers provide advice about compliance. It is in the latter respect that the advice of corporate counsel most commonly is called into question, and the prohibition against complicity acts as a restraint on the advice that can be given by corporate counsel.

This restraint takes the form, again pervasive in legal ethics, that the attorney offers advice with a reasonable basis in law and fact.\[17\] Referring to what is reasonable appeals to the prevailing standards of the profession, with all the indefiniteness that that implies. Yet any workable standard must leave attorneys with the latitude to exercise discretion and judgment in offering advice to their clients, while recognizing that the range of such advice must be limited.

\[15\] MODEL RULES R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .”); see also MODEL RULES R. 1.16(a)(1) (codifying the duty to withdraw if “the representation will result in violation of the rules of professional conduct or other law”); MODEL RULES R. 3.3(a)(3) (codifying the duty to correct false material testimony by a witness called by the attorney); MODEL RULES R. 4.1(b) (codifying the duty to disclose material fact when necessary to avoid assisting a client in criminal or fraudulent conduct); MODEL RULES R. 8.4(a) (providing that it is a misconduct to “knowingly assist or induce another” to violate the rules “or do so through the acts of another”); MODEL RULES R. 8.4(f) (providing that it is a misconduct to knowingly assist a judge in violation of rules of judicial conduct or other law).


\[17\] FED. R. CIV. P. 11; MODEL RULES R. 3.1.
lawfulness of a client’s action cannot be assessed ex post (after a court or jury has evaluated it) when the client has asked for an assessment of that action ex ante (before it has even been done). But if the prohibition against complicity in client wrongdoing is to be effective at all, it must be supported by the corollary that attorneys cannot unreasonably categorize an action as permissible when it is in fact illegal. Otherwise, complicity in client wrongdoing could always be excused by disingenuous ignorance, either about the facts or about the law. Failure to object to the client’s wrongful acts could be excused by willful blindness about whether they were wrongful.

As applied to organizational representation, this corollary has more complicated implications, imposing more restrictive constraints, than with respect to individual representation. For an individual, the attorney need only take a reasonable position in that individual’s interests. For an organization which acts only through its officers, directors, shareholders, or other constituents, the attorney must take a position that is reasonable with respect to all of these constituents’ interests, as defined by the law governing the organization. Because these interests differ and might conflict, the standard of reasonable action does not license an attorney to take the most aggressive position that might reasonably be available, for instance, on behalf of a single constituency within the organization, such as management. The ability to represent management is constrained by the duty to act reasonably with respect to shareholders.

The dependence of the attorney’s duties on the various interests within the organization also explains the dependence of Model Rule 1.13(a) on other sources of law. The rule explicitly refers to the law of the organization, not because legal ethics is somehow inadequate, but because it must take account of the external law on which attorneys base their advice. In order to act ethically, the lawyer must instead determine what the interests of the organization and its constituents legitimately are and how they legitimately may be pursued. It is the judgment on these issues, as much legal as it is ethical, that is the true subject of professional regulation: how to instill and, where necessary, to constrain professional judgment that lawyers exercise on behalf of their clients. Model Rule 1.13(a) provides the framework for properly exercising such judgment on behalf of organizational clients.

II. LEGAL ETHICS AND FIDUCIARY OBLIGATIONS

Strictly speaking, Model Rule 1.13(a) governs only questions of professional
Like the rest of the Model Rules, its focus is upon professional self-regulation rather than civil or criminal liability or procedural issues such as disqualification. Some states still limit their rules of professional conduct only to disciplinary proceedings, but a growing trend, evident in the current version of the Model Rules, is to make violation of the rules (and presumably compliance also) relevant to the issue of breach of standards of conduct that result in other forms of liability. Thus, Model Rule 1.13(a) influences other sources of law at the same time as it is dependent upon them.

This mutual dependence of the rule and the law governing the organization makes good theoretical sense for all the reasons given in Part I, but it diminishes the practical guidance that either source of law can provide to lawyers who face actual ethical problems. Model Rule 1.13(a) thus does not tell a corporate lawyer who is authorized to act on behalf of a corporation or what the extent of his authority is. By the same token, the law governing the organization does not directly address the obligations of its attorney, leaving those issues to be addressed by the Model Rules or perhaps the law of malpractice. The cross-references between each of these sources of law leave both of them with a troubling indeterminacy. Neither one appears to be the fixed point from which the other’s content can be filled out.

So, for instance, in disputes over control of a corporation, the very issue in dispute among the competing factions is over who the “duly authorized constituents” of the corporation are. Yet corporate counsel, if he or she is to abide by the dictates of Model Rule 1.13(a), must know who those constituents are. This apparent paradox can only be resolved through rules derived from a kind of equilibrium achieved between corporate law on the appropriate role of incumbent management and ethical restrictions on the role of corporate counsel. What management can do imposes limits on the advice that corporate counsel can provide, and conversely, the advice that corporate counsel can give determines the range of actions that management can take.

The mutual dependence of the Model Rules and principles of fiduciary obligation extends even deeper, however. Since the rules apply their own force only to issues of professional discipline, their effect on the civil liability of attorneys and their clients depends upon how they are translated into fiduciary obligations. At this point, any definite guidance that the rules appear to offer gets lost in the abstract terms in which fiduciary obligations are defined. Thus, the duties of an agent to a principal are framed even more abstractly than Model Rules Scope para. 19.

Id. para. 20.
Rule 1.13(a), by reference to "the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made," except to the extent that the agreement is overridden by "fraud, duress, illegality, or the incapacity of one or both parties to the agreement." So, too, the agent's duty to obey the principal is framed in similarly general terms: "unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform." The range of agents subject to these principles, and the range of circumstances under which they act, no doubt account for the abstract terms in which these duties are defined. Yet this degree of abstraction fails to specify how these duties apply to attorneys, and in particular, how to forge a synthesis between the rules of professional discipline and the standards of civil liability.

The principal obstacles to achieving this synthesis revolve around the remedies peculiar to each form of regulation. The remedies under the disciplinary rules are limited almost entirely to deterrence and prevention, through restrictions on an attorney's ability to practice law, such as suspension or disbarment. Moreover, because disciplinary actions are brought only in the clearest or most egregious cases, seldom do they deter marginally unethical conduct in controversial cases. Civil actions by private parties, or procedural motions for sanctions or disqualification, depend far more heavily on the stakes in the underlying litigation. The larger the claim, the more likely an adversely affected party is to allege that an attorney representing an opposing party engaged in unethical behavior. Everything else being equal, a party has more to gain and therefore greater reason to make such allegations.

This tendency has resulted in persistent fears on the part of the legal profession that civil liability for violating standards of professional conduct will result in overdeterrence of otherwise proper professional conduct. In the terms used by torts theorists, increased civil liability would result in "activity level" effects, deterring aggressive, but appropriate, representation in circumstances where it might be mistaken for unethical conduct. Concerns along these lines led, for instance, to the most recent amendments to Federal Rule of Civil Procedure 11, drastically restricting the frequency and severity of sanctions under this rule.

In this round of amendments, the standards for proper conduct went unchanged, leaving them almost entirely dependent upon external sources of law. So long as

21. Id. § 385(1).
an attorney takes reasonable positions on behalf of her client, reached after reasonable investigation, no violation of the rule occurs.

As suggested in Part I, exactly the same model should apply outside of litigation. In an adversary system, where attorneys are expected to assert the interests of their clients, it is hard to condemn an action as unethical simply because it proved to be unsuccessful or simply because the attorney’s argument for protecting the client’s interest proved to be unpersuasive. The judgment that attorneys must exercise on behalf of their clients requires some latitude for reasonable advice, even if, with the benefit of hindsight, it was found to be erroneous. Hence the prevalence of the word “reasonable” and similar terms throughout the provisions in Model Rule 1.13 on reporting wrongdoing by corporate officials. Even if a standard of reasonable action provides little definite guidance to attorneys, it does indicate where they should look for a baseline for permissible action for themselves and their clients. The direction to look is not to general ethical principles, but to the law governing the organization.

Left at that level of abstraction, however, almost all doubts about the propriety of actions by organizational officers and directors will be resolved in their favor. In giving advice to management, a lawyer would only be bound by the same ethical constraints as would a lawyer defending a corporate officer from a claim of wrongdoing. Attorneys for an organization would defend the interests of management, so long as these can be construed to be reasonably in accord with the law. The complication in organizational representation is that the attorney also has duties to other constituents in the organization, perhaps subordinate to the duties to management in most cases, but independent of those duties when the interests of different constituents conflict. An action that reasonably protects the interests of corporate officers and directors might be detrimental to the interests of shareholders. Hence, the attorney for the organization has a duty also to act reasonably on behalf of constituents other than management. Again, the reference point to determine the extent of those duties is the law governing the organization itself. The constraints on the organization’s lawyers arise from duties to its normally passive constituents, like shareholders, who do not usually direct the attorney’s actions.

The task of making these duties more definite thus depends, as does much else in legal ethics, on working out a standardized response to recurring problems. Two of these—reporting wrongdoing by corporate officers and resolving disputes between partners—will be discussed in the next part of this Essay. Although these model responses must retain a degree of flexibility to

24. MODEL RULES R. 1.13(b)-(c), (e).
accommodate different situations, they share a few common structural features. These are: first, a triggering event that requires the attorney to act outside the course of ordinary representation; second, a duty to have the matter resolved within the organization; and third, if that cannot be achieved, a duty to withdraw, partially or wholly, from representation of the conflicting interests within the organization. It is this last step that is most controversial, because it requires the organization to duplicate the work of the attorney who is now disqualified and because the attorney loses the representation, either partly or wholly, depending upon whether the client is alienated by the attorney’s actions.

Note that none of these features involves disclosure of client confidences outside the organization. This issue, which has dominated arguments about attorneys as whistleblowers, cannot serve as a plausible focus of regulation. Apart from disclosure of fraud on the court, exceptions to the duty to maintain client confidences are almost all permissive rather than mandatory. A permissive rule does not, by definition, limit what attorneys can do in response to perceived wrongdoing. Whatever might be said for or against such rules, they do not require members of the profession who might acquiesce in a client’s wrongdoing to do anything to stop it. Only mandatory disclosure would accomplish this result, but that step has been taken only where necessary to protect the integrity of the judicial process. Even “noisy withdrawal,” a close substitute for disclosure, has been proposed as a mandatory response to client fraud only in limited circumstances: when it is necessary to avoid assisting in client wrongdoing and when it does not violate the rule on protecting client confidences. Withdrawal by this means, which signals an attorney’s ethical problems with continued representation of a client, otherwise remains a permissive option, just as disclosure is under the rule on client confidences.

As several commentators have pointed out, the real focus of dispute should be on the first of the common features identified earlier: the standard that triggers a transition from ordinary representation of an organization to the extraordinary circumstances created by actual or probable wrongdoing by those

25. Model Rules R. 3.3(b).
26. Model Rules R. 4.1(b). The comment to this rule contemplates a duty to engage in “noisy withdrawal” in some circumstances, although it does not permit disclosure of client confidences contrary to Model Rule 1.6. This form of communication is widely recognized as a halfway measure between clear disclosure and silent withdrawal to avoid complicity in client wrongdoing. See, e.g., Geoffrey Miller, From Club to Market: The Evolving Role of Business Lawyers, 74 Fordham L. Rev. 1105, 1130–34 (2005).
27. Model Rules R. 1.6(b).
who normally run the organization. The problem at this point is avoiding the extremes of too little or too much regulation. Model Rule 1.13(b) adopts a standard of knowledge, both that someone within the organization has engaged in wrongdoing and that it is likely to harm the organization. Critics of this standard have argued that it allows the attorney to resolve all doubts in favor of incumbent management, who, after all, make the decisions about retaining or terminating the attorney. At the opposite extreme, a standard that only required available evidence that wrongdoing had occurred and was detrimental to the organization would transform every close question about management behavior into an ethical problem.

Both extremes have in common a fundamental distrust of the judgment that attorneys bring to bear on the question of whether any “duly authorized constituents” of the organization have engaged in wrongdoing. Requiring knowledge of wrongdoing relieves the attorney of any need to act except in the clearest cases of guilt. Requiring only evidence of wrongdoing forces the attorney to act except in the clearest cases of innocence. To paraphrase Justice Jackson, a learned profession cannot be expected to perform its functions without wits or with wits borrowed only from the rules.29 Even the most explicit ethical rules require judgment in determining when they apply. And those governing representation of an organization, dependent as they are on the interrelated fiduciary obligations of directors, officers, and agents, are more complicated than most ethical rules. Instead of denying the judgment necessary to take account of such complexity, it would be better to use it to frame the analysis of the attorney’s obligations.

Invoking a standard of reasonable representation, the attorney for the organization must consider the legally protected interests of all the constituents of the organization, not just those of management. Despite the social and economic pressure that leads attorneys to follow the interests of those from whom they usually take orders in the organization—the managers who hire and fire them and who pay their bills—they must also act reasonably to protect the interests of others in the organization.30 The fiduciary obligations of managers impose constraints on the legal position that the attorney for the organization can reasonably take on their behalf. The attorney must act reasonably to protect the interests of shareholders or other constituents of the organization to whom management owes fiduciary obligations. A standard of reasonable action does not allow the attorney to take an adversary position in favor of management.

alone. Instead, by recognizing the interests of others within the organization, it imposes constraints on the range of positions that the attorney can take.

The extent and nature of those constraints depend ultimately upon the law governing the organization and not upon ethical values in some general sense that constitute a brooding omnipresence over the legal profession. If, for instance, corporate law places shareholders at a disadvantage with respect to management, the ethical obligations of corporate counsel cannot improve their position. The perceived deficiencies in the ethical rules governing corporate counsel cannot be remedied through reform of the rules alone, but must extend deep into the structure of the corporation. What holds true of corporations, by the general terms of Model Rule 1.13(a), applies to any other organization. The law governing the organization largely determines the ethical obligations of the attorney who represents the organization. Promoting ethical behavior within the organization requires more than changing legal ethics in the narrow. It also requires a change in the other sources of law on which legal ethics necessarily depends.

The extent of this dependence also reaches the remedial issues necessary to transform disciplinary rules into effective incentives for ethical behavior. The network of contracts that constitute an organization generates a corresponding network of fiduciary obligations, which extend to the organization’s attorney. As an agent of the organization, the lawyer is subject to obligations enforceable by private actions for damages, in addition to any disciplinary actions by the state bar. The transition from ethical rules as a matter of professional discipline, to sources of civil liability is a vexed issue, addressed with studied ambiguity in the preamble addressing the scope of the Model Rules. In its current version, the preamble allows that “a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”31 The previous version of this provision disclaimed such an inference altogether, a position that a number of states still adhere to.32 Whatever the outcome of this particular debate, the reference to other law in Model Rule 1.13(a) brings the ethical rules into closer conformity with the fiduciary obligations of attorneys enforced through malpractice claims and other forms of civil liability. Under the current version of the rules, the preamble facilitates an inference from violation of the rules to violation of fiduciary obligations. And even under the previous version, the preamble increases the overlap between the obligations imposed by the rules and those imposed for ostensibly independent reasons based on other sources of law.

As a matter of enforcement, liability as a fiduciary creates the only real

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32. Id. para. 18.
deterrent to unethical conduct, since professional discipline is rarely imposed upon attorneys in major law firms, let alone in the complicated situations typically involved in organizational representation.\textsuperscript{33} Even in the absence of a money judgment, sanctions imposed by way of disqualification can be costly to attorneys who depend on a retainer or regular business from an organizational client. Purely as a conceptual matter, sanctions in these forms can be imposed only for breach of fiduciary obligations, but as a practical matter, effective deterrence depends upon expanding the range of sanctions, and therefore the nature of the obligation, imposed upon attorneys. Model Rule 1.13(a) facilitates that transition by grounding the attorney's ethical obligations in the other sources of law that actually determine behavior within the organization. How that transition is borne out in the context of reporting wrongdoing by corporate officers and in resolving conflicts within a partnership is discussed in the next part of this Essay.

III. TWO CONCRETE CASES

As William Simon has recently observed, everyone knows that Model Rule 1.13(a) requires corporate counsel to represent the organization, not the individuals within it; yet no one knows precisely what that requires corporate counsel to do.\textsuperscript{34} Only the negative command against individual representation is clear; the question of how to represent the organization through the same individuals remains mysterious. The approach developed in this Essay attempts to resolve these problems by looking to the law governing the organization to determine who acts as "its duly authorized constituents" in different circumstances. As noted earlier, however, this approach runs the risk of circularity. All the difficult problems of organizational representation are directed to the law of the organization and then all the difficult problems in that body of law are directed to professional ethics. The division of intellectual labor can become an excuse for gerrymandering the problems in each field into the other one. An integrated approach that draws on the insights of both fields is necessary, recognizing the heterogeneous sources of law and different situations that arise in the course of organizational representation. At this point, an analysis based on general propositions must yield to one focused on concrete cases.

The two cases discussed in this part are \textit{In re Carter \\& Johnson}\textsuperscript{35} and \textit{Fassihi v.}

\textsuperscript{33} Koniak, supra note 4, at 1279–80.

\textsuperscript{34} Simon, supra note 30, at 61–65.

Sommers, Schwartz, Silver, Schwartz & Tyler, P.C. The first is a well-known example of an attempt to impose a duty of disclosure on corporate counsel who was aware of wrongdoing by management in a publicly held company; and the second presents a dispute over the role of corporate counsel in a struggle for control of a closely held corporation. These cases arise in contrasting settings which, although fairly common, hardly exhaust the circumstances in which the actions of corporate counsel raise ethical issues, let alone the actions of counsel for some other kind of organization. In several respects, these cases are no longer as controversial as they once were. Under the current version of Model Rule 1.13, they could be decided more easily today and certainly with better notice to the attorneys whose actions were in dispute. The point of analyzing these cases under the current rule is not to invoke the benefits of hindsight, but to examine the scope and limits of the principle that an attorney acts through the “duly authorized constituents” of the organization.

A. In re Carter & Johnson

This case arose from the financial difficulties of a publicly traded corporation, the National Telephone Co., which was in the business of leasing telephone equipment to business clients. Because of the way in which the leases were structured, the corporation faced large up-front costs in entering into a lease which were only gradually reimbursed through payments over the course of the lease. The corporation therefore had to turn to outside financing in order to expand its business, leading in turn to increasingly severe cash-flow problems. Even if this business was profitable over the long term, it turned out to have a fatal weakness over the short term. In order to preserve the value of its shares, and therefore its access to new financing, the corporation had to keep increasing the number and value of its leases, but these leases, in turn, increased its need for immediate financing. The banks which had financed the corporation’s current portfolio of leases became concerned with this pattern of lending and provided new financing only on the condition that the corporation operate under a “Lease Maintenance Plan” (LMP) if its liquidity fell below a specified level. Once the LMP came into effect, the corporation had to concentrate its resources on existing leases, essentially winding down its operations by foregoing any new business.

Faced with this potential endgame situation, the president of the company adopted an endgame strategy that rapidly evolved into nondisclosure and fraud.

deceiving the corporation’s outside counsel among others. Two of these outside lawyers, Carter and Johnson, were charged with misconduct by the Securities and Exchange Commission (SEC), despite the fact that they had repeatedly advised the president of the corporation to make full disclosure. Nevertheless, in the last quarter of 1974, the attorneys acquiesced to nondisclosure of the LMP, advising that it need not be disclosed in a press release announcing the new credit agreement and in the filing of a Form 8-K. The lawyers’ rationale was that disclosure was required only if the LMP was incorporated as an exhibit to the loan, but not if the loan documents only referred to it without incorporating it. The SEC’s opinion, ultimately exonerating the lawyers, found both the press release and the Form 8-K to be misleading. The SEC exonerated the lawyers on the ground that they had insufficient knowledge of the materiality of the LMP.\footnote{In re Carter & Johnson, \textit{supra} note 35, \textit{Id.} 84,167–69, 1981 W1. 384414, at *25–26.}

In any event, the lawyers’ role in drafting or approving these public statements was as close as they came to active participation in fraudulent conduct.

All the other misstatements by management—and they increased in number and severity as the financial condition of the corporation deteriorated—were made without the knowledge or over the active opposition of outside counsel. These all involved the LMP and diverging statements about its implementation. To shareholders and independent directors, management issued statements assuring them that the company was proceeding with business as usual, without any disclosure that the conditions triggering the LMP had occurred. To the corporation’s creditors, management made statements assuring them that the LMP was being implemented when, in fact, it was not. The outside lawyers learned of these discrepancies only when they were informed by the counsel for the creditors.\footnote{Id. \textit{Id.} 84,153–64, 1981 W1. 384414, at *8–22.}

Largely because management had deceived the outside lawyers, the SEC refused to impose any sanctions upon them, making its ruling prospective only and initiating a rulemaking process that, in the end, resulted in no change in the regulation governing lawyers engaged in practice before the SEC. To the extent that the SEC recognized any new duties upon the part of corporate counsel, it did so in the most tentative and open-ended terms: “a lawyer must, in order to discharge his professional responsibilities, make all efforts within reason to persuade his client to avoid or terminate proposed illegal action. Such efforts could include, where appropriate, notification to the board of directors of a corporate client.”\footnote{Id. 84,170, 1981 W1. 384414, at *28 (footnote omitted).} Substantially the same obligations, stated more definitively and in greater detail, now appear in the provisions for reporting “up the ladder”
of an organization in Model Rule 1.13(b). At the time, however, the opinion in
Carter & Johnson caused an uproar among the corporate bar and attempts to
amend the rules on practice before the SEC came to nothing.40

The bar’s immediate concern arose directly from the facts of the case: what
more could the outside attorneys have reasonably been expected to do? As much
as the shareholders and independent directors, they were the victims of
management’s fraudulent statements and nondisclosures. With the benefit of
hindsight, we can confidently say today that they should have disclosed what they
knew to the board of directors as soon as they realized that management was
engaged in a campaign of misinformation. As it happened on the facts of that
case, the board had its own concerns about mismanagement of the corporation,
so that disclosure to the board would not have been an empty gesture, resulting
only in endorsement of management’s wrongdoing.41 This feature of the case
should be encouraging to supporters of “up-the-ladder” reporting as a remedy
for corporate misbehavior. Yet it also raises the further question of what an
attorney should do in the absence of a sympathetic decision maker within the
organization. What should Carter and Johnson have done if the board wanted to
go along with the misstatements of management?

In this Essay, it is impossible to offer a definitive answer to these questions,
which have prompted an extended debate over the responsibilities of corporate
counsel ever since Carter & Johnson was decided 25 years ago. Instead, it is
necessary to focus on how the general principle of representation of an
organization through its “duly authorized constituents” constrains the answers to
these questions. It gives very little room either to absolve corporate counsel
entirely of any duty to seek direction from a disinterested source within the
organization or to impose a duty of disclosure outside the organization. If a
conclusion at either of these extremes is adopted, it must be for reasons apart
from and to some degree inconsistent with the general principle of Model Rule
1.13(a).

Consider, first, the alternative of not reporting “up the ladder.” It requires
corporate counsel either to do nothing or to withdraw. On the facts of Carter &
Johnson, both courses of action were or would have been detrimental to the
corporation. Doing nothing, after having exhausted attempts to get the president
of the corporation to comply with his obligations, allowed his fraudulent
statements to continue, harming shareholders who relied upon his statements
and delaying attempts by the board of directors to oust current management and
to save what was left of the corporation. Both conditions are prerequisites to

40. See Hazard et al., supra note 14, at 188.
reporting “up the ladder” as that duty is now codified in Model Rule 1.13(b). Withdrawing from representation would have had the same consequences for the corporation, unless it served as an ambiguous signal, like “noisy withdrawal,” that induced someone, most likely the board of directors, to take effective remedial action. If it did serve as a signal, it would have been just a less effective version of reporting to the board. If it did not, it would have resulted in continuing fraud. Withdrawal in the face of continuing fraud is permitted, and sometimes required, by Model Rule 1.16, but only if counsel cannot stop the fraud by other means. It is an option of last resort with harmful effects on the corporation, which presupposes that alternative courses of action are not available. Reporting “up the ladder” is the most obvious of such alternatives.

Relieving corporate counsel of any duty to report “up the ladder” can be justified only on the assumption that incumbent management, despite continuing wrongdoing, still acts as the “duly authorized constituent” of the corporation. Only on this assumption can the adverse consequences to the corporation be justified. Like an individual who acts contrary to the advice of counsel and violates the law, the corporation must suffer the consequences of its wrongdoing. When it comes to the rights of third parties who deal with the corporation, the law often adopts this view, holding the corporation liable for the wrongful acts of management. But when it comes to authority to direct the actions of counsel, this is not the view adopted in the rules of legal ethics, which prohibit an attorney from assisting in wrongful activity, whether the request to do so comes from an individual client or from the managers of an organization. Managers who engage in wrongful conduct forfeit their authority to direct the actions of corporate counsel, and in so doing, allow recourse to disinterested sources of authority within the corporation.

Conceivably, another justification could be offered for blocking the access of corporate counsel to others within the organization, but it is difficult to formulate one that does not depend upon the continuing authority of management. This permission becomes a duty because corporate counsel must be directed by someone within the organization. We have not, as Judge Friendly observed in the context of settlement, entered a “brave new world” in which corporate counsel are presumed to have plenary authority to act on behalf of the corporation.42 In this respect, lawyers for an organization are no different from lawyers for an individual client. They must abide by the client’s decisions about what goals to seek and consult with the client about how to achieve them. In a crisis over wrongdoing within the organization, counsel cannot act without the

42. Int’l Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49, 58 (2d Cir. 1979) (Friendly, J., concurring).
guidance of those authorized to speak on the organization’s behalf.

The same considerations, rooted in the principle of representation through the organization’s “duly authorized constituents,” also bear upon the analysis of proposals at the opposite extreme from doing nothing: those involving disclosure outside the organization, or equivalently, disclosure to shareholders in a publicly traded corporation. The current version of Model Rule 1.13(c) allows disclosure, but only if and to the extent that other means are inadequate to protect the organization from harm. Similar, but narrower, provisions in the general rule on client confidences also allow an attorney to disclose criminal or fraudulent action by any client, whether an organization or an individual. These provisions stop short of a duty to disclose, partly because of the controversy that attends any erosion of client confidentiality. It was only the corporate scandals that precipitated the passage of the Sarbanes-Oxley Act that resulted in the bar approving these provisions in the rules.

But another reason supports the limitation of these provisions to permissive disclosure. Without client control, the attorney must act as a completely independent agent in assessing whether, the terms used in Model Rule 1.13(c), disclosure is “necessary to prevent substantial injury to the organization.” It may be, as some have contended, that lawyers should assume the role of whistleblower or gatekeeper, acting in the interest of shareholders or the public generally. Even limited to action on behalf of shareholders, however, these roles take the attorney far from the traditional one of acting with consultation and control of the client. In any publicly held corporation, consultation with the shareholders is equivalent to public disclosure and the possibility that they might exercise effective control over corporate counsel is minimal. So, too, the content, timing, and extent of disclosure must remain largely discretionary, even if some duty to disclose is actually imposed. Exactly how much should the attorneys in Carter & Johnson have disclosed outside the confines of corporate managers and directors? Permissive disclosure under the current provisions of the rules at least recognizes the considerable scope that judgment must necessarily play in any such decision.

Some ethical rules, of course, do require disclosure in some circumstances, notably those on client perjury in judicial proceedings. Even these, however, stop short of dictating precisely what the attorney should do and require the attorney only to “take reasonable remedial measures, including, if necessary, disclosure to

43. Model Rules R. 1.6(b).
Whatever might be said in favor of a duty to disclose in other circumstances, it depends on considerations entirely independent of client control over the attorney, and in the organizational context, independent of the principle of Model Rule 1.13(a) that the attorney acts through the agents of the organization. Disclosure within the organization need not resort to any such independent argument. To the extent that the board of directors controls the officers in the corporation, board members are entitled to full information on which to base their decisions.

Indeed, on the facts of Carter & Johnson, the board of directors independently questioned the actions of the president and could have, with earlier disclosure from the attorneys, acted more effectively to limit damage to the corporation. If, on the other hand, the board had gone along with the president’s fraudulent course of action, the attorneys would have been placed in the dilemma now addressed by Model Rule 1.13(c), whether to disclose publicly, or under Model Rule 1.16(a)(1), to withdraw to avoid complicity in the fraud. Either or both of these actions may be necessary to protect shareholders from the losses resulting from continued exposure of the corporation to liability for fraudulent misstatements. Any resulting damages awarded against the corporation will depend upon how long the fraud went undetected and its cost will ultimately be borne by the shareholders. Perhaps disclosure would prevent such losses, or perhaps it would only prevent corporate counsel from getting the necessary information in the first place. Whatever the answer to this question, it is independent of the principle of Model Rule 1.13(a).

B. Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C

When the context of representation moves from large organizations to small ones, the scope and extent of the attorney’s obligations change as well. When the change is from large, publicly held corporations to small, closely held ones, the contrast is quite striking, so much so that it leads some courts to “pierce the corporate veil” and treat all the shareholders in a closely held corporation as individual clients. Whether justified or not, this step represents a departure from Model Rule 1.13(a), by treating the attorney as if he represented the individual constituents of the organization rather than the organization itself. In Fassihi, the court took a different approach, one that preserved the organizational nature of the representation, yet recognized fiduciary obligations that the attorney owed to individuals within the organization.46

45. Model Rules R. 3.3.
46. Fassihi, 309 N.W.2d at 648.
Like *Carter & Johnson*, the facts of *Fassihi* admit of a direct and simple solution under the current version of the Model Rules. The current rule was not available, either to the court or to the parties and their attorneys, at the time. Dr. Fassihi owned half the shares in a closely held corporation with another doctor, Dr. Lopez. Both practiced radiology. Both were also directors and officers of the corporation: Fassihi was the secretary-treasurer and Lopez was the president. There was some dispute over whether another individual was a third director of the corporation. The work of both doctors depended upon access to the facilities at a local hospital, a privilege that, unknown to Fassihi, was controlled entirely by Lopez in his individual capacity.\(^4\)

After practicing medicine together for a year and a half, Lopez decided to terminate his relationship with Fassihi. To do so, he contacted his individual attorney, Epstein, who was also the attorney for the corporation. At a meeting of the board of directors, as alleged by Lopez, he and the third director voted to terminate Fassihi’s interest in the corporation. Fassihi alleged that he received no prior notice of this meeting. After his staff privileges at the hospital were terminated, he eventually sued Epstein for malpractice, breach of fiduciary and ethical obligations, and fraud. On an interlocutory appeal, the court held that Epstein’s motion for summary judgment was properly denied, as were his objections to questions about his communications with Lopez about the ouster of Fassihi from the corporation.\(^4\)

Both holdings today would follow directly from Model Rule 1.13(g), which requires any joint representation of a corporation and an individual officer or director to be subject to the general rule on joint representation and, where necessary, to require the consent of other constituents within the organization. Under this provision, Epstein’s joint representation of the corporation and Lopez constituted a conflict of interest, either from the beginning or as soon as a conflict over control of the corporation developed. Epstein could not fulfill both his duties to the corporation, acting through Fassihi as a director, and to Lopez individually in trying to terminate Fassihi’s interests in the corporation including his power as director. The corporation could make an informed decision about Fassihi’s status within it only if the entire board of directors, including Fassihi himself, were fully informed on this issue. Likewise, in order to obtain Fassihi’s consent to joint representation, Epstein would have had to fully inform him of the nature of his representation of Lopez and in particular, his communications with Lopez about terminating Fassihi’s interests in the corporation.

As noted in Part II, the Model Rules themselves do not determine questions

\(^{47}\) *Id.* at 647–48.

\(^{48}\) *Id.* at 650.
of fiduciary obligations or evidentiary privileges. Yet they are plainly relevant to such questions and at a minimum, must be interpreted consistently with the other sources of law that actually govern these questions. It is only a small step from the conclusion that joint representation violated the attorney’s ethical obligations to the conclusion that it also violated his fiduciary obligations and deprived him of any claim of privilege as against Fassihi. The same arguments that support the first conclusion also support the second. No attorney today would undertake joint representation in violation of Model Rule 1.13(a) and expect to be free of any claim of breach of fiduciary obligations to the corporation or its “duly authorized constituents.”

The analysis in Fassihi would be more complicated, but not very different in outcome, if corporate counsel had represented only the corporation and had avoided individual representation of any director and officer. In those circumstances, whatever Epstein learned about Lopez’s attempt to oust Fassihi from the corporation would have had to be disclosed to Fassihi for the reasons discussed earlier. The corporation could decide whether to keep Fassihi as director, officer, and shareholder only through the fully informed decision of its board of directors, which includes Fassihi himself.

A more complicated variation on the facts of this case involves Fassihi’s status only as a shareholder. If he were not a director and officer of the corporation, he could not plausibly argue that fiduciary obligations ran directly to him from corporate counsel. The usual control of the business, including control over corporate counsel, rests with management, not with shareholders, even in a closely held corporation. Yet, if management violates its fiduciary obligations to shareholders, the ordinary rules of corporate representation no longer apply. Corporate counsel in this situation must take steps to protect the interests of shareholders. Unlike the situation discussed earlier involving a publicly held corporation in Carter & Johnson, disclosure to the shareholders of a closely held corporation is not tantamount to public disclosure and it does not foreclose the possibility of an attorney obtaining direction and information from the shareholders as a group. On the assumption that Lopez would have been acting in breach of his fiduciary obligations to Fassihi as a shareholder, Epstein would have been obligated to take whatever steps were necessary to protect Fassihi’s interests, including disclosure to him.

Perhaps the analysis in this last situation comes close to “piercing the corporate veil.” But if so, it does less damage to the principle of Model Rule 1.13(a) than any other alternative. The corporate officers and directors, if they are acting in violation of their fiduciary obligations, can no longer speak for the corporation, and the interests of shareholders can best be protected by going to them as the only remaining constituents of the organization with authority to
direct the attorney. Disaggregation of the corporation into its constituents may be necessary, but only in order to find someone within the organization who still has authority to speak for it. This entire analysis, of course, depends on the assumption that the directors or officers of the corporation have breached their fiduciary obligations to shareholders. If corporate counsel concludes that they have not, reasonably taking account of both their interests and the interests of shareholders, the ordinary processes of corporate representation should remain in place.

**CONCLUSION**

This Essay has not attempted to resolve all the vexing issues of organizational representation. That would be too much for any one article or perhaps even an entire book. This Essay has a narrower purpose: to demonstrate that most aspects of organizational representation depend upon the principle of Model Rule 1.13(a) which, in turn, looks to the law governing the organization. Where that law, including the agreement or charter creating the organization, gives a determinate answer to the question of who is its “duly authorized constituent,” the attorney’s duties to the organization can be derived from the lawful actions of its constituents. In extraordinary situations, where the constituents of the organization act unlawfully, the attorney must first turn to other sources of authority within the organization. This approach confirms the wisdom of “reporting up the ladder” as now required by Model Rule 1.13(b) and by the Sarbanes-Oxley Act. It also supports extended fiduciary obligations of the attorney outside the normal channels of authority within the organization, if necessary to protect constituents, such as shareholders in a closely held corporation who are in a position to meaningfully control the attorney’s actions.

Other steps, such as disclosure outside the organization, might be necessary if such constituents cannot protect themselves. Thus, the inability of shareholders in a publicly held corporation to directly safeguard their own interests argues for giving someone authority to act on their behalf. Model Rule 1.13(a) does not preclude giving such authority to the attorney as whistleblower or gatekeeper. It does make clear, however, how far such steps go beyond the ordinary principles of representation. For an organization, as much as for an individual client, these presuppose the ability to control the attorney. Existing law on disclosure outside the organization, whatever its merits, at least recognizes that this should be an option of last resort.