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Cover Page Footnote
The author is an attorney in Washington, D.C

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CONFLICTS OF INTEREST AT AN ORGANIZATION'S HIGHEST AUTHORITY: HOW THE DISTRICT OF COLUMBIA'S RULES OF PROFESSIONAL CONDUCT CAN FAIL TO PROTECT PRIVATE ORGANIZATIONS

Christopher R. Deubert[+]

This Article examines how the District of Columbia's incomplete incorporation of the Model Rules of Professional Conduct into its own Rules of Professional Conduct has created a scenario in which wrongdoing inside a private organization can flourish. In 2002, following the Enron scandal, the American Bar Association (ABA) revisited and revised its Model Rules of Professional Conduct. The ABA nevertheless took a conservative route, rejecting rules long proposed by experts which would have permitted attorneys aware of corporate crimes, fraud, and other wrongdoing to report their concerns to individuals or entities outside the organization's reporting structure. Additional scandals unfolded contemporaneous with the ABA's revisions, instigating federal legislation, the Sarbanes-Oxley Act of 2002. Regulations promulgated under that Act included the reporting out opportunity long sought by ethics experts. In light of the new federal legislation, the ABA, in 2003, finally passed a revised Model Rule 1.13 which requires attorneys to report wrongdoing up the ladder to an organization's highest authority and permits those attorneys to report out such wrongdoing in the event the highest authority failed to respond appropriately.

Unfortunately, the District of Columbia did not heed these lessons. Citing antiquated notions of client confidentiality, the District adopted an approach which requires an attorney to report wrongdoing up the ladder but then fully accept the results of that reporting, even if the highest authority to whom the attorney reports the misconduct is the one engaging in the misconduct. In so doing, the District has created a structure which incentivizes the termination of ethical attorneys in order to cover up corporate wrongdoing. This Article recommends changes to the District of Columbia's Rules of Professional Conduct which will enable the District to take the lead in promoting a bar committed to ethical conduct and appropriate corporate governance

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I. INTRODUCTION

As has been commented on many times previously, following each corporate scandal it is often asked, "where were the lawyers?"[1] After one particular scandal, the 2001 downfall of the energy firm Enron due to various fraudulent practices,[2] the scrutiny reached a new peak.[3] As a result, Congress contemplated and eventually passed unprecedented legislation prompting the legal profession and the American Bar Association ("ABA") to undertake a comprehensive review of the Model Rules of Professional Conduct (the "Model Rules").[4]

After extensive debate, in 2003, the ABA ultimately amended its Model Rules with the intention of empowering lawyers to help prevent future corporate frauds.[5] In particular, the ABA modified Rule 1.6 governing "Confidentiality

1. *See, e.g.*, Christopher J. Motz, *Officious Meddler or Ethical Advocate? Corporate Counsel's Model Rule 1.13 Obligation to Report Up the Ladder: Defining "Related to the Representation"*, 10 U. ST. THOMAS L.J. 352, 354 (2012); Rebecca Lowe, *Compliant Counsel*, 8 IN-HOUSE PERSP. 13, 13 (2012); Cassandra B. Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 3 (2009); Bernard S. Carrey, *Enron—Where Were the Lawyers?*, 27 VT. L. REV. 871, 871 (2003).

2. *See* Richard Acello, *Enron Lawyers in the Hot Seat*, 90 ABA J. 22, 23–24 (2004); William H. Widen, *Enron at the Margin*, 58 BUS. LAW. 961, 973–74 (2003).

3. *See, e.g.*, Widen, *supra* note 2, at 972–73, 990–99; Arnold Rochvarg, *Enron, Watergate, and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 62, 75, 80–81 (2003).

4. *See generally* Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 35–38 (2003); Clifton Barnes, *ABA, States, and SEC Hash Out Lawyers' Responsibility in Corporate Settings*, AM. BAR. ASS'N: BAR LEADER, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2802/corporate/ (last visited Oct. 19, 2022).

5. *Id.* at 85.

of Information" and Rule 1.13 governing the "Organization as Client."[6] The changes were hailed as an opportunity for "lawyers to make the world a more ethical place."[7] However, the Model Rules are just that—a model—and thus are only as effective as the jurisdictions that adopt them.[8]

In time, thirty-nine states adopted in sum and substance the modified rules.[9] This leaves eleven states and the District of Columbia (the "District") that have not. As a result, attorneys practicing in these jurisdictions still have limited ability to mitigate or prevent corporate frauds. In particular, the District's approach can create particularly challenging circumstances for lawyers working on behalf of privately held and closely controlled organizations.

This Article will examine these issues as follows: Part II will discuss the 2003 amendments to the Model Rules; Part III will explain how states and the District responded (or failed to respond) to the 2003 amendments; Part IV will explain how the District's failure to fully adopt the 2003 amendments can cause problems for lawyers and the organizations for which they work or represent; and Part V will make recommendations to address these problems before concluding.

II. THE 2003 AMENDMENTS TO THE MODEL RULES

As alluded to above, the 2003 amendments to the Model Rules were significant. The path to those amendments, however, was not easy. This Section provides the background to those amendments, including prior failed efforts at such changes, and the stimulus for the eventual changes in the form of federal legislation and regulation. This Section will further describe the changes to Rules 1.6 and 1.13 and discuss how Rule 1.13 is designed, at least partially, to protect against conflicts of interest between an organization and its highest authority.

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6. *See generally* Hamermesh, *supra* note 4, at 35.

7. *See* Catharine E. Stark, *Regulating Corporate Governance: Amended Rules of Professional Conduct Allow Lawyers to Make the World a More Ethical Place*, 53 CATH. U. L. REV. 1195, 1195 (2004).

8. *See* Jonathan M. Weiss, *The Need for Federal Solutions to Interstate and International Ethics Conflicts: A Case Study in Confidentiality*, 11 J. Int'l Bus. & L. 1, 4 (2012); *Policy & Initiatives*, Am. Bar Ass'n (last visited Apr. 12, 2021) https://www.americanbar.org/groups/professional_responsibility/policy/ (last visited Apr. 12, 2021) (describing the ABA's Center Policy Implementation Committee's mission to "provide[] assistance to jurisdictions on the review and implementation of adopted policy, promotion of policy to the bar and the public.").

9. *See Variations of the ABA Model Rules of Professional Conduct, RULE 1.13: Organization As Client*, AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_13.pdf (last visited Apr. 12, 2021); *see also Variations of the ABA Model Rules of Professional Conduct, RULE 1.6: Confidentiality of Inofrmation*, AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-6 (last visited Nov. 5, 2022).

A. Background to the 2003 Amendments

To properly evaluate the 2003 amendments, it is necessary to first understand the amendments made (and not made) the year prior, as well as the relevant federal legislation passed in 2002. In 1997, before Enron's collapse, the ABA created a committee (the "Ethics 2000 Commission") to evaluate the Model Rules, which had not been updated since 1983.[10] After a lengthy public process, many drafts of proposed amendments, and considerable debate, on February 5, 2002, the ABA House of Delegates approved numerous changes to the Model Rules.[11]

The ABA did not, however, approve all the Ethics 2000 Commission's recommended changes as to Rule 1.6, governing confidentiality.[12] The Ethics 2000 Commission explained the need to modify Rule 1.6 as follows:

> There has always been a tension between the goal of keeping inviolate the client's confidences and the need to give the lawyer the ability to deal with situations where disclosure is necessary to protect third parties or the legal system from substantial harm. The Commission is proposing to broaden, in carefully circumscribed situations, the grounds for discretionary disclosure of client information under Rule 1.6.[13]

More specifically, the Commission proposed changes to Rule 1.6(b) that would have permitted (but not required) disclosure of confidential information:

> [(i)] "[T]o the extent the lawyer reasonably believes necessary" to prevent "reasonably certain death or substantial bodily harm"; [(ii)] to prevent the client from committing a crime or fraud reasonably certain to result in substantial financial injury, if it involves the lawyer's services; [(iii)] … to prevent, mitigate or rectify the consequences of a client's financial fraud or crime in furtherance of which the lawyer's services were used[; and (iv)]to obtain legal advice about compliance with the [Model] Rules.[14]

The ABA's House of Delegates approved the proposed changes except for items (ii) and (iii) concerning client fraud.[15]

The ABA House's decision not to expand the permitted disclosure of client information, however, was quickly second-guessed.

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10. Margaret C. Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. L. ETHICS 441, 441 (2002).

11. *See id.* at 443–44.

12. *See id.* at 450–51.

13. Comm'n on Evaluation of the Rules of Professional Conduct, Report, at 4 (2001), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.pdf.

14. *See* Love, *supra* note 10, at 450–51.

15. *Id.* at 451.

B. The Sarbanes-Oxley Act of 2002

On February 13, 2002, Representative Michael G. Oxley (R-OH), the Chairman of the House Financial Services Committee, introduced a bill intended to "prevent future Enrons."[16] In June 2002, Senator Paul Sarbanes (D-MD) introduced a similar bill as more corporate scandals unfolded.[17] Eventually, the bills merged and the Sarbanes-Oxley Act ("SOX"), a largescale reform of financial laws, was passed in July 2002.[18]

Of relevance here, SOX introduced unprecedented federal regulation of the legal industry.[19] SOX required that by early February 2003, the Securities & Exchange Commission ("SEC"):

> [I]ssue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.[20]

In March 2002, while Congress was debating the bills that would become SOX, the ABA sought to reassert its authority over the regulation of its profession by constituting a Presidential Task Force on Corporate Responsibility (the "Task Force").[21] As the Task Force did its work, in November 2002, the SEC issued its proposed rules for public comment.[22]

One aspect of the SEC's proposed rules caught the legal community by surprise.[23] The SEC proposed that attorneys practicing before the SEC be

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16. David S. Hilzenrath, *Bill Would Tighten Curbs on Auditors; Oxley's Measure is Similar to Proposals Backed by Accounting Industry*, WASH. POST, Feb. 14, 2002, at E12.

17. Linda Chatman Thomson & Donna Norman, *Sarbanes-Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. L. 393, 394–96 (2008).

18. *Id.* at 395–96.

19. *See generally* Stephanie R.E. Patterson, *Section 307 of the Sarbanes-Oxley Act: Eroding the Legal Profession's System of Self-Governance?*, 7 N.C. BANKING INST. 155, 158, 160–64 (2003).

20. 15 U.S.C. § 7245.

21. Hamermesh, *supra* note 4, at 35–36.

22. *Id.* at 39 n.17.

23. *See id.* at 38–39; Carrey, *supra* note 1, at 875–76.

required to report concerns about securities compliance up the chain of command, and, if such concerns were not satisfactorily resolved, to withdraw from the representation and notify the SEC.[24] The ABA objected to this "noisy withdrawal" requirement as an erosion of the attorney-client privilege and beyond the SOX mandate.[25]

The ABA's concerns were seemingly heard, as the SEC's final rules, promulgated in February 2003, did not mandate a noisy withdrawal. Instead, the final rule stated that an attorney:

> [M]ay reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.[26]

The final SEC rules also included the SOX-required rules obligating attorneys to report up the ladder possible violations of securities laws, including to the highest level in the organization if necessary.[27]

C. Rule 1.6: Confidentiality of Information

SOX and the SEC's new rules seemingly forced the ABA's hand. In permitting disclosure of client information in certain situations, the SEC had passed rules explicitly rejected by the ABA only a little more than a year earlier.[28] Consequently, it was perhaps not surprising that the Task Force's Final Report reintroduced those same proposed rules.[29]

Finally, in August 2003, the ABA adopted the proposed changes to Model Rules 1.6 and 1.13.[30] The revised and current Model Rule 1.6 reads as follows:

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24. *See* Patterson, *supra* note 19, at 166–67.
25. Barnes, *supra* note 4; Carrey, *supra* note 1, at 876–77.
26. 17 C.F.R. § 205.3(d)(2).
27. 17 C.F.R. § 205.3(b).
28. *See* Hamermesh, *supra* note 4, at 40-41.
29. *See id.* at 39–40.
30. Rochvarg, *supra* note 3, at 85.

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) 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;
>
> (3) 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;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[31]

Sections (b)(2) and (b)(3) are the key additions, as they permit attorneys to disclose confidential client information "to prevent crime or fraud, or to mitigate or rectify consequences of such misconduct."[32] Importantly, however, disclosure is permitted "if and only if the client has used or is using the lawyer's own services in furtherance of the crime or fraud."[33]

The Comments to the revised Rule 1.6 state that "[a]lthough the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the

31. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).
32. Hamermesh, *supra* note 4, at 38–39.
33. *Id.* at 39.

confidentiality rule is subject to limited exceptions."[34] Indeed, as Comment 7 explains, a "client can, of course, prevent such disclosure by refraining from the wrongful conduct."[35]

D. Rule 1.13: Organization as Client

Rule 1.13, governing an attorney's obligations to an organizational client, was also substantially amended. Rule 1.13 reads as follows:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
>
> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization 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.
>
> (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that

34. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS'N 2020).
35. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 7 (AM. BAR ASS'N 2020).

> require or permit the lawyer to take action under either of those paragraphs, 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.
>
> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
>
> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.[36]

There were two principal changes to Rule 1.13.

First, Rule 1.13 now requires, "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so," that an attorney report violations of law or legal obligations which are likely to harm the organization to the organization's "highest authority[.]"[37] Previously, the ABA Model Rule merely "suggest[ed] various remedial approaches—for example, a lawyer *may* ask for reconsideration; a lawyer *may* advise getting a separate legal opinion; a lawyer *may* refer the matter to higher authority in the organization—but require[d] none."[38] This change matched the new up the ladder reporting requirements required by SOX.[39]

Second, Rule 1.13 permits—but does not require—an attorney to report his or her concerns outside the organization if the highest authority fails to act appropriately, regardless of the confidentiality requirements of Rule 1.6.[40] This change too tracks the SOX regulation permitting disclosure to the SEC under similar circumstances.[41] Importantly, such disclosures should be narrowly tailored to the extent "necessary to prevent substantial injury to the organization."[42]

The Comments to Rule 1.13 explain that this provision

> makes clear . . . 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

36. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020).
37. MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS'N 2020).
38. Rochvarg, *supra* note 3, at 81.
39. *See* 17 C.F.R. § 205.3(b).
40. MODEL RULES OF PRO. CONDUCT r. 1.13(c) (AM. BAR ASS'N 2020).
41. *See* 17 C.F.R. § 205.3(d)(2).
42. MODEL RULES OF PRO. CONDUCT r. 1.13(c)(2) (AM. BAR ASS'N 2020).

> violation of law that might be imputed to the organization, the lawyer must proceed as reasonably necessary in the best interest of the organization.[43]

"Ordinarily, referral to a higher authority would be necessary" and "[t]he organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body."[44]

The purpose of these changes is at least partially described by the following comments of Senator John Edwards (D-NC) during the debate over SOX:

> We have seen corporate lawyers sometimes forget who their client is. What happens is their day-to-day contact is with the CEO or the chief financial officer because those are the individuals responsible for hiring them [and approving and paying their fees]. So as a result, that is with whom they have a relationship. . . . The problem is that the CEO and the chief financial officer are not the client. Their responsibility and the client they have to advocate for—and which they have an ethical responsibility to advocate for—is, in fact, the corporation, not the CEO or the chief financial officer.
>
> One of the most critical responsibilities that those lawyers have is, when they see something occurring or about to occur that violates the law, breaks the law, they must act as an advocate for the shareholders, for the company itself, for the investors. . . . They know the law and their responsibility is to do something about it if they see the law being broken or about to be broken.[45]

The permission to report out substantial concerns which are not resolved satisfactorily is considered vital to protecting both the organization and those with whom it has or may have a business or financial relationship. As Professor Lawrence Hamermesh, a member of the Task Force, explained

> Where the client refuses to cease or cure the wrongful conduct, a lawyer committed by rule to confidentiality may be helpless ("noisy withdrawal" aside) to prevent or mitigate damages for which the lawyer herself may be held accountable. The ability to disclose client information to third parties in order to prevent or rectify injury due to client crime or fraud dependent on the use of the lawyer's services may be particularly valuable to the lawyer, rather than harmful, because it may be the only effective way for the lawyer to achieve such prevention or mitigation of damages.[46]

Despite the above-described changes, it is important to nonetheless note the continued limited authority by an attorney in second guessing the organization's highest authority. "When constituents of the organization make decisions for it,

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43. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 3 (AM. BAR ASS'N 2020).
44. MODEL RULES OF PRO. CONDUCT r. 1.13 cmts. 4, 5 (AM. BAR ASS'N 2020).
45. Carrey, *supra* note 1, 873–74 (alterations in original).
46. Hamermesh *supra* note 4, at 51.

the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[47] However, when lawyers are aware of violations of law or legal obligations, then they must act.[48]

E. Conflicts of Interest Between the Organization and its Highest Authority

In reviewing Rule 1.13, it is important to remember its principal directive—that attorneys represent the organization's best interests, not those of the organization's owners, officers, directors, or employees.[49] There is of course the potential for conflicting interests between the organizations and such individuals, as both the Rule and its Comments recognize.[50] How attorneys manage such conflicts can be tricky.

Renowned ethics professor Stephen Gillers recognized these "knotty problems" decades ago.[51] In considering the former Rule 1.13, in which an attorney could—but was not obligated—to report concerns to the organization's highest authority, Gillers asked "what if the 'highest authority' is, by design or acquiescence, a source of the illegality that threatens the client so that its response to counsel's information cannot validly be characterized as a policy decision in the client's interests?"[52] Gillers was consequently critical of the former Rule 1.13 and the absence of a reporting out provision, arguing that "[w]here the highest authority is stealing large sums or valuable proprietary information from the client, or is seriously abusing the client's position or reputation to work misdeeds on third persons, disclosure which ends the conduct would on some occasions leave the client better off than silence."[53] Gillers went on to argue that:

> A corporate lawyer should have the authority to disclose client confidences when the corporation will suffer, or has suffered substantial and illegal harm at the hands of a "highest authority" whose members are pursuing their own interests or have tolerated illegal prospective conduct likely to be attributed to the corporation and to cause it substantial injury.[54]

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47. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 3 (AM. BAR ASS'N 2020).

48. *See id.*

49. *See* MODEL RULES OF PRO. CONDUCT r. 1.13(a), (g) (AM. BAR ASS'N 2020).

50. *See id.*; MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 10 (AM. BAR ASS'N 2020) ("There are times when the organization's interest may be or become adverse to those of one or more of its constituents.").

51. Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 295 (1987).

52. *Id.* at 298.

53. *Id.* at 300.

54. *Id.* at 305.

It is perhaps then not surprising that Gillers raised these points following the Task Force's July 2002 Preliminary Report, which contributed to the reporting out provision being included in the final Rule 1.13.[55]

The Task Force's Report also tried to address conflicts of interest between the highest authority and the organization in the context of Rule 1.6, stating as follows:

> The Task Force agrees with the Reporter to the Restatement that Model Rule 1.6
>
> ". . . should not be understood to preclude controlled disclosure beyond the organization in the limited circumstances where the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the interest of the entity client." The Task Force considers this especially important in the circumstance in which the board of directors or other highest authority of the organizational client is disabled from acting in the best interest of the organization, e.g., because of self-interest or personal involvement in the violation.[56]

Nevertheless, the Task Force explained that because of the importance of confidentiality obligations under Rule 1.6(a),

> Rule 1.13 contains strict conditions that must exist before any "reporting out" is allowed. The lawyer must have a heightened level of certainty as to the violation of law, and the actual or threatened violation must be "clear." Moreover, there is no permission to "report out" when the organizational governance failure involves a violation of legal duty to the organization but is not otherwise a violation of law. As under Rule 1.6, communication of client information outside the organization must be limited to information reasonably believed to be necessary to prevent substantial injury to the organization that is reasonably certain to occur. In most circumstances, this limitation would permit communication only with persons outside the organization who have authority and responsibility to take appropriate preventive action.[57]

Situations in which an organization's highest authority is conflicted present particular challenges for in-house counsel of such organizations seeking to comply with Rule 1.13. "When a lawyer complies with the 'up the ladder' procedures in an effort to prevent the entity from incurring substantial injury, the organization may not be pleased and it may fire the lawyer. Alternatively, Rule 1.16 may require the lawyer to withdraw"[58] as that Rule prohibits an

55. *See* Hamermesh, *supra* note 4, at 45–46.

56. James H. Cheek, III et al., *Report of the ABA Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 175–76 (2003).

57. *Id.* at 176.

58. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAW'S. DESKBOOK PRO. RESP. § 1.13-2(e), at 670 (2018-19 ed.).

attorney from representing a party if "the representation will result in violation of the rules of professional conduct or other law."[59] However,

> [i]f an in-house lawyer withdraws, he no longer has *any* client. Moreover, he no longer has a job or monthly income . . . The bottom line is that an in-house lawyer who has one client and who faces the prospect of having to withdraw is asked to sacrifice a career to maintain the ethical norm.[60]

At least part of the problem stems from the Model Rules' apparent focus on public companies in fashioning the Rules, akin to SOX's focus. The Comments to Model Rule 1.13 contemplate that "[t]he organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body," or "the independent directors of a corporation."[61] The District's Rule 1.13 contains the same proposition.[62] However, approximately 99% of companies with employees are private.[63] While some private companies have a board of directors, it seems likely that many (most) do not, let alone independent directors. Consequently, the highest authority in most instances is going to be the controlling shareholder, reducing the intended effectiveness of Rule 1.13.

III. STATE AND DISTRICT RESPONSES TO THE 2003 AMENDMENTS

A review of each state's rules of professional conduct revealed that 36 states adopted Rule 1.13(b)'s provision requiring that an attorney report possible violations of law or legal obligations to the organization's highest authority.[64] In addition, 39 states adopted, in some form, Rule 1.13(c)'s provision permitting—but not requiring—attorneys to report out their concerns.[65] Ten states failed to adopt either provision, and thus their Rule 1.13 generally follows Model Rule 1.13 before the 2003 amendments.[66] Four states (Maine, Michigan,

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59. MODEL RULES OF PRO. CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2020).

60. Rotunda, *supra* note 58, at 4.

61. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 5 (AM. BAR ASS'N 2020).

62. *See* D.C. RULES OF PRO. CONDUCT r. 1.13 cmt. 5 (D.C. BAR ASS'N 2007).

63. *See* Mary Ellen Biery, *4 Things You Don't Know About Private Companies*, FORBES (May 26, 2013, 6:45 AM), https://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies/?sh=6a298b2d291a [https://perma.cc/7GV5-TBEN].

64. *See Variations of the ABA Model Rules of Professional Conduct, RULE 1.13: Organization As Client*, AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_13.pdf (last visited Apr. 12, 2021).

65. *See id*.

66. *See id*. A notable exception to this is Texas, where attorneys have broader than normal discretion to disclose confidential information, including:

> When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act [and to] the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

New Jersey, and New York) adopted the reporting out provision but not the requirement to first report concerns to the highest level.[67] And finally, only one state, Ohio, and the District of Columbia require reporting to the highest authority but do not thereafter permit reporting out in the event the highest authority fails to take appropriate action.[68] The following Section discusses the District's approach to the new Rule 1.13 as well as distinctive and potentially important approaches adopted by three other jurisdictions—Maryland, Michigan, and New Jersey.

A. The District's Decision Not to Adopt All of the 2003 Amendments

Following the promulgation of the revised Model Rules in 2002 and 2003, the District constituted a committee (the "Committee") to consider their adoption.[69] Effective February 1, 2007, the District amended its Rules of Professional Conduct.[70]

The District's revised Rule 1.13 reads as follows:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. 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.
>
> (c) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's

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TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 105(c)(7)–(8) (STATE BAR TEX. 2022).

67. *See* ME. RULES OF PRO. CONDUCT r. 1.13 (ME. SUP. JUD. CT. 2009); MICH. RULES OF PRO. CONDUCT r. 1.13 (MICH. SUP. CT. 2022); N.J. RULES OF PRO. CONDUCT r. 1.13 (N.J. SUP. CT. 2021); N.Y. RULES OF PRO. CONDUCT r. 1.13 (N.Y. STATE BAR ASS'N 2021).

68. *See* OHIO RULES OF PRO. CONDUCT r. 1.13 (SUP. CT. OHIO 2021); D.C. RULES OF PRO. CONDUCT r. 1.13 (D.C. BAR ASS'N 2007).

69. *See Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations*, D.C. BAR RULES OF PRO. CONDUCT COMM. (June 21, 2005, rev'd Oct. 6, 2005), https://dcbar.org/getmedia/b34a1ab4-5040-487d-86c4-38c4355670cc/inside_the_bar-structure-reports-rules_of_professional_conduct_review_ committee-rpcredline.

70. *See Ethics Opinions Substantively Affected by the Amended Rules*, D.C. Bar Ass'n, https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-Substantively-Affected-by-the-Amen (last visited Apr. 6, 2021).

> interests may be adverse to those of the constituents with whom the lawyer is dealing.
>
> (d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.[71]

As mentioned above, the District's Rule 1.13 does not include the reporting out opportunity in the Model Rule 1.13. The Comments to the District Rule acknowledge the difference:

> Although Model Rule 1.13 contains a "reporting out" requirement that authorizes disclosure of confidential client information concerning an organizational client that would be prohibited with respect to other types of clients, D.C. Rule 1.13 does not expand the kinds of disclosures that are permitted for organizational clients.
>
> Under the D.C. Rules, client confidences are protected to the same degree whether the client is an organization or an individual. If a lawyer has reported a matter to the highest appropriate authority in the organization, and that authority has determined not to take any action recommended by the lawyer, the lawyer should accept that authority's decision, just as the lawyer is required to abide by the decision of an individual client to maintain confidences and secrets—unless disclosure is authorized under Rule 1.6.[72]

The Comment thus acknowledges the reporting out requirement in the Model Rule but does not substantively explain why the District does not adopt the same requirement. Nevertheless, some explanation is found in the Committee's 2005 Report on the proposed changes to the District's Rules of Professional Conduct, which is quoted here at length to provide the full context:

> The Committee does not recommend the adoption of the Model Rule's provisions that would allow lawyers to report violations of law outside the organization. These provisions would allow lawyers to disclose client confidences and secrets. The current D.C. Bar Rules provide strong protections for this client information. The Committee does not believe these protections should be loosened.
>
> The Committee is cognizant of the public interest that organizations disclose violations of law, reflected, for example, in provisions of the Sarbanes-Oxley Act concerning lawyers for publicly-traded companies. The Committee believes that its proposed amendments address that concern. If the lawyer's services were used to commit a crime or fraud, the proposed changes to Rule 1.6 recognize that the

71. D.C. RULES OF PRO. CONDUCT r. 1.13 (D.C. BAR ASS'N 2007).

72. D.C. RULES OF PRO. CONDUCT r. 1.13 cmt. 6 (D.C. BAR ASS'N 2007).

> attorney-client privilege would not apply and thus the lawyer could disclose relevant information. To ensure that attorneys are mindful of Rule 1.6's provisions, the Committee recommends a cross-reference to that Rule in Comment [7] to Rule 1.13. The Committee also addressed this issue by strengthening the "reporting up" provisions requiring lawyers to report any violations of law known to the lawyer to corporate management, which has its own reporting obligations.
>
> . . .
>
> In sum, the Committee's proposal does not prevent any action mandated by SOX or the SEC regulation, and it allows almost all permissive disclosure included within [SOX] Rule 205. Even if it is determined as a matter of federal law that broader disclosure obligations are appropriate for attorneys representing publicly traded companies, a lawyer's obligation to protect client confidences and secrets should be the same for individual clients and other types of organizational clients. Most organizational clients are not publicly traded companies subject to SEC regulation, and nothing in SOX or the SEC rules establishes standards of conduct for lawyers representing such organizational clients. It is therefore appropriate for the Court of Appeals to adopt Rules of Professional Conduct that identify the ethical obligations of lawyers representing organizational clients.
>
> Model Rule 1.13(c) goes further than proposed D.C. Rule 1.13, and provides for the disclosure of client confidential information the lawyer learned but which was not related to the services he or she performed for the organization. The Committee believes it is unlikely in such circumstances that a lawyer would *know*, within the meaning of Rule 1.0(f), that a violation of law had occurred or would occur. In the Committee's view, lawyers have authority, under Rule 1.6 as the Committee has proposed to amend it, to disclose information about crime or fraud by an organizational client in those circumstances where the lawyer is like to know of such conduct. The Committee therefore decided not to recommend adopting a provision that would trump Rule 1.6's protection of client confidences. The Committee notes that a number of states have decided not to adopt all provisions of Model Rule 1.13, although some states have.[73]

In short, the Committee believed that the Model Rule's addition of a provision authorizing reporting out was unnecessary as any concerns that might be covered by a reporting out provision are already addressed in Rule 1.6. This position will be explored further in Part IV below.

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73. *Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations*, D.C. BAR RULES OF PROFESSIONAL CONDUCT COMM. 96–98 (June 21, 2005; rev'd Oct. 6, 2005), https://dcbar.org/getmedia/b34a1ab4-5040-487d-86c4-38c4355670cc/inside_the_bar-structure-reports-rules_of_professional_conduct_review_committee-rpcredline.

B. The Maryland, Michigan, and New Jersey Approaches

Maryland, Michigan, and New Jersey adopted unique approaches as compared to other states. Each state adopted some parts of Model Rule 1.13, while also putting their own spin on the Rule to address potential concerns about conflicts of interest between the organization and its highest authority. The relevant portions of each state's rule are as follows:

1. Maryland

> (b) If an attorney for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the attorney shall proceed as is reasonably necessary in the best interest of the organization. Unless the attorney reasonably believes that it is not necessary in the best interest of the organization to do so, the attorney 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.
>
> (c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization, the attorney may take further remedial action that the attorney reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 19-301.6 (1.6) only if the attorney reasonably believes that:
>
> (1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and
>
> (2) revealing the information is necessary in the best interest of the organization.[74]

2. Michigan and New Jersey

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the

74. MD. ATTYS' RULES OF PRO. CONDUCT r. 19-301.13(b)–(c) (MD. STATE BAR ASS'N 2016).

> organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
>
> (1) asking reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
>
> (c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by [Rule] 1.6 only if the lawyer reasonably believes that:
>
> the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
>
> revealing the information is necessary in the best interest of the organization.[75]

Maryland thus adopted the amended Rule 1.13's reporting up requirement but restricts the ability to report out to those situations where the organization's interests are in conflict with those of the organization's highest authority. In contrast, Michigan and New Jersey retained the structure of the former Model Rule 1.13 by not adopting the reporting up requirement and leaving it as an option for the attorney. However, the states did adopt a reporting out option but, like Maryland, limit the use of reporting out to situations in which the highest authority is conflicted.

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75. MICH. RULES OF PRO. CONDUCT r. 1.13(b)–(c) (MICH SUP. CT. 2022); N.J. RULES OF PRO. CONDUCT r. 1.13(b)–(c) (N.J. SUP. CT. 2021).

There is an additional interesting aspect of these states' Rules 1.13. The limited authorization to report out is not limited to a "violation of law" as in Model Rule 1.13. These states adopted a broader approach by also permitting reporting out of "a violation of a legal obligation to the organization," which might include breaches of fiduciary duty or contract that an organization's highest authority has with respect to the organization.[76] California is the only other state to adopt this broader approach.[77]

IV. THE PROBLEMS WITH THE DISTRICT'S RULE

The District's Rule 1.13 fails to sufficiently protect the organizations for which attorneys provide counsel and can easily place in-house counsel in the difficult position of choosing between their job and their ethical obligations. This failure is the result of the District's unique (except for Ohio) decision to adopt the Model Rule 1.13's requirement that attorneys report certain concerns up the ladder to the highest authority, while (a) not providing those same attorneys the opportunity to report out if the highest authority fails to act, and (b) not providing any guidance for an attorney's actions in the event the highest authority is conflicted.

It is not difficult to imagine a situation in which the confluence of the District's approach could create real problems for a company and its counsel. Imagine a private, non-publicly traded company, which, again, approximately 99% of companies with employees are.[78] While such an organization commonly has multiple shareholders, there is often a majority or controlling shareholder. Such a shareholder, whom we will call "Owner," would be considered the "highest authority in the organization" under Rule 1.13. Now, imagine that counsel at this organization becomes aware that Owner has engaged or is engaging in transactions that have benefitted him or her at the expense of the organization and/or its minority shareholders. For example, Owner might own another business and require the organization's employees to either do work on behalf of the other business or cause the organization to purchase products or services from—or even acquire—the other business at an excessive cost. Or, Owner could be using a company credit card or other financial accounts to which Owner has access to pay for housing, travel, and other personal expenses not related to the organization's business. Furthermore, Owner may take steps to conceal these activities (or full information about them) from the organization's executives and other shareholders. Unfortunately, this is not hard to imagine.

How must counsel respond? Rule 1.13(a) (both Model and the District's) makes clear that counsel owes his or her ethical obligations to the organization and not Owner. At the same time, it seems fairly clear that Owner has or is engaged in conduct "that is a violation of a legal obligation, or a violation of law

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76. *Id.*

77. *See* CAL. RULES OF PRO. CONDUCT r. 1.13(d) (STATE BAR CAL. 2021).

78. *See* Biery, *supra* note 63.

which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization[.]"[79] For example, under Delaware law (a common place of incorporation for businesses), individuals responsible for managing a company "owe duties of care and loyalty to the corporation[.]"[80] These fiduciary duties generally require directors to make informed business decisions that are in the best interests of the company and its stockholders.[81] Self-dealing, in which a corporate director engages in transactions favoring his or her own interest at the expense of the company (like Owner), is a classic case of a breach of a director's fiduciary obligations to the company.[82] Moreover, the operating agreements of many legal entities, particularly more sophisticated ones, generally include provisions limiting the ability of a controlling shareholder to engage in self-interested transactions; e.g., transactions with other businesses controlled by the controlling shareholder. Consequently, in this hypothetical, it seems clear that Rule 1.13(b) obligates counsel to "refer the matter to the higher authority in the organization," i.e., Owner.[83]

The problem here is clear: counsel must report Owner's wrongdoing to Owner. This nevertheless is an essential and challenging part of an attorney's job, to advise people in an organization, particularly its highest-level leaders, that something they are doing may not be legal. In the best-case scenarios, the executives or controlling shareholders change or rectify their conduct. But it is certainly imaginable that in many situations such advice will not be welcome. In which case, there are a few ways in which the situation may play out.

Assuming Owner shows no interest in correcting his or her wrongful conduct, and counsel has given Owner an appropriate amount of time to do so, under Model Rule 1.13, if counsel believes the Owner's actions are "clearly a violation of law" and that such actions are "reasonably certain to result in substantial injury to the organization," then counsel may reveal confidential information to try and prevent the injury.[84] Theoretically, counsel could report to executives at the organization, minority shareholders, auditors or accountants, or regulatory or governing bodies. Any of these individuals or organizations may then have either the personal, professional or legal leverage or authority to cause Owner to stop and rectify his or her bad acts.

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79. MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS'N 2020); D.C. RULES OF PRO. CONDUCT r. 1.13(b) (D.C. BAR ASS'N 2007).

80. Dohmen v. Goodman, 234 A.3d 1161, 1168 (Del. 2020). Delaware limited liability company agreements also include an implied covenant of good faith and fair dealing which cannot be abrogated by contract. *See* Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 441–42 (Del. 2005); DEL. CODE ANN. tit. 6, § 18-1101(c) (2013).

81. *See* Malone v. Brincat, 722 A.2d 5, 9–10 (Del. 1998).

82. *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1169 (Del. 1995); Merritt v. Colonial Foods, Inc., 505 A.2d 757, 763–64 (Del. Ch. 1986).

83. MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR ASS'N 2020); D.C. RULES OF PRO. CONDUCT r. 1.13(b) (D.C. BAR ASS'N 2007).

84. MODEL RULES OF PRO. CONDUCT r. 1.13(c) (AM. BAR ASS'N 2020).

It is important to note that perhaps the most challenging requirement to meet before counsel may report out is the determination that Owner's actions are "clearly a violation of law." As discussed in Section II.E, in recommending the revised Rule 1.13, the Task Force explained that "there is no permission to 'report out' when the organizational governance failure involves a violation of legal duty to the organization but is not otherwise a violation of law."[85] However, the Model Rules do not delineate the distinction between violations of "law" and violations of "legal obligations." Perhaps violations of law are limited to codified statutes (criminal and civil) or regulations, and the violations of "legal obligations" incorporates common law concepts.[86] At least one commentator has suggested that the term "violation of law" should be construed broadly to include any conduct that is fraudulent in nature.[87] A broad construction finds support in other Model Rules. Model Rule 1.3 requires that an attorney "act with reasonable diligence and promptness in representing a client."[88] Model Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice" and that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[89] Consequently, in close cases, it seems appropriate for attorneys to take the action they reasonably believe to be in the organization's (the client's) best interests while acting with discretion to minimize the disclosure of confidential information and disruption to the organization.

Either way, unfortunately, the District's Rule 1.13 does not permit the limited reporting out contemplated by the Model Rule. As discussed earlier, the District's Committee stressed the "strong protections" for client information and explained that, in its view, Rule 1.6 should provide attorneys sufficient avenues to stop corporate wrongdoing.[90]

The Committee was wrong. Of relevance, under the District's Rule 1.6, an attorney may reveal confidential client information only

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85. Cheek et al., *supra* note 56, at 176.

86. *See* JOHN K. VILLA, 1 CORP. COUNSEL GUIDELINES § 3:7 (2022).

87. *Id.*

88. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020); *see also* Hamermesh, *supra* note 4, at 45 (citing Model Rule 1.3 in support of an attorney's right to "take reasonable steps to prevent harm to the client when any reasonable lawyer would be aware that a constituent's misconduct threatens the client with substantial harm").

89. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

90. *See Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations*, D.C. BAR RULES OF PROFESSIONAL CONDUCT COMM., 96–98 (June 21, 2005, rev'd Oct. 6, 2005), https://dcbar.org/getmedia/b34a1ab4-5040-487d-86c4-38c4355670cc/inside_the_bar-structure-reports-rules_of_professional_conduct_review_committee-rpcredline.

> (d) [w]hen a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
>
> (2) 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 the crime or fraud.[91]

The problem with the Committee's approach is in the very first line of District of Columbia Rule 1.6(d)—attorneys can only reveal confidential information if the "client has used or is using the lawyer's services to further a crime or fraud."[92] This limitation means the Rule therefore does not cover situations in which the client has committed or is committing a crime or fraud *without* using the lawyer's services. As is clear from the hypothetical, the highest authority in an organization is often perfectly capable of committing wrongdoing without the lawyer's involvement or immediate knowledge. Indeed, it is more than possible that such wrongdoers will take steps to conceal their actions from counsel. Consequently, the District's Rules fail to empower attorneys to take the necessary actions to stop corporate malfeasance at the highest level.

Of course, Owner could even fire counsel the very same day before counsel even had the opportunity to see if Owner corrected the wrongful conduct. Such a termination would sever the attorney-client relationship and thus make any possibility of reporting out seemingly moot. However, Model Rule 1.9, governing duties to former clients, permits the disclosure of a former client's confidential information if otherwise permitted by the Model Rules.[93] Consequently, it is conceivable that even after termination, under the Model Rules, an attorney could report out wrongdoing consistent with Model Rules 1.13 and 1.6. The District's Rule 1.9, however, does not include the relevant language from the Model Rule.[94] Thus, there again does not seem to be an avenue for a terminated attorney to report out illegal activity, even if such reporting would have been permitted by the District's Rule 1.6 prior to termination.

Additionally, the Model Rules theoretically provide another avenue for attorneys terminated for following their ethical obligations. Model Rule 1.13(e) provides that a "lawyer who reasonably believes that he or she has been discharged" as a result of reporting up the ladder or reporting out as contemplated by Rule 1.13(b) and (c), "or who withdraws under circumstances

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91. D.C. RULES OF PRO. CONDUCT r. 1.6(d) (D.C. BAR ASS'N 2007).

92. *Id.*

93. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(a), (c) (AM. BAR ASS'N 2020) (prohibiting attorneys from "reveal[ing] information relating to the representation except as these Rules would permit or require with respect to a client.").

94. *See* D.C. RULES OF PRO. CONDUCT r. 1.9 (D.C. BAR ASS'N 2007).

that require or permit the lawyer to take action under either of those paragraphs, 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."[95] Nevertheless, in our hypothetical, this provision gets counsel nowhere, since counsel would be reporting to Owner that Owner terminated him or her for raising concerns about Owner's wrongful conduct. Moreover, the District's Rule 1.13 does not even include this modest layer of potential protection.[96]

What is even more striking about the District's non-inclusion of the Model Rule's reporting out provision is the apparent failure to contemplate conflicts of interest. The District's Rule 1.13 requires attorneys to report concerns to the highest authority in an organization, regardless of whether that authority is conflicted, and then provides attorneys with no further method of protecting the organization or themselves if the highest authority decides not to take any action and/or fires the attorney. The District's Rules thus may require in-house attorneys to tread a path to their own professional execution.

Again, the District's approach is apparently rooted in a strong preference for the confidentiality of client information.[97] But at what cost? As Professor Gillers has stated, "[t]he client's interests are what we sacrifice. Instead, we honor the interests of a presumptively corrupt higher authority to whom the lawyer owes no duty."[98] Another renowned ethics professor, William H. Simon, echoed these sentiments, explaining that reporting out is appropriate because, in that scenario, "the client organization is the *victim* of the act. The constituent perpetrator whose acts threaten harm to the organization is not the client."[99] Moreover, Simon expressed the view that

> [t]he legal profession's confidentiality norms are harder to justify with respect to organizations than with respect to individual clients. The case for strong confidentiality norms—norms that preclude disclosures necessary to prevent serious injustice or undeserved harm––is fragile in any context, but it is especially weak with organizational clients.[100]

Simon argues that the positive effects of permitting more situations in which lawyers can disclose confidential information outweighs the negative effects of

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95. MODEL RULES OF PRO. CONDUCT r. 1.13(e) (AM. BAR ASS'N 2020).

96. *See* D.C. RULES OF PRO. CONDUCT r. 1.13 (D.C. BAR ASS'N 2007).

97. *See Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations*, D.C. BAR RULES OF PROFESSIONAL CONDUCT COMM., 96–98 (June 21, 2005, rev'd Oct. 6, 2005), https://dcbar.org/getmedia/b34a1ab4-5040-487d-86c4-38c4355670cc/inside_the_bar-structure-reports-rules_of_professional_conduct_review_committee-rpcredline.

98. Gillers, *supra* note 51, at 304.

99. William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS, 489, 502 (2016).

100. *Id.* at 518.

such permissions, including that it might inhibit clients from engaging counsel.[101]

The District's approach ultimately leaves organizations worse off. The absence of a reporting out provision could seemingly create a chilling effect on efforts to prevent corporate wrongdoing, as in-house attorneys must contemplate choosing their jobs or abiding by their ethical obligations. Moreover, if in the hypothetical, Owner ignores counsel's concerns, then Owner can continue to enrich him or herself at the expense of the company. Or, if Owner decides to terminate counsel, the organization will then lack proper oversight over corporate governance and may look to retain less ethical or competent counsel, i.e., counsel that will either not discover Owner's wrongdoing or not say anything about it if they do.

For counsel terminated for following their ethical obligations, the indignities do not stop there. Counsel may be able to state a claim against the organization for wrongful termination, retaliatory discharge or termination in violation of public policy.[102] However, while Model Rule 1.6 permits attorneys to use confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,"[103] the District limits such usage to only establish a defense, not an affirmative claim.[104]

Defenders of the District's Rule 1.13 might argue that, in the event of a conflicted highest authority, reporting out is implicitly authorized by Rule 1.6. This position is supported in part by the Task Force's Report, which said that Rule 1.6 would not prohibit "controlled disclosures" where the "highest authority of the organizational client is disabled from acting in the best interest of the organization, e.g., because of self-interest or personal involvement in the violation."[105] However, this guidance is not included in the Comments to the Model Rules, even though there is a paragraph therein devoted to "Authorized Disclosure."[106] Moreover, in recommending changes to the District's Rules of Professional Conduct, the Committee made no such similar comment.

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101. *See id.* at 519.

102. *See, e.g.*, Karstetter v. King Cnty. Corr. Guild, 444 P.3d 1185, 1188 (Wash. 2019); Crews v. Buckman Lab'y Int'l, Inc., 78 S.W.3d 852, 858 (Tenn. 2002); Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 179 (3d Cir. 1997); Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 490 (Cal. 1994).

103. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2020).

104. *See* D.C. RULES OF PRO. CONDUCT r. 1.6(e)(3) (D.C. BAR ASS'N 2007); D.C. BAR LEGAL ETHICS COMM. Op. 363 (2012),https://dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-363 ("[A]n in-house lawyer may not reveal or use employer/client secrets or confidences offensively in making a claim for employment discrimination or retaliatory discharge—unless, of course, such disclosures are authorized by another exception to D.C. Rule 1.6 (e.g., the crime/fraud exceptions in subsection (d)).").

105. Cheek et al., *supra* note 56, at 175–76.

106. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 5 (AM. BAR. ASS'N 2020).

V. RECOMMENDATIONS

The District should amend Rule 1.13. As set forth in the Committee's Report, the District made the conscious choice to adopt some of the 2003 amendments (the up the ladder reporting requirement) but not others (the reporting out possibility), believing that: (1) client confidentiality is near sacrosanct; and, (2) Rule 1.6 could adequately permit attorneys to disclose confidential information about corporate wrongdoing. As Part IV explained, the District's choice does not adequately protect private organizations from wrongdoing by their highest authorities.

I recommend that the District adopt the entirety of Model Rule 1.13, with a few tweaks. First, I recommend that the District join California, Maryland, Michigan, and New Jersey in explicitly permitting the reporting out of violations of legal obligations.[107] Explicitly including this phrase will help to protect companies from highest authorities that breach their fiduciary obligations to the company and prevent lawyers from having to infer such reporting authority from other Rules and related commentary. An amended section (c)(1) of Rule 1.13 would read as follows, with the added text underlined:

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law[108] *or a violation of a legal obligation to the organization*, and . . .

Second, I recommend that Comment 5 to Rule 1.13 be revised to reflect the realities that most companies do not have a board of directors and that consequently conflicts of interest between the organization's highest authority and the organization will occur in at least some organizations. A revised comment would read as follows, with the added text underlined:

> [5] When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, paragraph (b) requires the lawyer to refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.[109] *Additionally, as many private organizations do not contain a board of directors or other governing body, the organization's highest authority may be the majority or controlling shareholder. Consequently, in reporting matters to the organization's*

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107. *See* discussion *supra* Section III.B.

108. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020).

109. *Id.*

> *highest authority, the attorney should be mindful that the interests of the organization and its highest authority may conflict.*

Third, in addition to the Model Rules' Comments on the reporting out provision, I recommend the addition of a Comment suggesting that an attorney representing a private company prioritize reporting his or her concerns to other shareholders, beginning with the largest, non-conflicted ones. This approach has previously been proposed by both Gillers and Simon.[110] Moreover, the Comment should reference that reporting out is more likely to be the appropriate course of action where the interests of the organization's highest authority are in conflict with those of the organization. A proposed Comment [6] reads:

> [6] If an attorney representing a private company reasonably determines it to be appropriate to reveal information pursuant to paragraph (c), the attorney should prioritize the persons or organizations to whom the information is disclosed, beginning with such persons or organizations with the greatest interest in preventing substantial injury to the organization, which may be the organization's shareholders. Nevertheless, in prioritizing such disclosures, the attorney may disregard such individuals or organizations the attorney reasonably believes to have an interest which conflicts with the organization's concerning the matter at issue. Similarly, revealing information pursuant to paragraph (c) is more likely to be the appropriate course of action where the organization's highest authority has acted to further the personal or financial interests of that authority which are in conflict with the interests of the organization.

Fourth, I recommend that the permission to report out survive termination of the attorney-client relationship, a recommendation also previously made by Professor Gillers.[111] Such survival would mitigate the harm done to the organization in the event the organization's highest authority terminates the attorney in an effort to prevent disclosure of the wrongful conduct and prevent the conduct from continuing unnoticed or otherwise be covered up. An amended paragraph (c)(2) of Rule 1.13 would read as follows, with the added text underlined:

> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[112] *The lawyer's authority to disclose pursuant to this paragraph shall continue notwithstanding the termination of the*

110. *See* Simon, *supra* note 99, at 504; Gillers, *supra* note 51, at 305, 307.

111. *See* Gillers, *supra* note 51, at 305.

112. MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N 2020).

attorney-client relationship between the lawyer and the organization prior to the disclosure.

IV. CONCLUSION

In 2002, the ABA missed a meaningful opportunity to improve the Model Rules of Professional Conduct to help prevent or mitigate corporate wrongdoing. After additional scandals, and related federal legislation, the ABA learned its lesson and revised Model Rule 1.13 to require attorneys to report wrongdoing up the ladder to the highest authority and permit those attorneys to report out such wrongdoing in the event the highest authority fails to respond appropriately. Although the amended Model Rule 1.13 does not explicitly address conflicts of interest at the highest authority, a long-held concern of experts, the amendments did create a regime through which attorneys could take action to address the types of scandals that regularly occurred at the turn of the century.

Unfortunately, the District of Columbia did not heed these lessons. Citing antiquated notions of client confidentiality, the District adopted an approach that requires an attorney to report wrongdoing up the ladder but then to fully accept the results of that reporting, even if the highest authority to whom the attorney reports the misconduct is the one engaging in the misconduct. In so doing, the District has created a structure that incentivizes the termination of ethical attorneys in order to cover up corporate wrongdoing.

The District's Rule 1.13 and related commentary should be revised to: (i) include the Model Rule 1.13's reporting out provision; (ii) explicitly permit the reporting out of violations of legal obligations; (iii) reflect the realities that most companies do not have a board of directors and that consequently conflicts of interest between the organization's highest authority and the organization will occur in at least some organizations; (iv) suggest that an attorney representing a private company prioritize reporting his or her concerns to other shareholders, beginning with the largest, non-conflicted ones; (v) reference that reporting out is more likely to be the appropriate course of action where the interests of the organization's highest authority are in conflict with the those of the organization; and, (vi) permit reporting out even after termination of the attorney-client relationship. In so doing, the District can take the lead in promoting a bar committed to ethical conduct and appropriate corporate governance.