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CORPORATE LAW'S FORGOTTEN CONSTITUENTS: REIMAGINING CORPORATE LAWYERING IN ROUTINE BUSINESS CONTEXTS

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Although they are artificial entities, corporations are operated, managed, and represented by people. Sometimes, these people have personal interests at stake—interests that are separate and distinct from the corporation's interests and that arise from these people acting in their corporate roles. These personal interests and related potential liabilities range from employment concerns and civil liability to criminal prosecution and imprisonment. Until now, however, the law has determined that, in most situations, a corporation's lawyer neither represents the corporation's constituents nor their personal interests. The corporate lawyer, therefore, has the challenging role of discharging the proper ethical and legal obligations to the corporate client while ensuring that the corporation's highest-level employees are not misled or left in dire legal straits themselves.

Professional responsibility concerns about corporate attorneys' conduct in these contexts have gone largely undiscussed. This Note evaluates how corporate attorneys have typically structured communications with corporations' constituents—via the "entity theory" and, sometimes, joint representation—and suggests a new way to structure corporate counseling in routine business matters. Accordingly, this Note proposes a new model rule—Rule 1.13(h)—for the American Bar Association to consider to allow corporate attorneys to inform officers and directors, for example, of the personal risks associated with their business conduct. A new model rule will assist corporate attorneys in navigating the thorny ethical considerations of these uncharted waters without compromising the duties owed to the corporate client.

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INTRODUCTION

A corporation[1] is an artificial entity—"invisible, intangible, and existing only in contemplation of law."[2] A corporation's fictional legal existence means that it can only possess the properties, rights, and powers[3] that its corporate charter confers.[4] Yet, even with such seemingly limited authority, a corporation can "conduct business in its own name with virtually all the

1. This Note uses "corporation" to refer to publicly held companies. Although there may be commonalities with other types of organizations, the applicability of the ethics issues addressed herein to such alternative entities is beyond the scope of this Note.

2. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (1 Wheat.) 518, 636 (1819).

3. *See When Did Companies Become People? Excavating the Legal Evolution*, NPR (July 28, 2014, 4:57 AM), https://www.npr.org/transcripts/335288388 [https://perma.cc/9LSX-LERN] (explaining the history of corporate legal personhood and the U.S. Supreme Court's recent expansion of corporations' rights).

4. A corporate charter is "[a] document that one files with the secretary of state upon incorporating a business" and is usually "the articles of incorporation." *Corporate Charter*, BLACK'S LAW DICTIONARY (11th ed. 2019).

powers of a natural person."[5] A corporation must pay taxes,[6] can enter into contracts with third parties,[7] and can sue, and be sued, for any wrongdoing.[8] A corporation is, for all intents and purposes, a legal person with legal personality.[9]

A corporation cannot, however, manage its affairs alone.[10] It must engage with the marketplace and the world through the calculated and informed decisions of the sophisticated individuals who manage it.[11] And a corporation can only communicate with and receive legal advice from its attorneys through the individuals who govern the corporate entity.[12] Despite this structure of communication, the law currently assumes that the corporate attorney owes all professional obligations to the corporate client[13]—the corporation itself—rather than to the corporation's constituents.[14] These constituents, instead, are typically treated as third-party nonclients.[15]

A problem thus arises where a corporation's constituents' interests diverge from those of the corporation itself.[16] Corporate attorneys' legal advice

5. Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection than the Model Rules Provide?*, 23 IND. L. REV. 1, 7 (1990).

6. *See, e.g.*, *Forming a Corporation*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation [https://perma.cc/WN34-LAUL] (last visited Aug. 9, 2021).

7. *See* James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 HASTINGS L.J. 623, 628 (1988).

8. *See, e.g.*, *Starting a Case*, N.Y. STATE UNIFIED CT. SYS., https://www.nycourts.gov/courts/nyc/smallclaims/startingcase.shtml [https://perma.cc/967H-VTHE] (last visited Aug. 9, 2021) (explaining that in New York City, for example, corporations can be sued and can similarly bring actions); *see also* Claire Provost & Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015), https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid [https://perma.cc/VK59-VJCK] (discussing lawsuits lodged by multinational corporations against states).

9. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (1 Wheat.) 518, 636 (1819); *see also Corporations*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/corporations [https://perma.cc/X8FP-ADQB] (last visited Aug. 9, 2021) (explaining that corporations: (1) can sue and be sued; (2) must pay taxes, albeit under a different tax scheme than that of individuals; and (3) have perpetual lives).

10. *See* Susan B. Heyman, *Corporate Privilege and an Individual's Right to Defend*, 85 GEO. WASH. L. REV. 1112, 1123–24 (2017).

11. *See id.*; *see also infra* Part I.A.

12. *See infra* Part I.A.

13. *See* Tate, *supra* note 5, at 2 n.3 (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); *see also infra* Part II.A.

14. This Note uses "constituent" to refer to a corporation's "duly authorized constituents," which, within the meaning of the American Bar Association's Model Rule 1.13, includes "[o]fficers, directors, employees and shareholders . . . of the corporate organizational client." MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 1 (AM. BAR ASS'N 2020). This Note uses "constituent" to refer specifically to corporate officers, directors, and other high-level management employees. "Constituent" may be used interchangeably with "officer," "manager," or "individual" throughout this Note. *See id.*; *see also infra* Part II.A.

15. *See* John Levin, *Ethical Issues in Serving the Organization as Client*, 81 ILL. BAR J. 483, 483 (1993).

16. *See id.* (explaining that corporate client representations may be rewarding but may also present serious professional responsibility challenges).

generally does not affect constituents' personal legal interests.[17] Sometimes, however, advice given in routine circumstances[18] may implicate a constituent's interests.[19] These interests may diverge from the corporation's interests, for example, where a constituent's actions may result in termination of employment, civil liability vis-à-vis the corporation, or even criminal prosecution.[20]

The law does not, however, adequately anticipate such circumstances; it neither instructs the corporate attorney how precisely to handle situations that may implicate constituents' personal legal interests[21] nor does it explicitly detail which duties the corporate attorney owes to these particular nonclients.[22] These "intrinsic ambiguities"[23] make abiding by the rules of professional responsibility especially complex for corporate attorneys.[24]

Professional responsibility concerns pertaining to corporate attorneys' conduct and duties have received minimal attention compared to other ethics issues arising in the law.[25] In fact, "[m]ost of the critical commentary addressing issues of significance to corporate counsel" has only focused on attorney-client privilege and "the rights of corporate counsel in employment-related disputes with their employer-clients."[26] The understanding of proper ethical conduct in such contexts is further complicated by professional responsibility norms that "regulate the provision of legal services to concrete individuals" rather than to entities, as governed by the Model Rules of Professional Conduct ("the Model Rules") and ethics jurisprudence.[27]

This Note does not attempt to address all ethical and professional challenges faced by corporate counsel.[28] Rather, this Note focuses on the

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17. *See* Michael H. Graham, 4 HANDBOOK OF FED. EVID. § 503:3 (9th ed. 2020) (explaining that a representative of the corporate client obtains legal advice and acts on behalf of the client).

18. This Note uses the phrase "routine situations," "routine matters," and "routine circumstances" to refer to noninvestigative business contexts. *See infra* Part III.

19. *See generally* DENNIS P. DUFFY, SELECTED ETHICS AND PROFESSIONALISM ISSUES IN LABOR AND EMPLOYMENT LAW CASES (2008); *see also* John L. Reed, *Avoiding Personal Liability: A Guide for Directors and Officers*, DLA PIPER (Apr. 13, 2015), https://www.dlapiper.com/en/us/insights/publications/2015/04/avoiding-personal-liability/ [https://perma.cc/C46Y-M3G3].

20. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020). *See generally* Duffy, *supra* note 19; *infra* Part I.C.

21. *See* Tate, *supra* note 5, at 68.

22. *See id.* at 68–69.

23. Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1011 (1997).

24. *See* ANNOTATED MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N, 9th ed. 2019) ("[R]epresenting an entity can be the most conceptually complex area of professional responsibility.").

25. *See* Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1023 n.3 (1997).

26. *Id.*

27. McCall, *supra* note 7, at 623.

28. *See* E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 4 (2006).

ethical and legal obligations that corporations' lawyers[29] owe—or should owe—to corporations' officers, directors, and other high-level management employees when these constituents' personal interests diverge from those of the corporation, especially in routine business contexts.[30]

This Note urges the American Bar Association (ABA) to adopt a new model rule that establishes an appropriate standard of conduct for corporate attorneys to follow when representing a corporation through the corporation's duly authorized constituents. Similar guidelines and particular warnings already exist in other areas of corporate law, such as in investigative contexts.[31] In routine matters, however, corporate attorneys' options for structuring relationships and routine communications with corporate constituents are not clearly defined and have been historically limited.[32] A new rule will ensure that corporate constituents are not only advised to act in the corporation's best interests but also informed of the personal liabilities associated with acting on behalf of the corporation.[33] This information will allow constituents to make fully informed decisions for themselves and for the companies they manage.[34]

Part I of this Note provides relevant background information pertaining to corporations' status as the client. Part I also assesses the legal and ethical implications governing attorneys' interactions with corporations' constituents. Part II evaluates how corporate attorneys have historically interacted with, advised, and informed the corporate client and corporate constituents. Part III addresses these traditional methods' shortcomings and proposes a new way to structure the relationship between the corporate attorney, the corporate client, and the corporate constituent. Finally, Part III also recommends the draft text for the proposed model rule: Model Rule 1.13(h).

I. CORPORATIONS ARE PEOPLE, TOO: COUNSELING THE CORPORATION

Corporations have long been important clients for the American corporate lawyer.[35] Indeed, lawyers' representation of corporations has upheld these

29. This Note addresses professional responsibility challenges pertaining to the lawyer for the corporation, regardless of the lawyer's status as "inside legal counsel" or "outside legal counsel," although certain in-house counsel ethics issues may be further nuanced due to such lawyers' dual status as employee. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b (AM. L. INST. 2000) (explaining that "a lawyer's responsibilities to a client organization are the same in both capacities"); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.13-1 (2021) ("Rule 1.13 applies equally to outside lawyers and in-house counsel. Both inside and outside lawyers represent the entity as client acting through its duly authorized constituents.").

30. *See infra* Part I.C.

31. *See infra* Part I.B.

32. *See infra* Part II.

33. *See infra* Part III.B.

34. *See infra* Part III.B.

35. *See* McCall, *supra* note 7, at 628.

entities' rights to file for bankruptcy,[36] permitted successful companies to merge and expand their brands,[37] and even inspired ethical changes in corporate governance and boardroom conduct.[38] As such, lawyers have played a "critical role" in regulating the "modern corporate enterprise."[39]

The representation and counseling of these abstract entities have, however, involved challenges.[40] The issues addressed in this Note—the relationships between corporations' lawyers and corporations' constituents—often arise because corporate law has conditioned corporate attorneys to represent the corporation as an entity, often to the detriment of the *people* behind the corporate curtain.[41] In other words, corporate attorneys are generally assumed to owe professional loyalties to the corporate entity and the corporate entity alone.[42] This distinction is frequently strained, depending on the nature of a constituent's relationship with the corporation and its counsel, as well as the context or the scope of the representation itself.[43]

This part provides background information about the corporate entity as the client. Part I.A addresses the ethical and legal standards by which attorneys represent corporations through their constituents and provides a brief overview of corporate structure and corporate governance. Part I.B examines the obligations that corporate attorneys generally owe to corporations' constituents as unrepresented nonclients and further qualifies such duties depending on the context of the interactions. This background information helps demonstrate how a corporation's officer, for example, may be vulnerable to the actions of the corporation and its attorney.[44] Part I.C

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36. *See* Stephanie Saul, *Elizabeth Warren's Days Defending Big Corporations*, N.Y. TIMES (Jan. 7, 2020), https://www.nytimes.com/2019/10/28/us/politics/elizabeth-warren-corporations.html [https://perma.cc/BA7B-VMEF].

37. *See Inspire Brands to Buy Dunkin' Brands Group for $11.3 Billion Including Debt*, CNBC (Oct. 30, 2020, 9:29 PM), https://www.cnbc.com/2020/10/30/inspire-brands-to-buy-dunkin-brands-group-for-11point3-billion-including-debt.html [https://perma.cc/X289-A6JV].

38. *See* Andrew Ross Sorkin, *Ex-Corporate Lawyer's Idea: Rein in 'Sociopaths' in the Boardroom*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/business/dealbook/corporate-governance-reform-ethics.html [https://perma.cc/2U4F-8KAG].

39. Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 14 (2003).

40. *See* McCall, *supra* note 7, at 628. *See generally* THOMAS E. SPAHN, ETHICS CONSIDERATIONS FOR IN-HOUSE COUNSEL: HYPOTHETICALS AND ANALYSES (2013), https://www.vsb.org/docs/sections/corporatecouncil/annualmtgcle2013.pdf [https://perma.cc/7NJA-EU9K].

41. *See* THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939) ("[P]ay no attention to that man behind the curtain."); *see also infra* Part II.A.

42. This is known as "entity theory." *See* MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 1 (AM. BAR ASS'N 2020); *see also infra* Part II.A.

43. *See* Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 196 (2001) (noting the "triangular relationship between the lawyer, the client, and the client's agents"); *see also* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 965 (2005) ("The specifics of a general counsel's role . . . vary considerably depending on . . . the size of the corporation . . . as well as on the complexity and nature of the legal and regulatory questions that the corporation must address.").

44. *See* Tate, *supra* note 5, at 7.

evaluates the personal risks that constituents face in light of a recently changing corporate landscape, especially where these constituents rely on corporate counsel's advice, despite being underinformed.

A. The Corporation As Client

In representing a corporation, corporate lawyers must consider the ethical obligations they owe to the corporation as the client.[45] They may also contemplate the risks that the corporation—and perhaps its constituents—face when engaging in certain conduct.[46] Part I.A.1 evaluates the Model Rules relevant to the issues addressed herein. Part I.A.2 considers the application of such ethical considerations in light of the realities of corporate structures and corporate governance.

1. The Ethics of Corporate Representation

The ABA's Model Rules are the foremost authority on legal ethics in the United States.[47] The Model Rules serve as examples of ethics rules and "provide a framework for the ethical practice of law."[48] The Model Rules, however, are not exhaustive, and they do not detail all possible considerations that should inform attorneys' conduct or advice.[49]

Different jurisdictions have different ethical standards.[50] Still, almost all states have adopted or use some form of the Model Rules.[51] Unless a particular state adopts the Model Rules indiscriminately, the Model Rules themselves are not binding on attorneys in those jurisdictions.[52] Rather, states incorporate what they perceive to be the optimal rules and make changes relevant to their jurisdictions.[53] For example, the New York Code of Professional Responsibility is the authority on attorneys' ethical obligations in New York State.[54] Nonetheless, a corporate attorney may look to relevant model rules for guidance when navigating a variety of corporate ethics issues or other thorny legal questions.[55] The Model Rules are not designed to create potential causes of action against attorneys but rather are

45. *See* Campbell & Gaetke, *supra* note 39, at 16–17.

46. *See* Thomas E. Rutledge, *When Your Client Is an Organization—Some of the Problems Not Resolved by Rule 1.13*, 40 N. KY. L. REV. 357, 374 (2013) ("[A]ttorneys representing organizational clients may have obligations to protect the interests of the organization's constituents, notwithstanding the limitations of Rule 1.13.").

47. *See* Campbell & Gaetke, *supra* note 39, at 15.

48. MODEL RULES OF PRO. CONDUCT scope (AM. BAR ASS'N 2020).

49. *See id.* pmbl.

50. *See Ethics and Professional Responsibility*, GA. STATE UNIV. L. LIBR. LIBGUIDES, https://libguides.law.gsu.edu/c.php?g=253396&p=1689859 [https://perma.cc/BAZ3-MNSQ] (July 2, 2021, 2:46 PM).

51. *See id.*

52. *See* Stephen Gillers, *Some Misperceptions Among Corporate Lawyers*, N.Y. LEGAL ETHICS REP., http://www.newyorklegalethics.com/some-misperceptions-among-corporate-lawyers/ [https://perma.cc/6CCD-7WV4] (last visited Aug. 9, 2021).

53. *See id.*

54. *See id.*

55. *See generally* MODEL RULES OF PRO. CONDUCT scope (AM. BAR ASS'N 2020).

created by disciplinary authorities and agencies to provide guidance for regulating attorneys' conduct.[56]

Model Rule 1.13 ("the Rule"), in particular, governs and prescribes the ethical duties of attorneys who represent corporations, organizations, and other entities.[57] Most importantly, the Rule explains that a corporation can only act through its duly authorized constituents.[58] Similarly, a corporate attorney can only interact with or represent the corporate client through these individuals.[59] Former Chief Justice William H. Rehnquist noted in *Upjohn Co. v. United States*[60] that corporations—even more so than individuals—rely on counsel to understand how to comply with the law.[61] In these frequent interactions with the individuals who manage and make decisions on behalf of the corporation, however, the lawyer is not generally understood to owe duties "independent of [the] duty to the corporate entity."[62] Indeed, the attorney's representation of the corporation does not automatically extend to the corporation's constituents.[63]

Corporate constituents' interests are usually aligned with those of the corporation.[64] For example, constituents' diligent corporate governance typically translates into a corporation's successful financial performance and "strong social or environmental performance."[65] In these situations, Rule 1.13(g) also permits the corporation's lawyer to represent the corporation's constituents.[66] At minimum, such dual representation must comply with the

56. *See id.* pmbl.

57. *See id.* r. 1.13; *see also* Timothy M. Middleton, Note, *"Watered-Down Warnings": The Legal and Ethical Requirements of Corporate Attorneys in Providing Employees with "*Upjohn *Warnings" in Internal Investigations*, 21 GEO. J. LEGAL ETHICS 951, 956 (2008).

58. *See* MODEL RULES OF PRO. CONDUCT r. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); *see also id.* cmt. 1 ("Officers, directors, employees and shareholders are the constituents of the corporate organizational client."); Robert R. Summerhays, *The Problematic Expansion of the* Garner v. Wolfinbarger *Exception to the Corporate Attorney-Client Privilege*, 31 TULSA L.J. 275, 298 (1995).

59. *See* MODEL RULES OF PRO. CONDUCT r. 1.13(a); *see also id.* cmt. 1.

60. 449 U.S. 383 (1981).

61. *Id*. at 392.

62. Summerhays, *supra* note 58, at 298.

63. *See* GSI Com. Sols., Inc. v. BabyCenter, LLC, 618 F.3d 204, 210 (2d Cir. 2010) (restating the notion that a lawyer who represents a corporation does not necessarily represent the corporation's constituents or affiliated organizations); *see also* MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 2.

64. *See generally* Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance [https://perma.cc/7ULT-64AL]. *See also* Ralph Gomory & Richard Sylla, *The American Corporation*, DÆDALUS, Spring 2013, at 102, 106, https://www.amacad.org/sites/default/files/daedalus/downloads/Sp2013_American-Democracy-and-the-Common-Good.pdf [https://perma.cc/K9PD-BQTX] (explaining that, historically, "[t]he interests of [corporate] managers, stockholders, workers, consumers, and society seemed well aligned").

65. Paine & Srinivasan, *supra* note 64.

66. *See infra* Part II.B.

criteria of Model Rule 1.7; it also requires the informed consent of the corporation or its shareholders.[67]

Sometimes, however, "the organization's interest may be or become adverse to those of one or more of its constituents."[68] Model Rule 1.13(f) addresses attorneys' duties when dealing with corporate constituents whose interests conflict with those of the corporate client.[69] A constituent's interests need not be entirely at odds with those of the corporation, but the interests may be sufficiently contrary to influence an attorney's representation.[70] When these situations arise, corporate attorneys can warn corporate constituents about the limited scope of the corporate representation and inform constituents that their communications with the attorney may not be privileged.[71] These warnings are not entirely helpful because corporate attorneys are not required to advise constituents of their personal risks or suggest that constituents retain independent counsel.[72] These warnings are also left to the discretion of the corporate attorney, and the need for such warnings "may turn on the facts of each case."[73]

The representation of corporations implicates other model rules, in addition to Model Rule 1.13.[74] Model Rules 1.1 and 1.3, for example, require the corporate attorney to represent the corporate client with "competency and diligence."[75] Indeed, one of the corporate attorney's most important duties is to advise the corporation in a "conscientious and intellectually honest . . . manner, and to counsel the board to act only upon complete *understanding* of the issue being decided."[76]

Finally, Model Rule 4.3[77] provides the corporate lawyer with guidance about dealing with unrepresented persons—for example, a corporation's

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67. Model Rule 1.7 prohibits the dual representation of two clients if "the representation of one client" is "directly adverse" to the representation of the second client or if "there is a significant risk" that the lawyer's legal or personal obligations will harm the representation of more than one client. MODEL RULES OF PRO. CONDUCT r. 1.7(a); *see also infra* Part II.B.

68. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 10.

69. *See id.* r. 1.13(f).

70. *See id.* ("In dealing with an organization's [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."); *see also infra* Parts I.C, II.B.

71. *See* ANNOTATED MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS'N, 9th ed. 2019).

72. *See id.*

73. *Id.*

74. *See* Sarah H. Duggin, et al., *Ethical Rules and Professional Liability Risks of Business Lawyers Advising on Executive Protection Programs*, AM. BAR ASS'N (June 28, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/07/executive-protection/ [https://perma.cc/G6ZE-T6YA].

75. *Id.*

76. E. Norman Veasey, *Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come as a General Practice*, 59 BUS. LAW. 1413, 1418 (2004).

77. *See* MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2020) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal

constituents.[78] This guidance ensures that the corporation's attorney does not mislead a corporate constituent into thinking that the lawyer represents the constituent's interests if that is not the case.[79] Model Rule 4.3 "distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests" do not conflict with the client's.[80] While commentary suggests that attorneys are prohibited from providing advice to unrepresented persons whose interests are adverse to the client's,[81] Model Rule 4.3 does not address attorneys' provision of legal advice to unrepresented persons whose interests are merely "different" from the client's.[82]

2. Corporate Structure and Corporate Governance Considerations

Notwithstanding the professional obligations attorneys must consider, corporations also have complex organizational structures that make corporate attorneys' jobs even more difficult.[83] Indeed, corporations are artificial persons[84] typically organized in a trilateral manner.[85] Shareholders own the corporation through purchased shares of dispersed stock.[86] Directors are elected by the shareholders and run the corporation pursuant to state law, internal rules, and the corporation's charter and bylaws.[87] The directors then choose the officers and delegate management tasks to them.[88] These officers and a corporation's other duly authorized constituents speak for and act on behalf of the corporation[89] pursuant to attorneys' advice.[90] Through these duly authorized constituents, corporate attorneys might advise the corporation on any number of matters.[91] A corporate attorney can help a

advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.").

78. *See infra* Part I.B.

79. *See* MODEL RULES OF PRO. CONDUCT r. 4.3 cmt. 1.

80. *Id.* r. 4.3 cmt. 2.

81. *See id.* (qualifying this prohibition, however, by explaining that "[w]hether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur").

82. For a more thorough discussion of the differences between constituents' "different" versus "adverse" interests with respect to the corporation, see *infra* Part I.B.1.

83. *See* 29 AM. JUR. PROOF OF FACTS 3D *Liability of a Director to a Corporation for Mismanagement* § 133 (1995).

84. *See Artificial Person*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/artificial_person [https://perma.cc/7XSG-4JRH] (last visited Aug. 9, 2021) (noting that corporations are the most common artificial persons).

85. *See supra* note 83.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See* Kim, *supra* note 43, at 180.

90. *See* John A. Humbach, *Director Liability for Corporate Crimes: Lawyers as Safe Haven?*, 55 N.Y.L. SCH. L. REV. 437, 441 (2010–2011) ("The corporation's lawyers have a prominent (indeed, statutory) role in protecting the directors and senior management from liability . . . they too are fiduciaries . . . [t]he active role of the corporation's lawyers cannot be ignored."); *see also* MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 2020).

91. *See generally* Campbell & Gaetke, *supra* note 39.

corporation "plan, structure, negotiate, draft, and implement" the corporation's transactions.[92] Or, an attorney may advise corporate managers about handling an unwanted tender offer or a hostile takeover.[93] Regardless of the nature of the counseling, the law currently recognizes the corporate entity as separate and distinct from the individual constituents.[94] The relationship between the corporation and the corporation's attorney is, therefore, understood to be a bilateral one whereby the attorney owes fiduciary duties to the corporate client alone.[95] Because of the complex compositions of these corporate entities—which are comprised of multiple individuals with "potentially differing interests"[96]—attorneys' representations of corporations are inevitably "prone to internal conflicts that do not arise in individual representation."[97]

B. Clarifying the Corporate Lawyer's Role

As discussed, the corporate lawyer typically owes duties to the client rather than to the agents who represent or speak on the corporation's behalf.[98] Inevitably, though, as a corporate attorney advises the corporate client through its officers and other managers, the attorney develops relationships and may recognize that these individuals have personal interests at stake even with respect to the corporation's most routine matters.[99] The ambiguous nature of the relationship between the corporate attorney and a corporation's constituents—and what the corporate attorney is permitted to tell or discuss with these constituents—is the crux of this Note.

This part demonstrates how a corporate attorney can clarify the attorney's obligations to the corporate entity and to its constituents, depending on the context of the relationship and the scope of the representation. Part I.B.1 addresses a corporate attorney's existing duties when dealing with

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92. *Id*. at 14.

93. *See* Ralph Jonas, *Who Is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 617 (1988).

94. *See id. But see* Thomas D. Morgan, *The Client(s) of a Corporate Lawyer*, 33 CAP. U. L. REV. 17, 23 (2004) ("Such employees and their interests should be seen as an integral part of the corporate fabric."); David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/JHP7-9XZH] (explaining that corporations are increasingly paying attention to the rights and interests of the stakeholders rather than just the interests of the shareholders).

95. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (1 Wheat.) 518, 667 (1819) (Story, J., concurring) (explaining that a corporation "is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it"); *see also* Levin, *supra* note 15, at 483.

96. William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57, 59 (2003); *see also* Middleton, *supra* note 57, at 951 (explaining that, notwithstanding the obvious differences between individual and entity representation, lawyers have many of the same duties).

97. Simon, *supra* note 96, at 59.

98. *See infra* Part II.A; *see also* Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RSRV. L. REV. 975, 981 (2019).

99. *See* Campbell & Gaetke, *supra* note 39, at 17.

constituents as unrepresented persons. Part I.B.1 also surveys other legal contexts in which members of the bar and the bench advise or inform nonclients about risks and liabilities. Part I.B.2 evaluates established practices of giving warnings in other corporate contexts, such as in internal investigations, that may provide the foundation for the implementation of additional required warnings about personal interests in routine corporate matters.

1. Interacting with Unrepresented Persons

Barring unusual circumstances in which a corporate officer has proactively retained independent counsel for personal interests,[100] a corporation's constituent is deemed "unrepresented" by law.[101] In other words, despite a constituent's professional relationship with the corporation, constituents are treated by law as if they are "total stranger[s] to the organization."[102]

In dealing with "unrepresented persons,"[103] an attorney must consult Model Rule 4.3, which provides that when an attorney "knows or reasonably should know" that an unrepresented person does not understand the attorney's role in a matter, the attorney must make "reasonable efforts" to correct the unrepresented person's misunderstanding."[104] Model Rule 1.13(a) similarly requires the attorney to clarify the attorney's role in representing the corporation to the corporate constituent but only where a constituent intends to harm the corporate client in some way.[105] If the constituent's interests merely differ, the attorney may not be required to provide any such warnings.[106] Rather, the attorney's duty to clarify the nature of the attorney's obligations is determined by the specific circumstances of each situation because "assessing the nature of such a duty requires balancing several considerations."[107]

These rules, interpreted together and applied to the situations described herein, can best be understood to mean that "when a lawyer, acting on behalf of a client, deals with an unrepresented person, the burden is on the lawyer to clear up any misunderstandings about whom the lawyer represents and where the lawyer's loyalties lie."[108] The trigger for this clarification is the

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100. *See infra* Part II.B.

101. ROY D. SIMON JR., SIMON'S N.Y. RULES OF PRO. CONDUCT ANNOTATED § 1.13:7 (2020).

102. *Id.*

103. *See supra* note 101 and accompanying text.

104. *In House Counsel's Duty to Give "Miranda" Warnings to Corporate Officers and Employees*, FINDLAW FOR LEGAL PROS. (Mar. 26, 2008), https://corporate.findlaw.com/litigation-disputes/in-house-counsel-s-duty-to-give-miranda-warnings-to-corporate.html [https://perma.cc/YW2D-5J4G] [hereinafter *In House Counsel's Duty*].

105. *See* SIMON, *supra* note 101, § 1.13:8.

106. *See id.*

107. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e (AM. L. INST. 2000).

108. *In House Counsel's Duty*, *supra* note 104; *see also* MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2020).

attorney's perception that there may be conflicts between the corporation's interests and the unrepresented person's interests.[109]

These warnings are necessary for the unrepresented constituent because, "as a general rule," a corporation's attorney does not automatically represent the constituents "by operation of law."[110] The Model Rules do not directly address how an attorney-client relationship is established;[111] rather, principles of substantive law beyond the scope of the Model Rules determine the existence of these relationships.[112] Such relationships may be determined on a case-by-case basis and as a factual matter.[113] The specific professional duties attorneys owe in each individual situation, however, may stem from the creation of such relationships.[114] If the attorney fails to clarify the nature of the duties to the corporate client, the attorney and the constituent can enter into an inadvertent attorney-client relationship,[115] even if the corporate attorney does not intend to form a relationship with the corporate constituent.[116]

Model Rule 4.3 also details that a lawyer should not "give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[117] An attorney who answers a "fact-specific" legal question can be "characterized as offering personal legal advice, especially if the lawyer is responding to a question that can be reasonably understood to refer to the questioner's individual circumstances."[118] Posing and answering a hypothetical question, however, is not considered to be legal advice.[119] Similarly, an attorney is not considered to have given legal advice where the lawyer merely shares legal information with the constituent.[120]

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109. *See* SIMON, *supra* note 101, § 1.13:8.

110. Roy Simon, *Whom Does a Corporation's Attorney Represent?*, N.Y. LEGAL ETHICS REP., http://www.newyorklegalethics.com/whom-does-a-corporations-attorney-represent/ [https://perma.cc/DT4M-X4WM] (last visited Aug. 9, 2021).

111. *See generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995).

112. *See id.*

113. *See id.*

114. *See* Ingrid A. Minott, Note, *The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 UNIV. DETROIT MERCY L. REV. 269, 288–89 (2009); *see also* Tate, *supra* note 5, at 15 ("When an employee is contacted by corporate counsel, his relationship with her will differ depending on whether she approaches the employee only as an agent of the entity or offers him personal representation.").

115. *See infra* Part II.B.

116. *See* Tate, *supra* note 5, at 15.

117. MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2020).

118. ABA Comm. on Ethics and Pro. Resp., Formal Op. 10-457 (2010).

119. *See id.*

120. *See, e.g.*, TEX. JUD. BRANCH, LEGAL INFORMATION VS. LEGAL ADVICE 5–6 (2015), https://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf [https://perma.cc/KNV6-4M8U] (defining: (1) "legal advice" as a written or oral statement that interprets an aspect of the law, recommends a particular course of action, or applies the law to a particular factual circumstance; and (2) "legal information" as providing public information, reciting common legal functioning, referring an individual to resources, explaining the meanings of terms, or answering questions about deadlines and due dates); *see also* ABA Comm. on Ethics and Pro. Resp., Formal Op. 10-457 (2010) (explaining that when

Providing information to unrepresented persons—sometimes in the form of warnings about personal interests or consequences—is not a completely new idea.[121] In criminal cases, for example, conflicts frequently arise where two or more defendants are represented by the same attorney.[122] In such circumstances, "the trial court has a duty to . . . warn defendants of the possible risks of such representation."[123] The purpose of such inquiry into a defendant's informed decision to retain joint representation is to ensure that the defendant has not waived the "constitutional right to effective counsel."[124] In *United States v. Gaines*,[125] for example, the Court noted that such inquiry—and the process of warning defendants of potential conflicts of interest—best serves the administration of criminal justice.[126]

Such clarification also exists in attorneys' representations of unions.[127] For example, when a union is the client, and when the union's attorney does not clarify to the union's employees that the attorney represents the union, a union employee may inadvertently disclose information under the false assumption that the attorney will keep the disclosed information confidential.[128] In these situations, the union's attorney is, therefore, required to "fully" explain the relationship to the employee at the outset of any discussions, including the idea that any information the employee provides to the attorney may be disclosed and shared with the union.[129]

2. *Upjohn* and Corporate Warnings

It is especially important for the corporate attorney to clarify the legal relationship and provide warnings where criminal liability may arise.[130] Remedies for such issues exist in corporate investigative contexts,[131] where

information is presented on a lawyer's website, for example, disclaimers can be created to limit or condition a lawyer's obligations to potential website readers to avoid any misunderstandings that: "(1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party").

121. *See generally* Cuyler v. Sullivan, 446 U.S. 335 (1980). *See also* ABA Comm. on Ethics, Formal Op. 743 (2001).

122. *See generally Cuyler*, 446 U.S. 335.

123. *Id.* at 354 (Marshall, J., concurring in part and dissenting in part) (explaining that the trial judge has an obligation to anticipate reasonably foreseeable conflicts). *But see* Steven J. Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315, 337 n.121 (1977) ("The trial court is not required, however, to warn co-defendants of the disadvantages including possible conflicts of interest of joint representation." (quoting Foxworth v. Wainwright, 516 F.2d 1072, 1076 n.5 (5th Cir. 1975))).

124. *Cuyler*, 446 U.S. at 352 (Brennan, J., concurring).

125. 529 F.2d 1038 (7th Cir. 1976).

126. *See id.* at 1044.

127. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 743 (2001).

128. *See id.*

129. *See id.*

130. *See generally infra* Part I.C.

131. *See generally* Upjohn Co. v. United States, 449 U.S. 383 (1981); *In House Counsel's Duty*, *supra* note 104.

Upjohn[132] warnings address the issue of privilege.[133] These warnings are provided during investigations to "ensure that the officer or employee is not unfairly lulled into relying on the corporation's lawyer for legal advice."[134] When corporate counsel realizes that an individual who is acting on behalf of the corporation is revealing too much information or information that reveals a conflict of interest, the corporate attorney has an ethical obligation to advise the corporate officer of this conflict.[135] The attorney must advise the officer that: (1) corporate counsel is not the officer's personal counsel and (2) the corporation's interests and the officer's or director's interests are opposed.[136]

Indeed, *Upjohn* warnings are meant to "set appropriate expectations between the [c]onstituent and the corporation"[137] and might include an explanation that the officer has a personal interest that conflicts with that of the corporation.[138] Such warnings include a recommendation for the

132. In *Upjohn*, lawyers for a pharmaceutical company interviewed the corporation's managers, officers, and employees about suspicious payments that were made to government officials abroad. *See* 449 U.S. at 386–87. Some of these individuals were also asked to complete questionnaires about the payments as part of an internal investigation. *See id*. The Internal Revenue Service also subsequently investigated the matter, requesting that the company produce the questionnaires, as well as the notes the lawyers took during the interviews. *See id*. at 387–88. The pharmaceutical company refused to produce these documents, claiming that the documents were protected by attorney-client privilege and the work-product doctrine because they were prepared for litigation. *See id*. at 388. In its decision, the U.S. Supreme Court reasoned that the attorney-client privilege exists not only to protect attorneys' giving advice to individuals who can actually act on the advice but also individuals' giving information to an attorney, who can then represent the corporate client better. *See id*. at 389–95. The Supreme Court, therefore, reversed the U.S. Court of Appeals for the Sixth Circuit's judgment that attorney-client privilege and the work-product doctrine could never apply to communications with middle- and lower-level employees in such corporate contexts and, instead, concluded that attorney-client privilege and the work-product doctrine can protect certain communications of all constituents acting on behalf of the corporation. *See id*. at 386, 391, 397–98, 401–02. The attorney-client privilege is the corporation's, rather than the individual's. *See, e.g.*, *id.* at 391–93, 395, 397.

133. *See generally Upjohn*, 449 U.S. 383; *see also* John K. Villa, *When and How to Issue Corporate Miranda Warnings*, 24 ACC DOCKET 76 (2006). These "corporate *Miranda* warning[s]" may take a form similar to the following:

> As I am sure you know, I and the other members of this office represent the corporation. We don't represent you personally. Based on what you have said, your personal interest may be in conflict with that of the corporation, and we in the corporate counsel's office cannot represent you. In addition, I have an obligation to pass on to the corporation everything you have told me and will tell me. The corporation may then choose to disclose it or use it adverse to your interests. I recommend that you seriously consider retaining a lawyer. Only your own personal lawyer can promise you that your discussions with him or her will remain strictly confidential. Because of my position as a lawyer for the corporation, I am not your lawyer and cannot give you that assurance.

Id. (typeface altered).

134. *In House Counsel's Duty*, *supra* note 104.

135. *See id.*

136. *See id.*; *see also* MODEL RULES OF PRO. CONDUCT r. 1.13(d) (AM. BAR ASS'N 2020).

137. CROWELL & MORING LLP, *UPJOHN* WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES 10 (2009), https://www.crowell.com/pdf/abaupjohntaskforcereport.pdf [https://perma.cc/H6LQ-FJPX].

138. *See id.*

constituent to retain a personal attorney not only to ensure that the officer's interests are best represented but also to facilitate the communication of legal advice that is not disclosed to the employer.[139] These warnings also protect the corporation's interests by ensuring that the attorney does not inadvertently create an attorney-client relationship that could undermine the original representation of the corporation.[140]

Government investigations and the scrutinizing of corporations are common,[141] especially for larger organizations. In 2015, 75 percent of companies with more than $10 billion in revenue retained counsel to assist with investigations.[142] But while investigations into wrongdoing are frequent and important, corporations also conduct plenty of other business that requires a corporate attorney's perspective on fair dealings and risk.[143] Ethical issues for corporate counselors and corporations' constituents arise in far more common situations.[144]

Because the corporate entity is only permitted to act through its constituents, the question becomes whether corporate attorneys should issue warnings to these constituents in seemingly banal situations, as well.[145] In routine matters, constituents may not perceive that they have personal interests or that there are risks associated with their conduct, and they may assume that they can rely on the advice of corporate counsel.[146] Some argue, therefore, that the general premise and purpose of *Upjohn* warnings—which are meant to apply to issues of attorney-client privilege and may arise in corporate internal investigative contexts—should extend to more routine interviews or conversations conducted even "in anticipation of litigation."[147] In such communications—about "the good, the bad, and the ugly" of any particular legal situation—the attorney "should achieve a balance between informing employees that an attorney-client relationship does not exist and . . . defend[ing] a [potential] lawsuit properly."[148]

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139. *See id.*

140. *See id.*

141. *See Effective Corporate Investigations*, AM. BAR ASS'N (Apr. 25, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2016_17/winter/effective_corporate_investigations/ [https://perma.cc/C2G8-WHBT] ("In 2014 more than two thirds of companies in the insurance, energy, financial services, and health care industries reported retaining outside counsel to assist with regulatory and government investigative activity."); NORTON ROSE FULBRIGHT, 2015 LITIGATION TRENDS ANNUAL SURVEY 61 (2015), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/20150514---2015-litigation-trends-survey_v24.pdf [https://perma.cc/RT9X-RXLF]; *see also infra* Part I.C.2.

142. *See* NORTON ROSE FULBRIGHT, *supra* note 141, at 34.

143. *See infra* Part I.C.2.

144. *See* Daniel C. Headrick & Ryan L. Harrison, *You Have the Right to an Attorney, but It Might Not Be Me*, FOR THE DEFENSE, Apr. 2013 at 39, 39.

145. *See id.*

146. *See generally id.*

147. Headrick & Harrison, *supra* note 144, at 73.

148. *Id.*

C. Constituents' Risks in a Rapidly Changing Corporate Landscape

Corporate attorneys face many ethical and logistical challenges in their daily work.[149] Corporate officers' and directors' routine work also raises the possibility of different kinds of personal liability.[150] Commentators and practitioners increasingly warn that officers can be held personally liable not only for corporate losses arising from corporate scandals but also for daily occurrences and failures stemming from ordinary business transactions.[151] This is true especially where the constituent—acting on behalf of the corporation—mistakenly relies on corporate counsel's advice in a legal gray area.[152]

At minimum, a corporate constituent can be terminated for making a mistake.[153] Parties can also bring legal claims against officers or directors alleging the officers or directors have breached their fiduciary duties.[154] Statutory claims can be brought against corporate constituents who have failed to satisfy the requirements of federal securities laws.[155] Most significantly, if constituents engage in financial crimes, such as bribery or insider trading, they may face prosecution and imprisonment.[156]

Fortunately for constituents, most corporate statutes allow corporations' charters to include provisions that eliminate such liability and indemnify constituents for monetary damages that may arise from breaches of these duties.[157] These provisions do not, however, allow for waiver of liability for equitable claims, and they are not applicable to violations of federal law, laws of foreign countries, or laws of states other than the corporation's state of incorporation.[158] In certain circumstances, therefore, a constituent's reliance on the corporate attorney's advice—even when given in the corporation's best interests—may ultimately cause the individual to be "financially responsible for malfeasance,"[159] or worse.

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149. *See* Janaya Moscony & Julie DiMauro, *D&O Liability Insurance: Hazards for the CCO*, FCPA BLOG (July 10, 2019, 12:28 PM), https://fcpablog.com/2019/07/10/do-liability-insurance-hazards-for-the-cco/ [https://perma.cc/2L9V-LUYB].

150. *See id.*

151. *See supra* note 19 and accompanying text.

152. *See supra* note 19 and accompanying text.

153. *See* Richard E. Wood, *Hiring, Firing, and Setting the Compensation of Corporate Officers: Who Has the Authority?*, 19 BENEFITS L.J. 77, 81 (2006) (explaining that in approximately fifteen states, certain officers may remove other officers, whereas in the remaining states—including Delaware, New York, California, and Pennsylvania—officers do not have the express authority to remove other officers; rather, these jurisdictions reserve such authority for the CEO or the board).

154. *See* Moscony & DiMauro, *supra* note 149.

155. *See* Corp. L. Comm., *Corporate Director's Guidebook*, 75 BUS. LAW. 2741, 2835 (2020).

156. *See* Moscony & DiMauro, *supra* note 149.

157. *See* Corp. L. Comm., *supra* note 155, at 2835–36.

158. *See id.*

159. Josephine Sandler Nelson & Richard O. Parry, *Protecting Employee Rights and Prosecuting Corporate Crime: A Proposal for Criminal Cumis Counsel*, 10 BERKELEY BUS. L.J. 115, 119 (2013).

The risks associated with constituents' reliance on corporate attorneys' counseling tend to be most pronounced in investigative contexts.[160] During both the waning months of George W. Bush's administration and the early years of the Obama administration, the U.S. Department of Justice ("the Justice Department") punished few individual executives who had been "involved in the housing crisis, the financial meltdown and corporate scandals."[161] Historically, corporate entities—rather than individual constituents—took the brunt of civil and criminal liability for corporate malfeasance.[162]

In 2015, however, the Justice Department issued a new set of guidelines ("the Yates Memo") encouraging the prosecution of natural persons and emphasizing the need for individual accountability with regard to corporate wrongdoing.[163] These new rules encouraged federal prosecutors around the country to "prioritize the prosecution of individual employees—not just their companies—and to put pressure on corporations to turn over evidence against their executives."[164] In issuing the Yates Memo, the Justice Department recognized that "[c]orporations can only commit crimes through flesh-and-blood people,"[165] and it acknowledged that corporate misconduct could be most effectively combatted and deterred "by seeking accountability from the individuals who perpetrated the wrongdoing."[166] The Yates Memo sought to erase barriers inhibiting the prosecution and punishment of corporate constituents engaged in criminal activity.[167]

The Yates Memo advanced important public policy,[168] and since its issuance, corporate lawyering has shifted in significant ways.[169] Indeed, in seeking accountability from corporate employees, the Yates Memo aimed to deter future wrongful acts, incentivize corporations to modify and better their

160. *See infra* Part I.C.2.

161. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html [https://perma.cc/4V92-2V69].

162. *See id.*; *see also* James K. Robinson, Assistant Att'y Gen., Crim. Div. of the U.S. Dep't of Justice, Address to the Sponsoring Partner Forum Ethics Officer Association (Apr. 6, 2000), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/04-06-200-speechjkrobinson.pdf [https://perma.cc/T52P-F7D5] (remarking that corporate crime in the U.S. health care industry alone results in a loss of $100 billion each year). *See generally* Paul Healy & George Serafeim, *How to Scandal-Proof Your Company*, HARV. BUS. REV., July–Aug. 2019, at 42, https://hbr.org/2019/07/white-collar-crime [https://perma.cc/9BFC-5YG6] (detailing a study conducted in 2018 suggesting that nearly 50 percent of 7228 organizations surveyed reported economic crime or fraud in the previous year).

163. *See* Memorandum on Individual Accountability for Corporate Wrongdoing from Sally Quillian Yates, Deputy Att'y Gen. (Sept. 9, 2015), https://assets.documentcloud.org/documents/2393039/justice-dept-memo-on-corporate-wrongdoing.pdf [https://perma.cc/UBP2-5RQB] [hereinafter Yates Memo].

164. Apuzzo & Protess, *supra* note 161.

165. *Id.*

166. Yates Memo, *supra* note 163, at 1.

167. *See* Apuzzo & Protess, *supra* note 161.

168. *See id.*

169. *See* Reed, *supra* note 19.

conduct, ensure "proper parties" answer for illegal acts, and maintain public trust in the justice system.[170] Although some say the shifts in policy created positive change by holding individuals accountable for corporate misconduct,[171] these new guidelines also endangered individual constituents' rights and broadened the possibilities for personal liabilities.[172]

In the wake of the "spate" of corporate scandals that inspired the Yates Memo, "lawyers, directors, and academics have taken an increased interest in the professional responsibility challenges faced by corporate counsel."[173] In an increasingly litigious environment, therefore, it is important for corporate management to understand their duties and obligations to the corporation and its shareholders, "the legal safeguards available to them and, perhaps more important, the limits of those safeguards."[174]

II. THE CORPORATE ATTORNEY'S DILEMMA: STRUCTURING CORPORATE REPRESENTATIONS

Corporate attorneys wear many different hats when representing corporations and therefore must interact with a wide variety of individuals.[175] Although it is generally assumed that a corporate attorney owes undivided loyalty to the corporate client[176]—an entity that is distinct from its flesh-and-blood constituents and its shareholders[177]—the corporation's routine matters can implicate the personal interests of the individuals in charge, complicating the attorney's work.[178] The law's "assumptions" about corporate attorneys' loyalties in these situations "seem less than solid."[179] Indeed, where a corporation's constituents' interests diverge from those of the corporation, the corporate attorney is confronted with a challenging balancing act.[180]

The Model Rules provide general guidelines that help corporate attorneys avoid the myriad legal and ethical pitfalls associated with representing corporations.[181] The Model Rules do not, however, recommend the best way for corporate attorneys to structure their interactions with corporate constituents, especially in routine contexts.[182] The Model Rules also do not

170. Yates Memo, *supra* note 163, at 1.
171. *See supra* note 163 and accompanying text; *see also* Apuzzo & Protess, *supra* note 161.
172. *See* Apuzzo & Protess, *supra* note 161.
173. Veasey & Di Guglielmo, *supra* note 28, at 4.
174. Reed, *supra* note 19.
175. *See supra* Part I.A; *see also* Jonas, *supra* note 93, at 619 ("The client to which [the attorney] owes undivided loyalty, fealty, and allegiance cannot speak to him except through voices that may have interests adverse to his client.").
176. *See infra* Part II.B.
177. *See* Jonas, *supra* note 93, at 617; *see also supra* Part I.A.
178. *See* Jonas, *supra* note 93, at 619; *see also supra* Part I.C.
179. Jonas, *supra* note 93, at 618.
180. *See* Robert J. Landry, III, *Joint Representation of a Corporation and Director/Officer Defendants in a Stockholder Derivative Suit: Is it Permissible?*, 18 J. LEGAL PRO. 365, 366 (1993).
181. *See generally supra* Part I.A.
182. *See generally supra* Part I.A.

adequately define the relationship between the corporate lawyer and corporate constituents.[183] These principles are "incomplete" and fail to provide clear guidance to attorneys who strive to "conscientiously discharge their obligations" to the corporate client.[184]

To avoid immense frustration, attorneys "do not [frequently] concern themselves with these ethical considerations."[185] The "substance of the problem" is similarly untouched by the bar and the bench,[186] perhaps in an effort to encourage attorneys to treat corporations as natural persons for purposes of adhering to ethical standards.[187] Corporate attorneys' duties and responsibilities when interacting with, providing advice to, and giving relevant information to corporate constituents thus remain unclear.[188] The existing guidance on the issue is unsettled at best.[189]

Part II examines how corporate attorneys have typically structured their routine interactions and communications with corporate constituents. Part II.A evaluates the widely accepted method of structuring such interactions—known as the "entity theory"—whereby corporate attorneys represent solely the corporation and advise constituents about the corporation's interests only. Part II.B addresses an alternative method of formulating these relationships—known as "joint representation"—whereby the corporation's attorney represents both the corporation as an entity and its constituents as individuals.

A. The Entity Theory of Corporate Representation

Corporate attorneys have typically structured communications with corporate constituents pursuant to the entity theory of corporate lawyering.[190] This is the communication structure that has been referenced throughout this Note.[191] Notably, some legal scholars argue that a corporate attorney who applies this methodology need not "explain the nature of corporate representation to the communicating executive" in routine legal matters,[192] unlike in corporate criminal investigations where attorneys routinely issue *Upjohn* warnings.[193]

183. *See generally supra* Part I.A.

184. Rutledge, *supra* note 46, at 357; *see also* Miriam P. Hechler, *The Role of the Corporate Attorney Within the Takeover Context: Loyalties to Whom?*, 21 DEL. J. CORP. L. 943, 954 (1996) ("The corporate lawyer who resorts to [the Model Rules] for assistance usually finds nothing more than silence or vague generalities that are of little help in solving practical, immediate concerns." (quoting Frederick W. Kanner, *Overview of Professional Responsibility Issues for the Corporate Lawyer*, *in* CONFLICTS OF INTEREST IN LEGAL REPRESENTATION 211, 221 (1988))).

185. Jonas, *supra* note 93, at 619.

186. *Id*. at 619–20.

187. *See id.* at 620.

188. *See* Rutledge, *supra* note 46, at 357.

189. *See supra* Part I.A.1.

190. *See generally* Cohen v. Acorn Int'l Ltd., 921 F. Supp. 1062 (S.D.N.Y. 1995); Tricarico v. Baer, No. 31988-2013, 2015 WL 1641626 (N.Y. Sup. Ct. Apr. 1, 2015).

191. *See* MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 1 (AM. BAR ASS'N 2020).

192. JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 3D § 2:15 (2021).

193. *See id.*

The entity theory is a compelling way to structure these relationships for several reasons.[194] First, an attorney can easily identify the client.[195] Under the entity theory of "organizational representation," an attorney who represents an organization or a corporation "owes professional duties of loyalty and competence" solely to the entity.[196] The attorney does not owe duties of care, diligence, or confidentiality to the corporation's constituents.[197] Second, the entity theory allows an attorney to separate the interests of the corporation from those of the corporation's constituents.[198] According to the entity theory, corporate lawyers only give officers and directors advice pertaining to their roles as representatives of the corporation.[199] Third, the entity theory approach makes it easier for corporate attorneys to protect corporations' best interests while diminishing concerns about the creation of inadvertent attorney-client relationships and the neglect of constituents' personal interests.[200] The entity theory's elimination of such concerns serves the corporate client's best interests because "the flow of information and decisionmaking is not impaired by needless warnings to constituents with important responsibilities or information."[201]

Critics have noted the traditional entity theory's shortcomings.[202] Hostile takeovers, in which corporate attorneys are expected to advise their corporate clients, are a salient example of the entity theory's limitations.[203] They involve fights for the control of a corporation and ultimately create conflicts for the corporation and its officers.[204] A corporate attorney, however, is expected to represent the "entity."[205] The reality of these situations is that the entity may not exist by the end of the takeover, and the identity of the client may become unclear.[206] The entity theory of representation has, therefore, been slated as "unrealistic" and "objectionable."[207]

194. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b (AM. L. INST. 2000).

195. *See id.*; *see also* Kim, *supra* note 43, at 191; Campbell & Gaetke, *supra* note 39, at 18.

196. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b.

197. *See id.* (explaining that third-party "non-clients," such as corporate constituents, cannot "reasonably conclude . . . that a lawyer for the organization represents officers individually").

198. *See id.*; *see also* Kim, *supra* note 43, at 191; Campbell & Gaetke, *supra* note 39, at 18.

199. *See supra* notes 111–16 and accompanying text.

200. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. f; *see also supra* Part II.

201. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e.

202. *See generally* Hechler, *supra* note 184.

203. *See id.* at 943–45; *see also* Scott L. Olson, *The Potential Liabilities Faced by In-House Counsel*, 7 U. MIAMI BUS. L. REV. 1, 4 n.15 (1998).

204. *See* Hechler, *supra* note 184, at 943–45; *see also* Olson, *supra* note 203, at 4 n.15.

205. *See* Hechler, *supra* note 184, at 943–45; *see also* Olson, *supra* note 203, at 4 n.15.

206. *See* Hechler, *supra* note 184, at 943–45; *see also* Olson, *supra* note 203, at 4 n.15.

207. Hechler, *supra* note 184, at 944; *see also* Olson, *supra* note 203, at 4 n.15.

The corporate attorney is left with "little or no guidance from the Model Rules"[208] about how to handle corporate constituents' interests in these routine matters.[209] The Model Rules themselves acknowledge that "[t]he proposition that the organization is the lawyer's client does not alone resolve the issue."[210] Many have similarly criticized the entity theory in additional contexts, including—but not limited to—situations involving attorneys' representations of venture capital firms and banking institutions.[211]

Further, many recognize that corporate constituents are extremely "vulnerable in a relationship with an attorney who represents [the] corporate employer,"[212] especially where the constituents' personal interests may be implicated.[213] This vulnerability may arise out of attorney-client privilege concerns or power dynamics.[214] In light of these vulnerabilities, some argue that there are actions corporate attorneys must pursue when engaging with nonclients.[215] In *Reinert v. Indeck*,[216] for example, the court acknowledged that a lawyer can owe a limited duty to a nonclient.[217] Thus, in the context of corporate representation, an attorney's "diligent representation can impose a duty"[218] on the attorney also to "act on behalf of someone other than the organization."[219] Indeed, corporate attorneys' duties realistically extend beyond standard allegiances to legal corporate entities.[220] Some commentators have advised corporate attorneys to take a more proactive approach when dealing with nonclients; for example, the attorney should at least advise the constituent to retain independent counsel, if necessary.[221]

Finally, others have argued that corporate attorneys' duties must be entirely reimagined and divested from the traditional entity theory.[222] Under this view, attorneys should not represent abstractions—including

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208. Hechler, *supra* note 184, at 943.

209. *See id.*; *see also* George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605, 608 (1988) (noting that the lawyer's representation of the corporation as an entity presents the lawyer "with conflicting duties of loyalty, confidentiality, and zeal owed to the various [constituents] . . . that make up the organizational client").

210. MODEL RULES OF PRO. CONDUCT r. 1.13 cmt. 14 (AM. BAR ASS'N 2020) (commenting on issues that arise regarding client identity and client interests in other similar derivative contexts).

211. *See* Hechler, *supra* note 184, at 955 n.66.

212. Tate, *supra* note 5, at 58.

213. *See id.*

214. *See id.*

215. *See* James Mulcahy & Douglas Luther, *Walking the Line: When Are The Franchisor's In-House Counsel's Communications or Advice to a Franchisee an Ethical Violation?*, 37 SPG FRANCHISE L.J. 571, 572 (2018).

216. No. A-4119-16T1, 2018 WL 4262095 (N.J. Sup. Ct. App. Div. Sept. 7, 2018).

217. *See id*. at *6.

218. Rutledge, *supra* note 46, at 372.

219. *Id. See generally* Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich. Ct. App. 1981).

220. *See* Jonas, *supra* note 93, at 622.

221. *See* D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313, 337 (2006).

222. *See* Jonas, *supra* note 93, at 622.

corporations—at all.[223] Rather, corporate attorneys should represent and owe fiduciary duties to the individual constituents who hire and fire the lawyers on the corporation's behalf.[224] One commentator has acknowledged that the board and the management of any corporation inevitably make decisions that are in the corporation's best interests.[225] If the directors and officers conduct themselves appropriately, it seems obvious that the "corporation's interests when viewed as a separate entity become a *non sequitur*."[226] In other words, if the primary concern of corporate law and corporate representation is to preserve the interests of the corporation and its shareholders, the "professional responsibilities of the corporate attorney" also must reflect that reality.[227]

Practitioners have acknowledged that the entity theory mechanism provides an important frame of reference for corporate attorneys.[228] Nonetheless, as evidenced by the many interpretations of the entity theory, its advantages, and its shortcomings, the entity theory approach neglects to appropriately consider the complicated relationships between corporate attorneys, corporations' interests, and corporate constituents' risks.[229]

B. Joint Representation of Corporations and Corporate Constituents

As an alternative to the entity theory, corporate attorneys also structure communications with constituents to include consideration of the constituents' interests and the corporation's interests.[230] These joint representations are not uncommon[231] and may permit a corporate attorney to advise a constituent about personal risks associated with certain conduct.

The Model Rules do not suggest that there is anything inherently unethical about joint representation.[232] In fact, many corporations permit corporate

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223. *See id.*
224. *See id.*
225. *See id.*
226. *Id.*
227. *Id.*
228. *See* Campbell & Gaetke, *supra* note 39, at 17.
229. *See id.* at 30.
230. *See supra* note 40 and accompanying text.
231. *See* Kathryn M. Fenton & Ryan C. Thomas, *"The Rules of Professional Conduct Are Not Aspirational": Joint Representation of Corporations and Their Employees*, 8 ANTITRUST SOURCE 1, 2 (2009) (remarking that joint representation as between corporations and their "owners, executives, or officers" is not uncommon).
232. *See* SPAHN, *supra* note 40 (explaining that Model Rule 1.13 acknowledges the possibilities of joint representation, such that "[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"); *see also* Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 677 (1994) (explaining that the purpose of ethics rules and guidelines about entity representation "is not to exclude the possibility that the entity lawyer might *also* represent one or more individuals, but rather to clarify that a lawyer who represents an entity" does not automatically then also represent the entity's constituents (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:102, at 387 (2d ed. 1993))); Landry, *supra* note 180, at 373.

counsel to jointly represent the company's employees, especially in instances where such constituents face personal liability.[233] Model Rule 1.13(d), for example, permits such representations "[u]nless the lawyer fails to obtain the clients' informed consent, or the conflict is so severe that a reasonable lawyer would not . . . represent the clients in those particular circumstances."[234] Put differently, to pursue joint representation, the corporate lawyer must obtain informed consent[235] from both the corporate client and the prospective individual client.[236] Informed consent means that both clients fully understand the related risks and the possible alternatives to joint representation,[237] the extent to which confidential information will be shared between the parties,[238] and the consequences associated with the clients' potential withdrawal from the joint representation.[239]

In addition to obtaining consent, attorneys' representation of constituents can also sometimes arise inadvertently.[240] Model Rule 1.13, for example, requires attorneys to clarify their roles[241] in situations where a constituent intends to harm the corporate client.[242] Attorneys' duty to clarify the nature of their obligations is determined by the specific circumstances of each situation.[243] When attorneys explain the nature of representation, they are required only to "clear up any misunderstandings."[244] When corporate attorneys fail to do so—or when corporate attorneys inadvertently give

233. *See Ethical Problems Complicate Joint Representation of a Company and Its Supervisors*, FINDLAW FOR LEGAL PROS. (Mar. 26, 2008), https://corporate.findlaw.com/human-resources/ethical-problems-complicate-joint-representation-of-a-company-and.html [https://perma.cc/RW4B-XGFR].

234. Moore, *supra* note 232, at 664.

235. *See* Nineteen Twenty Four, Inc. v. Parachini, No. 653984/2014, 2015 WL 682814, at *8–9 (N.Y. Sup. Ct. Feb. 17, 2015) (holding that "no proper consent was given" and, thus, Parachini "met his burden of establishing that continued representation . . . violate[d] 1.13 and 1.7 of the Rules of Professional Conduct").

236. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995).

237. *See* Lucian T. Pera, *Needed Warnings to Happy Joint Clients*, AM. BAR ASS'N. (Nov.-Dec. 2018), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2018/ND2018/ND2018Ethics/ [https://perma.cc/NHC2-ZFLB] (addressing the reality that all joint representations carry potential for conflicts of interest and other risks, including the potential for time lost, hefty expenses, and inconvenience).

238. *See id.* (recognizing that part of the danger of joint representation includes the obligation of confidentiality to each client, that those obligations may conflict with other duties owed to each client, and that representing multiple clients in related matters is, therefore, different than representing multiple clients in unrelated matters).

239. *See* NYCLA Comm. on Pro. Ethics, Formal Op. 747 (2014).

240. *See supra* Part I.B.1.

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

242. *See* SIMON, *supra* note 101, § 1.13:8 (explaining that if the constituent's interests merely differ from those of the corporation, rather than being adverse, the lawyer is not required to provide such warnings).

243. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e (AM. L. INST. 2000).

244. *See supra* note 104 and accompanying text; *see also* SIMON, *supra* note 101, § 1.13:8 (explaining that the lawyer might advise the constituent that a conflict or a potential for a conflict exists, that the lawyer does not represent the constituent in connection with the matter, and that the constituent may want to retain independent counsel).

constituents legal advice or legal opinions[245]—constituents may assume the attorneys also represent the constituents' personal interests.[246] If the assumption is "reasonable," an attorney-client relationship is inadvertently created.[247] Courts have recognized that lay persons may have mistaken expectations about attorneys' roles.[248] Regardless of a joint representation's formation, therefore, attorneys are responsible for observing and assessing changes in clients' circumstances that may compromise the representation—including waivers, contractual limitations, or the use of shadow counsel.[249]

There are many reasons why a corporate attorney, a corporation, and its constituents might prefer joint representation.[250] First, joint representation of two or more parties is permitted and attractive because, depending on the circumstances, it can be in the clients' best interests "to risk the inherent dangers of multiple representation" to achieve cheaper[251] and more efficient counseling.[252] One commentator suggests that "a corporation's attorney may reasonably aid the corporation's officers to retain power but only if such aid is in the corporation's best interest."[253] Second, joint representation can help corporations and their constituents form a united front, especially when their interests are more or less aligned[254] and litigation becomes necessary.[255] An attorney who pursues the joint representation of several clients in a related matter also may receive more revenue for legal services provided to the clients.[256]

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245. *See generally* Minott, *supra* note 114.

246. *See supra* note 24 and accompanying text.

247. *Id.*

248. *See* Steines v. Menrisky, 222 F. Supp. 3d 648, 653 (N.D. Ill. 2016) ("[T]he pertinent question is not whether [the officer] *subjectively* believed that [counsel] represented him personally, but whether that belief was *reasonable*."). *See generally* Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., Civ. A. No. 91-5433, 1994 WL 62124 (D.N.J. Feb. 23, 1994) (explaining that the court assessed New Jersey's modification of Model Rule 1.13(d), so the need to provide warnings arises when the lawyer believes an explanation of such warnings is necessary).

249. *See* NYC Bar Comm., Formal Op. 2004-02 (2004); *see also Shadow Counsel*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining such standby counsel as "a court-appointed or privately hired lawyer who is prepared to assume representation of a client if the client's primary lawyer withdraws or is fired by the client").

250. *See* Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 429 n.182 (2001) (explaining the logical reasons why a corporate defendant would prefer a lawyer to represent all defendants jointly, including that joint representation can minimize attorney fees).

251. Moore, *supra* note 232, at 664.

252. *See id.*; *see also* Melody Nashan, *OCDC Article: Joint Representation: Analysis Required*, OFF. OF CHIEF DISCIPLINARY COUNS. (July 1, 2015), https://www.mochiefcounsel.org/newsP.htm?id=38 [https://perma.cc/UKR5-4GTM] (explaining that "shared counsel" can save parties costs in legal fees and can mitigate the duplication of lawyers' efforts in the same matter).

253. Roberta S. Karmel, *Duty to the Target: Is an Attorney's Duty to the Corporation a Paradigm for Directors?*, 39 HASTINGS L.J. 677, 687 (1988).

254. These interests still may be aligned even if they are "different," so long as the interests between the parties are not "adverse." *See infra* Part III.B.

255. *See supra* note 252 and accompanying text.

256. *See* Bassett, *supra* note 250, at 390.

Further, some practitioners and courts have supported the joint representation of corporations and corporations' constituents in routine derivative suits, for example.[257] In such circumstances, it appears "[a]t first blush" that the interests of the corporation are adverse to those of its constituents.[258] But, a corporation is unlikely to want to sue its officers or directors in a derivative action.[259] Those who support joint representation warn against assuming that parties' interests are so conflicting that separate counsel is necessary, especially at the outset of such suits.[260]

There are, however, some "potentially significant detriments for both the company and the individual" associated with joint representation.[261] For one, representing a corporation's officers or directors together with the corporation in the same matter may present conflicts of interest for the attorney, including attorney-client privilege concerns.[262] Generally, such conflicts must be tested against the criteria of Model Rule 1.7.[263] Lawyers frequently avoid such situations entirely due to these concerns.[264]

Joint representation also may be problematic when it is likely that neither the corporation nor the individual constituent fully appreciates the complex relationship that arises out of the shared representation.[265] Dual representation effectively transforms the lawyer's duties such that "the lawyer then owes total loyalty to both the organization and the individual constituent."[266] One commentator notes that this can lead to further conflicts, especially where the employer (e.g., the corporation) pays the costs of the constituent's legal representation.[267]

Finally, if the interests of the jointly represented clients become adverse or conflicting—rather than merely divergent or different—the lawyer is obliged

257. *See generally* Voss v. Sutardja, No. 14-CV-01581-LHK, 2015 WL 349444 (N.D. Cal. Jan. 26, 2015) (acknowledging the risks associated with a lawyer's jointly representing a corporation and its directors but, nonetheless, allowing companies and companies' constituents to pursue joint representation at certain stages of litigation).

258. *New Support for Joint Representation of Company and Directors in Derivative Litigation*, JONES DAY (Feb. 2015), https://www.jonesday.com/en/insights/2015/02/new-support-for-joint-representation-of-company-and-directors-in-derivative-litigation [https://perma.cc/PCC7-G72M].

259. *See id.* (reasoning that the interests of the company and the interests of the individual director defendants may be aligned at the outset of such an action because both the entity and the individuals want to defeat the claims against them).

260. *See id.*

261. Fenton & Thomas, *supra* note 231, at 1.

262. *See generally* SPAHN, *supra* note 40; *see also* Bassett, *supra* note 250, at 390 (explaining that joint representation of clients also risks diluting the lawyer's duty of loyalty to each client).

263. *See* SIMON, *supra* note 101, § 1.13:33 (explaining that Model Rule 1.7 permits multiple representation unless the lawyer does not believe that the lawyer "will be able to provide competent and diligent representation to each affected client").

264. *See* SPAHN, *supra* note 40, at 25.

265. *See* Fenton & Thomas, *supra* note 231, at 1.

266. SIMON, *supra* note 101, § 1.13:10.

267. *See* Bassett, *supra* note 250, at 429–31.

to withdraw from the representation of both clients entirely.[268] This, of course, poses a great risk for both the corporation and any director or officer of a corporation that requires subsequent legal advice and counseling, and it also can result in significant inefficiencies, directly contradicting the original justification of joint representation.[269]

A recent disciplinary proceeding exemplifies the challenges of joint representation.[270] In 2011, Cynthia Baldwin represented Pennsylvania State University ("Penn State") in investigations into Gerald Sandusky's pattern of child sexual abuse on the Penn State campus.[271] Baldwin also represented three of Penn State's administrators during grand jury proceedings, inadvertently creating attorney-client relationships with each of them.[272] In 2017, the Office of Disciplinary Counsel[273] charged Baldwin with multiple counts of professional misconduct[274] for failing to correct the officials' misinterpretations of her representation.[275] Then, in July 2020, Baldwin was formally reprimanded by the Disciplinary Board of the Supreme Court of Pennsylvania (the "Disciplinary Board") via a session conducted on YouTube.[276] According to the Disciplinary Board, Baldwin "violated four provisions of the state ethics code for lawyers" in her representation of Penn State and its three top administrators.[277] The chairperson of the Disciplinary Board concluded that Baldwin's missteps in her representation "fatally undermined the cases against the three administrators,"[278] which left the three administrators—charged with felony perjury, obstruction, and child

268. *See* SPAHN, *supra* note 40, at 67 ("[T]he development of any adversity between the jointly represented clients almost inevitably requires the withdrawal from representation of both clients.").

269. *See id.*

270. *See* Off. of Disciplinary Couns. v. Baldwin, 225 A.3d 817, 820 (Pa. 2020).

271. *See id. See generally* Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. Ct. 2016); Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super. Ct. 2016); Commonwealth v. Spanier, 132 A.3d 481 (Pa. Super. Ct. 2016).

272. *See Baldwin*, 225 A.3d at 820.

273. The Office of Disciplinary Counsel "investigates and prosecutes attorney misconduct." *Structure of the Disciplinary Board of the Supreme Court of Pennsylvania*, DISCIPLINARY BD. OF THE SUP. CT. OF PA., https://www.padisciplinaryboard.org/about/structure [https://perma.cc/BL7W-MLZC] (last visited Aug. 9, 2021). The Office of Disciplinary Counsel functions under the Chief Disciplinary Counsel of the Supreme Court of Pennsylvania, and the Chief Disciplinary Counsel is an extension of the Disciplinary Board of the Supreme Court of Pennsylvania. The mission of the Disciplinary Board "is to protect the public, maintain the integrity of the legal profession, and safeguard the reputation of the courts." *Our Mission*, DISCIPLINARY BD. OF THE SUP. CT. OF PA., https://www.padisciplinaryboard.org/about [https://perma.cc/G2QE-NNZ9] (last visited Aug. 9, 2021).

274. *See Baldwin*, 225 A.3d at 820.

275. *See* SPAHN, *supra* note 40, at 72 (citing Shannon Green, *Was Penn State's GC Counsel for University Officials?*, CORP. COUNS. (Feb 3. 2012), https://www.law.com/corpcounsel/almID/1202541166368/ [https://perma.cc/YG5D-EGFD].

276. *See* Craig R. McCoy, *For Errors in Jerry Sandusky Case, Former Penn State Attorney Gets Scolding From Lawyers' Board*, MORNING CALL (July 22, 2020, 3:45 PM), https://www.mcall.com/news/pennsylvania/mc-nws-pa-penn-state-cynthia-baldwin-20200722-n6cwqyufonb77cfrvb53jpteyi-story.html [https://perma.cc/ZQ95-C2NW].

277. *Id.*

278. *Id.*

endangerment—to each serve less than three months in prison.[279] Her failure to clarify her role also compromised her representation of Penn State.[280] Baldwin thus "found herself embroiled in a high-profile question about whether she had simultaneously represented the [u]niversity" and its high-level officials.[281] Baldwin's conduct in the Penn State representations constituted a "'worst-case scenario' for ethical miscalculation in"[282] the joint representation context.

Notwithstanding its many virtues, one commentator suggests that joint representation of entities and their constituents, as evidenced by Baldwin's indiscretion, does not adequately solve the problems addressed in this Note.[283] To the contrary, the risks of joint representation—"to the clients, to the attorney, and to society"—far outweigh its benefits.[284]

III. REIMAGINING CORPORATE ATTORNEYS' ETHICAL DUTIES

Both the Model Rules and case law generally support the entity theory over relationships that extend corporate attorneys' duties to corporate constituents.[285] Still, "courts are beginning to recognize that in some entity cases," the entity's lawyer may, indeed, owe a duty to the entity's constituents."[286] This Part proposes that the ABA—with individual states to follow—adopt a new Model Rule that requires corporate attorneys to *inform* corporations' constituents of the personal risks and liabilities that may arise from acts taken on behalf of the corporation. Part III.A addresses why common corporate attorney-constituent interactions and relationships—including the entity theory and joint representations—are unsustainable. Part III.B assesses why a new model rule is necessary to fill in the gaps that still exist in corporate counseling. Finally, Part III.C proposes the draft language of this new model rule: Model Rule 1.13(h).

A. The Shortcomings of Corporate Law's Entity Theory and Joint Representation

Corporate attorneys have typically structured their interactions with, and their counseling of, the corporate client in several ways.[287] Until now, determining the scope of attorneys' duties to nonclients has been "complicated by competing policy demands,"[288] similar to policy

279. *See id.*
280. *See id.*
281. SPAHN, *supra* note 40, at 72.
282. Lance Cole, *Multiple Representation Meltdown: "Penn State Three" Case Illustrates Entity Representation Pitfalls for Both Criminal Defense Counsel and Prosecutors—and the Need for Systemic State Law Reforms*, 79 U. PITT. L. REV. 583, 590 (2018).
283. *See* Bassett, *supra* note 250, at 458.
284. *Id.*
285. *See, e.g.*, Moore, *supra* note 232, at 673.
286. *Id.*
287. *See supra* Part II.
288. Moore, *supra* note 232, at 660.

considerations of "accountants, architects, and engineers."[289] Perhaps the most important public policy concern that an attorney faces in offering advice to nonclients is the possibility that doing so may diminish the quality of the lawyer's representation of the original client.[290]

There are significant ramifications associated with maintaining the entity theory approach when counseling corporate clients, especially with respect to attorneys' ethical duties and constituents' interests.[291] The entity theory—whereby the corporate attorney exclusively owes duties to the corporation or the entity rather than to its constituents—is, admittedly, appealing for its simplicity.[292] It is easier for a corporate attorney to understand the significance of representing one client and one client only.[293] This kind of representation also contributes to the problem addressed in this Note.

For example, if the corporate attorney only focuses on giving advice pertinent to the corporation's interests, the attorney will have failed to acknowledge the complexities of corporations and will have potentially harmed the corporation's constituents' interests in the process.[294] Further, by only focusing on the corporation's needs without considering the individuals that make up the corporation and these individuals' interests, the corporate attorney risks misleading these constituents—a fatal ethical maneuver—such that they are unaware that a distinction even exists between their interests and the corporation's interests.[295] The lawyer is prohibited from misrepresenting material matters of the lawyer's representation when dealing with the unrepresented constituents.[296]

Surprisingly, the Model Rules do not require the corporate attorney to inform unrepresented constituents that they may need independent counsel, even though a constituent's personal interests might be so important that they should retain independent counsel.[297] Rather, the Model Rules and ethics jurisprudence leave this decision up to the particular facts of the situation.[298] Regardless, merely advising the corporation's constituents that they may require independent counsel is a potentially useless exercise.[299] Even if a lawyer does advise the constituent to retain counsel, without understanding why the constituent requires representation independent of the corporation, the constituent may not know exactly whom to contact for help, whom to hire, or what personal interests are at stake. The attorney's advice to the constituent to retain independent counsel without any context or further

289. *Id.* at 661.
290. *See id.*
291. *See supra* Part II.A.
292. *See supra* Part II.A.
293. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b (AM. L. INST. 2000).
294. *See* Campbell & Gaetke, *supra* note 39, at 30.
295. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. a.
296. *See id.*
297. *See supra* note 101 and accompanying text.
298. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e.
299. *See supra* notes 104–07 and accompanying text; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e.

explanation might even scare the constituent into acting in derogation of the corporation's best interests. This conduct could, in turn, make the constituent's matters worse. This could cause more negative consequences than an attorney's explaining the constituent's personal interests at stake from the start.

Further, there are significant limitations that corporate attorneys face when pursuing joint representation of both the corporation and its constituents.[300] Notwithstanding the potential solutions that a corporate attorney's joint representation may provide,[301] joint representation poses far too many potential complications.[302] Such representation might affect the corporation's best interests; after all, the corporation is the original client and is most likely paying for the representation.[303] Moreover, the corporate attorney faces personal liability, as well as ethical and other disciplinary proceedings stemming from incorrectly navigating such representations.[304]

B. Resolving Ethical Ambiguities and Pitfalls

Given the inadequacies and the problems associated with traditional forms of corporate lawyering, the law should facilitate a new way for corporate attorneys to structure their interactions with corporations' constituents. The corporate world is a demanding environment.[305] Thus, corporate constituents should understand their duties, their rights, and the potential risks associated with acting—even in routine ways—on behalf of the corporation.[306] Such clarification can mitigate constituents' personal liability, help the corporation make informed choices about its affairs through its personnel, and allow constituents to consider whether they should be serving in their capacities for the corporation at all.[307] Part III.B.1 addresses the need for a new structure in corporate representation. Part III.B.2 explains why such a structure is appropriate and permissible within the bounds of the law.

1. Including Constituents' Interests in Legal Ethics

In investigative circumstances, the interests of the officers and other corporate employees can be adverse to those of the corporation.[308] In the wake of the Yates Memo and many notorious corporate scandals, corporations have been shown to implicate their constituents in wrongdoing in exchange for governmental cooperation credits.[309] Constituents' interests and the corporation's interests in such scenarios are fundamentally in conflict

300. *See supra* Part II.B.
301. *See supra* notes 251–56 and accompanying text.
302. *See supra* notes 261–69 and accompanying text.
303. *See supra* note 250 and accompanying text.
304. *See supra* notes 270–82 and accompanying text.
305. *See supra* note 19 and accompanying text.
306. *See id.*
307. *See id.*
308. *See supra* Parts I.B–C.
309. *See supra* note 161 and accompanying text; *see supra* Parts I.B–C.

because corporations cannot go to prison like individuals can.[310] Similarly, corporations are more likely than individuals to have the resources to pay hefty fines imposed by the government or by other regulatory agencies.[311] In such situations, the law has established *Upjohn* warnings to protect constituents.[312]

But the law has not yet come around to mandating any such warnings in noninvestigative contexts.[313] In daily transactional matters and routine counseling, the interests are not necessarily conflicting, as they may be in investigations. To the contrary, corporations are known for taking care of their employees and their most important officers in "normal" circumstances.[314] Upper-level managers of corporations are frequently granted noncash benefits and other valuable perks by the corporation, indicating these individuals' value and importance to the company's operations.[315] Thus, the interests of the corporation and its employees are usually aligned outside of investigative contexts.[316] In routine matters where the corporate attorney merely advises the corporate constituents to act in the best interests of the corporation, the corporation has no reason to exchange incriminating information about its officers and directors with enforcement entities.

In routine circumstances, therefore, the worst case scenario is that constituents' interests, as compared to those of the corporation, are merely different rather than adverse.[317] But constituents' differing interests in routine contexts are no less important than constituents' adverse interests in investigative contexts; they, too, warrant warnings or information.[318] Even in routine matters, such constituents have important personal interests beyond those of the corporation.[319] Yet, the interests of the officers and other authorized constituents in noninvestigative contexts are frequently excluded from the professional responsibility canon.[320]

None of this is to suggest that the attorney should lose sight of the fact that the corporation is, and should be, the actual client. But the reality of corporate representation is that while corporate internal investigations are certainly not unusual, ethical issues for corporate counselors also arise in more common situations.[321] The daily legal analyses confronting

310. *See supra* note 156 and accompanying text.

311. *See* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & SOC'Y REV. 121, 123 (1996) ("[E]verything else being equal, injured parties are more likely to blame and sue deep-pocket targets.").

312. *See supra* note 133 and accompanying text.

313. *See supra* notes 145–48 and accompanying text.

314. *See supra* note 94 and accompanying text.

315. *See* Morgan, *supra* note 94, at 23.

316. *See* Landry, *supra* note 180, at 366 ("In an ideal situation, interests of the corporation and its constituents will be in agreement.").

317. *See id.*

318. *See* Headrick & Harrison, *supra* note 144, at 73.

319. *See* Tate, *supra* note 5, at 68.

320. *See* Weaver, *supra* note 25, at 1023 n.3.

321. *See* Headrick & Harrison, *supra* note 144, at 39.

corporations are typically complex and, without proper information, directors and officers may be subject to severe penalties that, in some cases, may leave them bankrupt or worse.[322] This Note thus asserts that an attorney advising a corporate client about future conduct should have legal and ethical obligations to ensure that the flesh-and-blood individuals who manage a corporation, in addition to the entity itself, understand the prospects of all legal liabilities associated with proposed conduct, both of personal and corporate nature.[323]

Indeed, the reality of corporate representation that the professional responsibility canon has failed to address is that corporations, as entities, cannot understand the consequences of their actions without the help and voices of their constituents.[324] The current Model Rules do not consider the personal liability of such constituents in conjunction with their decision-making on behalf of the corporation. When advising the corporation through its constituents, the corporate attorney should, therefore, make directors and officers aware that they may be included as defendants in claims against the corporation and that they might incur personal liability.

2. Informing Corporate Constituents About Personal Risks and Liabilities

The restructuring of the relationship between the corporate attorney and a corporation's constituents is appropriate and beneficial. A corporate attorney *can* inform corporate constituents of their personal risks without forming an unwanted attorney-client relationship or compromising the client's interests.[325] Part of the current problem comes from the interpretation of Model Rule 4.3, which states, in pertinent part, that an attorney will "typically" need to explain and identify the nature of the client's representation and the client's interests to avoid any misunderstandings.[326] But it is unclear if this language is mandatory or merely advisory.[327] Although courts have expanded the duties of attorneys to third-party nonclients in the past,[328] "considerable confusion and disagreement" concerning the scope of such duties persist.[329]

First, warning a constituent of personal risks attached to a particular course of action is very different from advising the constituent about what the lawyer thinks the constituent should do. Objective legal information is very different than subjective legal advice.[330] For example, explaining to a constituent that the constituent may need to hire an attorney or warning a constituent that there may be personal risks associated with signing a securities filing is notably different than the corporation's attorney advising the constituent to

322. *See* Reed, *supra* note 19; *supra* text accompanying notes 153–56.
323. *See* Schaefer, *supra* note 98, at 979.
324. *See supra* Part I.A.
325. *See supra* text accompanying notes 121–37.
326. *See* MODEL RULES OF PRO. CONDUCT r. 4.3 cmt. 1 (AM. BAR ASS'N 2020).
327. *See id.*
328. *See* Moore, *supra* note 232, at 659–60.
329. *Id.* at 660.
330. *See supra* note 120 and accompanying text.

avoid signing the filing for personal reasons. By presenting a realistic preview of the personal risks associated with certain conduct, the corporate attorney can provide the constituent and the corporate client with the tools to make more informed decisions.[331] Such information is just that—information.[332]

Second, relationships already exist in the law whereby nonclients receive greater information, as well as warnings, about personal risks.[333] For example, judges are permitted to warn defendants of the risks of pursuing joint representation.[334] And attorneys in union representation contexts are required to "fully" explain the nature of the representation to union members.[335] Thus, corporate attorneys informing corporations' duly authorized constituents of potential personal risks associated with routine business conduct is not as remarkable as one may think. Aside from joint representation contexts, the law has thus far typically treated corporate constituents as third-party nonclients; realistically, a far closer relationship than that exists between the corporate attorney and the corporate client's employees.[336]

C. A New Model Rule: Model Rule 1.13(h)

The current Model Rules provide helpful guidance to the corporate attorney in dealing with the general matters of corporate representation.[337] The Model Rules, as they currently stand, are a good starting point to assess the issues addressed herein.[338] The relevant Model Rules, however, are insufficient to ensure: (1) that the corporate attorney provides the corporate client with competent and complete representation and (2) that the personal interests of the corporation's management and leadership are protected.[339]

The Model Rules should, therefore, strongly encourage, if not require, corporate attorneys to inform corporate clients' officers, directors, and other duly authorized constituents of the personal risks that may arise from engaging in certain conduct on behalf of the corporation and that the constituent should retain an independent attorney, if necessary. Thus, a new Model Rule 1.13(h) should be drafted, as follows:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall inform such duly authorized constituents of all reasonably foreseeable personal risks and liabilities that may arise from relying on advice given in the best interests

331. *See supra* note 120 and accompanying text.
332. *See supra* note 120 and accompanying text.
333. *See supra* text accompanying notes 121–37.
334. *See supra* text accompanying notes 121–37.
335. *See supra* text accompanying notes 121–37.
336. *See supra* note 101 and accompanying text.
337. *See generally* MODEL RULES OF PRO. CONDUCT scope (AM. BAR ASS'N 2020).
338. *See generally id*.
339. *See generally* Rutledge, *supra* note 46.

> of the organization. The lawyer shall also advise these constituents of their need to retain independent counsel where such interests may arise.[340]

It is possible that such warnings—if given too frequently or in inappropriate circumstances—may have a chilling effect on the interactions and conversations corporate attorneys have with corporate officers in routine counseling.[341] But, in an increasingly litigious environment, where officers and directors can face irreversibly harmful liability for corporate conduct, the adoption of such a rule will surely guarantee that corporate officers' interests are neither confused nor overlooked in daily business affairs.[342] Such a rule can prevent grave personal consequences for constituents by requiring that attorneys provide proper information.[343]

CONCLUSION

Corporate constituents need legal advice to effectively carry out their fiduciary duties and other daily corporate responsibilities.[344] These individuals are frequently the ultimate decision-makers for the corporation.[345] These same individuals often have personal interests that may differ from the corporation's interests.[346] In such situations, a constituent may not be able to act in the corporation's best interests. Without information about the consequences of their actions, these individuals also may struggle to protect themselves, especially in a rapidly changing corporate environment.

Accordingly, corporate law should transition away from the status quo of corporate attorneys' communications with corporate constituents.[347] Instead, corporate attorneys should give information "within the corporate structure"[348] and "without disruption of the chain of command created by the corporate entity."[349] The continuity of this corporate chain of command includes advising corporations' constituents about their personal interests and the personal liabilities associated with relying on corporate counsel's advice. A new rule—Model Rule 1.13(h)—should be created and subsequently adopted by state codes so that corporate attorneys can inform corporations' officers, directors, and other duly authorized constituents of their personal liabilities before it is too late.

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340. *See* Nayar, *supra* note 221, at 337.

341. *See* Kara Scannell, *For Corporate Lawyers, There's Just One Client*, WALL ST. J. (Apr. 13, 2009, 12:01 AM), https://www.wsj.com/articles/SB123957668346611921 [https://perma.cc/ZFM6-R94R].

342. *See supra* note 19 and accompanying text.

343. *See id.*

344. *See* Irma S. Russell, *Wait, Wait, Don't Tell Me: Accountability, Plausible Deniability, Model Rule 1.13, and the Role of Corporate Counsel in an Age of Enhanced Monitoring*, 7 GEO. WASH. J. OF ENERGY & ENV'T. L. 67, 72 (2016).

345. *See id.*

346. *See* Duffy, *supra* note 19, at 1592.

347. *See supra* Part II.

348. Russell, *supra* note 344, at 72.

349. *Id.*