University of St. Thomas Law Journal

Volume 10
Issue 1 *Fall 2012*

Article 10

2012

Officious Meddler or Ethical Advocate? Corporate Counsel's Model Rule 1.13 Obligation to Report Up the Ladder: Defining "Related to the Representation"

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NOTE

OFFICIOUS MEDDLER OR ETHICAL ADVOCATE? CORPORATE COUNSEL'S MODEL RULE 1.13 OBLIGATION TO REPORT UP THE LADDER: DEFINING "RELATED TO THE REPRESENTATION"

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When a lawyer for a corporation knows of wrongdoing within the organization, the Model Rules of Professional Conduct trigger action by the attorney. The contours of the trigger are coterminous with information known to the corporate lawyer through his representation, as defined in both Model Rules 1.6 (Confidentiality) and 1.13 (Organization As Client). Each of these rules is essential to fully understanding the other, but on close analysis their language is apparently conflicting. This Note argues that the Model Rules of Professional Conduct use the phrase "related to the representation" in Rule 1.13 with a substantively different meaning than their use of the very similar phrase "relating to the representation" in Rule 1.6.

I. HYPOTHETICAL

Acme, Inc. is a growing medical technology company with offices in several states and is currently involved in a product liability dispute with an independent distributor. Acme hired Broad & Narrow, a reputable law firm, to defend against all of the distributor's claims that seem likely to go to trial. Broad & Narrow is working under the guidance of Mr. Gray, Acme's in-house counsel, who gave Broad & Narrow a massive electronic file containing thousands of e-mails. The e-mails were largely between Acme executives and its regional distributors, which Broad & Narrow needed in

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order to review all discoverable material and prepare for a potential trial, although the e-mail file does not appear to have been assembled with care. While looking through the thousands of e-mails, Broad & Narrow learn that (1) Acme is almost certainly deliberately withholding some of the most pertinent internal communication regarding the liability claim, contrary to discovery rules; and (2) Acme's medical director is not licensed.

Unsettled by their client's seeming two-fold violation of the law and unsure of what they are professionally bound or permitted to do, Broad & Narrow consult their state's ethics code, which has adopted the Model Rules of Professional Conduct in full. Model Rule 1.13 "Organization as Client" subsection (b) states:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act *in a matter related to the representation* that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer *shall proceed* as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer *shall refer the matter to higher authority in the organization*, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[1]

"My only question is this," Broad says to Narrow, "which of the two breaches are 'related to the representation'? Because if Acme is breaking the law and it's related to our representation, it seems that according to 1.13 we have to take it up the ladder—at the very least we've got to go to Mr. Gray with this."

"Well," Narrow responds, scratching her head, "we definitely have to ask about those internal e-mails that are missing. They're clearly inside our lane—'related to the representation,' to quote the rule—but I don't know about that medical license stuff. It doesn't have anything to do with the litigation that we're working on. I don't think we have a duty to report it to anybody."

"Hmm, this is confusing," answers Broad as he continues to flip through the Model Rules. "Rule 1.6 'Confidentiality of Information' uses similar language to 1.13. It reads, 'a lawyer shall not reveal information

1. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2010) (emphasis added). There are four elements that must be met before the "shall" provision is triggered: it must be a (1) "matter related to the representation"; (2) "violation of a legal obligation"; (3) "that reasonably might be imputed to the organization"; and (4) "is likely to result in substantial injury to the organization." The focus of this Note is element (1). In dealing with the first element while contemplating the hypothetical above, I assume that elements (2), (3), and (4) are met. I call these three elements the "harm threshold" of Rule 1.13.

relating to the representation of a client.' This keeps us from revealing *all* information 'relating to the representation,' absent some pretty narrow exceptions. That seems really broad—it protects *everything* we might learn about a client relating to the representation. Does 1.13 mean to use the phrase 'related to the representation' in the same way? If it does, would it require that we go up the ladder on each of these issues? Or is it possible that something is not sufficiently 'related to the representation' to warrant a Rule 1.13 duty to report up the corporate ladder, and is also not 'relating to the representation' enough to warrant the Rule 1.6 duty of attorney-client confidentiality? That doesn't seem like a correct reading of the two rules. Do the 'related to the representation' phrases mean different things in each rule?"

II. INTRODUCTION

If there was ever a time for corporate soul-searching, it was the years following the collapse of Enron and WorldCom in 2001 and 2002. Their embarrassing frauds have been widely commented on and will not be recounted here. However, we must not forget that lawyers were very near the center of it all, and issues of professional responsibility in the corporate context warrant continuing scrutiny.

Even before the details of the massive scandals were fleshed out, people wanted to know "where were the lawyers?"[2] Examining this question, the American Bar Association Task Force on Corporate Responsibility studied anew two age-old duties lawyers owe to organizational clients: to keep confidences and to protect from harm.[3] The Task Force acknowledged that "[i]t is not clear . . . what the [Model Rules of Professional Conduct] permit the lawyer to disclose upon learning of corporate misconduct through confidential consultation with a corporate officer,"[4] and it made several recommendations—subsequently adopted—that attempt to clarify what lawyers must or may do in such situations.[5]

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2. *See, e.g.*, Bernard Carrey, *Enron—Where Were the Lawyers?*, 27 VT. L. REV. 871, 871–72 (2003); New Jersey Commission on Professionalism in the Law, New Jersey State Bar Association, *Standing Up to Corruption and Greed*, 211 N.J. LAW., Apr. 2003, at 42; Lawrence Hamermesh, *Corporate Responsibility in Real Time: The Work (So Far) of the ABA Task Force on Corporate Responsibility*, 21 DEL. LAW. 18, Spring 2003, at 21 (discussing the question "where were the lawyers" in the context of the role of the ABA Task Force on Corporate Responsibility, which was formed after the Enron scandal).

3. *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW. 189, Nov. 2002, at 203–207.

4. *Id.* at 205.

5. *See* ABA Res. Nos. 119A–119B, House of Delegates, Annual Meeting 12–13 (Aug. 11–12, 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/2003journal.authcheckdam.pdf; *see also* ABA Res. No. 119B, House of Delegates, Annual Meeting, Report 3–6 (Aug. 11–12, 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119b.authcheckdam.pdf (providing the proposed comments for Rule 1.13, which were adopted by the ABA).

It succeeds in many important ways, but the Task Force missed one important detail of textual dissonance between two key ethical rules. Through its focus on corporate decision making, it refined and clarified the duties owed by a general counsel, but it failed to answer a question more relevant to the numerous attorneys employed by corporations as outside counsel: What are an outside counsel's obligations when confronted with misconduct that falls beyond the immediate purview of his assigned task—in other words, is "outside his lane"? Rule 1.6 of the Model Rules of Professional Conduct ("Model Rules" or "Rules") binds lawyers to near-absolute confidentiality regarding all information "relating to the representation" of a client. If the client is a corporation, Model Rule 1.13 further binds lawyers to refer to corporate authorities certain misconduct by employees or officers in matters "related to the representation," and allows disclosure outside the organization in some limited circumstances, even if it might otherwise violate the confidentiality mandated by Model Rule 1.6. The similar language in each of these rules can be confusing when viewed in light of the other. This confusion is often overlooked, perhaps because most practicing attorneys have well-honed instincts for ethical behavior, rather than a rote adherence to the text. If a lawyer representing an organization becomes aware of impropriety within the organization, but not in a matter sufficiently "related to the representation" to trigger his 1.13 duty, is that information "relating to the representation" such that it deserves Rule 1.6 protection? What exactly does Model Rule 1.13 mean by "related to the representation"?

In this Note, I seek to analyze the interplay of Model Rule 1.13(b) with Rule 1.6(a), and analyze two possible interpretations of Rule 1.13's "related to the representation." Specifically, in addressing the above hypothetical, I consider whether Broad & Narrow *must* go up the ladder at Acme, Inc. with their knowledge of each instance of wrongdoing. I will discuss both what I view as the minimum required of Broad & Narrow under the Model Rules and the aspirational ethic for the firm as outside counsel. There is a surprising lack of scholarship addressing the particular question of what an outside counsel may be obligated or allowed to do when it comes to discovery of corporate wrongdoing that is not directly related to the legal matter he is handling—"outside his lane," as many call it.[6]

The result of my analysis is that the phrase "matter related to the representation" in Rule 1.13(b) has a completely different meaning than the use

6. Although understandably motivated by the large corporate scandals, the Task Force on Corporate Responsibility focuses on the duties of an in-house general counsel to the detriment of outlining the duties owed by outside counsel. *See* ABA Res. No. 119A, House of Delegates, Annual Meeting, Report, Section II, 9–12 (Aug. 11–12, 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119a.authcheckdam.pdf. The "related to the representation" language predates the 2003 changes, but is of arguably greater import to decision making by outside counsel than the updated language itself.

of the phrase "information relating to the representation" in Rule 1.6(a). I conclude that Rule 1.13's use of the phrase should be construed narrowly insofar as it establishes a trigger for up-the-ladder reporting. As such, I offer a draft comment to modify Comment 6 to Rule 1.13 that addresses the differentiation between each phrase and clarifies how attorneys are bound to act when representing organizations, particularly as outside counsel.[7]

III. Intent of Rules 1.6 and 1.13 and the 2003 Changes

The law profession's ethics rules seek to strike a balance between the characteristic of trustworthiness—built upon the ability to keep confidences—and the trait of independence, which is necessary for an "officer of the legal system" having a "special responsibility for the quality of justice."[8] It will be important to keep this theme in mind as we consider the obligations Rules 1.6 and 1.13 impose upon lawyers representing organizations. Considered together, these rules demand that lawyers keep secrets as a member of the corporate team while simultaneously performing a gatekeeper function with independent judgment.

A lawyer's obligation to maintain strict confidence with his clients is a "core value" of the legal profession.[9] It is granted privilege under the Law of Evidence[10] and has been continuously enshrined in the rules of professional ethics since at least 1908.[11] The 1969 Code of Professional Responsibility defined the duty succinctly: "[A] person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client."[12] The 1969 Code also seeks to keep lawyers professionally independent, even

7. Model Rules of Prof'l Conduct R. 1.13 cmt. 6. Comment 6 is the first of three comments addressing Rule 1.13's relation to other rules.

8. *Id*. at Preamble.

9. Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. Pa. J. Int'l Econ. L. 879, 891 (2000).

10. Fed. R. Evid. 502; *see also* Upjohn Co. v. United States, 449 U.S. 383 (1981) (for a discussion of the attorney-client privilege in the context of corporations and their employees); 8 Wigmore Evidence § 2290 (McNaughton rev. 1961) (explaining the history of the privilege of confidentiality).

11. Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1107 (1985).

12. Model Code of Prof'l Responsibility EC 3-3 (1980). The code defines "confidence" as referring to information protected by the attorney-client privilege under applicable law, and "secret" as referring to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Model Code of Prof'l Responsibility DR 4-101(A)(1980). According to one scholar, "the term 'secret,' while broadly construed, is limited to information about the client 'gained in the professional relationship' "; thus, the Model Rules arguably grant broader protection than the Code because "information outside of the professional relationship is also protected, so long as it relates to the relationship." Subin, *supra* note 11, at 1150 n.305 (citing Model Code of Prof'l Responsibility DR 4-101(A)(1969) and Model Rules of Prof'l Conduct R. 1.6 (1983)).

when employed by and representing organizations.[13] The current incarnation of lawyers' ethics norms were first adopted in 1983 as the Model Rules of Professional Conduct. Most recently bearing on the tension between trustworthiness and independence, the Model Rules were amended in 2003 in the wake of serious and well-publicized corporate fraud scandals.

The subject of intense debate, amended Rule 1.6 was approved by a vote of 218–201, and the new Rule 1.13 passed by a margin of 239–147.[14] The new Rule 1.6 allows greater opportunity for disclosure of confidential information, and the new Rule 1.13 now mandates up-the-ladder reporting in certain situations, rather than merely allowing it. Of particular importance to an analysis of Rules 1.6 and 1.13 is the theme of tension between trustworthiness and independent judgment, which form the basis for a lawyer's obligations to his corporate client.

IV. Defining the Terms

The meaning of the words "related to the representation" as used in Model Rule 1.13(b) bear directly upon how an organization's outside attorney must or may treat an organization's confidential information. A full understanding of this phrase, in order to alleviate confusion in its meaning, must necessarily begin with defining individual terms and phrases in Model Rule 1.13(b).

(1) "A lawyer for an organization." Obviously, this person may be either inside or outside counsel.[15] It is important to note that both are included. Although the rule may impose obligations differing in *degree—e.g.*, the up-the-ladder duty may potentially be triggered sooner for in-house counsel—the duty still exists for outside lawyers.[16]

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13. Model Code of Prof'l Responsibility EC 5-24 (1980). ("Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles."). However, the Model Code had no direct counterpart to Model Rule 1.13. Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics, Law. Deskbk. Prof. Resp. § 1.13 (2012–13).

14. *See* ABA Res. Nos. 119A–119B, House of Delegates, Annual Meeting 12–13 (Aug. 11–12, 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119a.authcheckdam.pdf.

15. *See* Model Rules of Prof'l Conduct R. 1.13(a) (stating that "[a] lawyer *employed* or *retained* by an organization represents the organization . . . .") (emphasis added). By its plain meaning, this may include inside or outside lawyers for a corporation. The conclusion that both inside and outside counsel are included in the term "lawyer for an organization" is affirmed by Comment 19 to Rule 1.8, which prohibits intimate relationships between certain constituents of an organization and "a lawyer for the organization (whether inside counsel or outside counsel)."

16. *See* E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 Bus. Law. 1, 22 (2006) (noting that "[i]n-house counsel, and the general counsel in particular, usually have a deeper and broader knowledge of the client's business than do outside counsel."); *see also* Geoffrey C. Hazard, *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1019 (1997) (emphasizing the difference between inside and outside counsel: "To put the point bluntly, a lawyer in independent practice is sheltered from the informal, back-channel information that flows around the company

(2) "Knows." This denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.[17] What might denote actual knowledge in any situation is impossible to define precisely with a general rule, as here. However, allowing knowledge to be inferred from circumstances permits room for intelligent judgment. Further, "knows" obliges a higher burden than "reasonable belief," a phrase used elsewhere in the Model Rules.[18] Rule 1.13 has a knowledge component whereas Rule 1.6 does not.

(3) "Matter." This word immediately precedes and qualifies the phrase "related to the representation" in Model Rule 1.13(b). Neither Model Rule 1.0 (Terminology) nor 1.13 defines "matter," although it is used seventy-two times in the Model Rules and comments. In various instances, "matter" has a meaning suggestive of a point of law or fact.[19] Elsewhere in the Model Rules it is used to mean a case, controversy, or legal task on which a lawyer may work.[20] Courts have variously said that a "matter" is the substantial facts upon which an attorney may base a claim or a defense,[21] or that it is the particular subject of litigation—the cause for which an action is brought.[22] These judicial definitions roughly parallel the way "matter" is used in the Model Rules. Whichever of the meanings of "matter" used in the Rules is meant in Rule 1.13, it arguably has a narrower connotation than the term "information" as used in Rule 1.6.

(4) "Related to the representation." This phrase is not defined by the rules. Significantly, it is conditioned by the preceding and following clauses, so that only certain types of "matters" related to the representation of a client will trigger the mandatory reporting outlined in Rule 1.13. The Model Rules' use of this exact language in Rule 1.13 is confusing because it is almost the exact same as the phrase "relating to the representation," as

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water cooler. Instead, engagement of an independent law firm is necessarily predicated on a distillation of the facts about the matter in question.").

17. MODEL RULES OF PROF'L CONDUCT R. 1.0(f).

18. *Id.* at 1.0(i) ("'Reasonable belief' . . . when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."). "Reasonable belief" is the burden a lawyer must meet under Model Rule 1.6 for permissive disclosure in the narrow circumstances outlined in 1.6(b)(1)–(6). Contrast this with the Model Rule 1.13(b) requirement that a lawyer "know" of harmful wrongdoing before he is required to report up within a corporation.

19. *Id.* at Scope [15] (outlining the context for understanding the role of lawyers, the Scope says to look at "statutes relating to matters of licensure"); *id.* at 1.0(i) (stating "'reasonable belief' . . . when used in reference to a lawyer denotes that the lawyer believes the matter in question").

20. MODEL RULES OF PROF'L CONDUCT, Preamble [3] (providing that attorneys may at times be neutral third-parties rather than advocates, helping others solve a "dispute or other matter"); *id.* at 1.0(k) (stating that "'[s]creened' denotes the isolation of a lawyer from any participation in a matter").

21. Boucher v. Pure Oil Co., 101 So. 2d 408, 410 (Fla. Dist. Ct. App. 1958) (citing Black's Law Dictionary).

22. Quinault Tribe v. Gallagher, 368 F.2d 648, 654 (9th Cir. 1966) (defining "matter in controversy").

used in Rule 1.6.[23] Given this, there are two possible interpretations of "related to the representation" in Rule 1.13. Below, I first present an argument for a broad interpretation of the phrase, and then secondly address a narrow interpretation. I conclude that the twin phrases are indeed used differently—broadly in Rule 1.6 and narrowly in Rule 1.13.

V. Analysis of "Related to the Representation"

A. Broad Interpretation

The broad interpretation of the phrase relies upon the profession's clear understanding of what is "information relating to the representation" according to Rule 1.6. This view equates Rule 1.13's language with Rule 1.6's such that if an attorney knows of wrongdoing by an officer or employee of a corporate client, and that knowledge is sufficiently "relating to the representation" to warrant Rule 1.6 confidentiality, that knowledge is also "related to the representation" under Rule 1.13 and triggers Rule 1.13's up-the-ladder analysis.[24] Under this interpretation, Broad & Narrow's Rule 1.13 up-the-ladder duties are triggered for both of the known instances of wrongdoing (assuming the wrongdoing also meets the "harm threshold"[25]), even though the medical licensure issue is not related to the attorneys' specific work assignment.[26] But under this broad interpretation, how is the re-

23. One state's version of the Model Rules defines this term of art. The Oregon Rules of Prof'l Conduct R. 1.0(f) (2012), which closely mirror the American Bar Association's Model Rules of Professional Conduct, states: "'Information relating to the representation of a client' denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." However, this definition seems both circular and vague, essentially saying that information meets the threshold for being protected if (1) it is protected and (2) the client would not want it revealed.

24. This conclusion is based upon the textual canon of construction *ejusdem generis*, which holds that things "of the same kind" are all included in the same class. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 352 n.44 (2010). Here, I assume that Rule 1.6's use establishes the meaning of the class rather than Rule 1.13 simply because I believe the confidentiality rule to be both clearer and longer established as a norm. *See*, *e.g.*, Restatement (Third) of the Law Governing Lawyers § 59 (2000). The Model Rules of Professional Conduct Rule 1.8(b) also uses a similar phrase. It prohibits a lawyer from using "information relating to representation of a client" to the client's disadvantage without consent. Model Rules of Prof'l Conduct R. 1.8(b). This usage has a broad meaning that is interchangeable with Rule 1.6's use.

25. "Harm Threshold," as defined in *supra* note 1, occurs when elements 2–4 of Rule 1.13 are met.

26. Whether or not a matter is related to an attorney's work assignment is difficult to define, and necessarily requires some level of subjective judgment. Several factors ought to be considered: Is the lawyer outside or inside counsel? What are the length and scope of the representation? What is the level of the attorney's exposure to and work on other legal services and tasks for the corporation? In considering the overall decision on whether to report up-the-ladder, Comment 4 to Rule 1.13—newly added in 2002—lists several factors: "the lawyer should give due consideration to [(1)] the seriousness of the violation"; (2) "the responsibility in the organization and apparent motivation of [the purported wrongdoer]"; (3) "the policies of the organization concerning such

lationship between an attorney's knowledge of client wrongdoing and the attorney's representation of a client evaluated?

The Model Rules offer no guidance, although common sense sheds light on the duty of confidentiality. No practitioner would deny that Rule 1.6 binds Broad & Narrow to keep confidential their knowledge of each of the two issues listed in the hypotheticals (unless a 1.6(b) or 1.13(c) permissive exception applies). All would agree that each of the two matters is sufficiently "relating to the representation"—each stems from action taken by the corporation through its agents, and Broad & Narrow only came to the knowledge through their representation.[27] Under the broad interpretation, because they are bound by Rule 1.6 to protect this information, it follows that Broad & Narrow have an obligation to report these matters up-the-ladder (assuming they also determine that the harm threshold is met). This view, however, has minimal support within the legal profession.[28]

Unfortunately, there is little case law to further guide an analysis.[29] The D.C. Circuit, in deciding whether a lawyer's dishonesty was "related to the representation," discussed only practice-related versus non-practice-related dishonesty, concluding that all practice-related actions are "related to the representation."[30] This supports the broad interpretation.

A structural analysis of Rule 1.13 in its entirety also supports this conclusion. Consider the following: 1.13(c) grants a narrow exception to the strictures of Rule 1.6 confidentiality. Subsection (c) permits an attorney to disclose otherwise confidential information if he first reports wrongdoing

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matters"; and (4) "any other relevant considerations." Moreover, "[u]nless the lawyer reasonably believes it is not necessary in the best interest of the organization" immediately precedes the "shall refer" mandate in Rule 1.13(b), granting a wide berth for discretionary judgment.

27. This is a "but for" approach to understanding what information is relating to the representation sufficient to earn 1.6 protection. If the attorney would not have the knowledge "but for" his representation, that knowledge is confidential.

28. *See* Thomas G. Wilkinson Jr., *Confidential Communications of an Organizational Client*, 34 PA. LAW., Jan.–Feb. 2012, at 52 (supporting my broad interpretation, a Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee advisory opinion said the following to a municipal attorney who received a question from an organizational constituent regarding the legality of bringing a firearm to a city meeting: "Having determined that the communications were confidential, inquirer was further advised that if inquirer had reason to believe that the member's actions in bringing a weapon to a municipal meeting could be imputed to the municipality or might result in substantial injury to the municipality, inquirer should proceed as is reasonably necessary in the best interests of the municipality per Rule 1.13(b)."). This might suggest a broad interpretation, however, the city attorney here is essentially an inside counsel, so arguably *all* issues that pertain to the organization's constituents are related to his representation.

29. Neither the ABA nor the bar associations of California, Illinois, Florida, the District of Columbia, Delaware, or New York published any advisory opinions that contribute to a definition of "related to the representation."

30. *In re Kennedy*, 542 A.2d 1225, 1229–30 (D.C. 1988). Model Rule 8.4(c) holds it is professional misconduct for lawyers to engage in dishonest conduct. Of course, under the Model Rules, *all* attorney dishonesty is professional misconduct. The court merely used the phrase "related to representation" in order to measure the weight of the offense, finding here that practice-related dishonesty qualifies as related to representation.

all the way up-the-ladder to no avail and if he "reasonably believes" the corporation will suffer substantial injury as a result.[31] Rule 1.13(d) says that subsection (c)'s permissive disclosure may not be invoked "with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law"—essentially, a lawyer hired for the purpose of conducting an internal investigation is not permitted to report outside the corporation under 1.13(c).[32] By explicitly saying that attorneys charged with investigating claims of alleged violations of law *may not* act pursuant to 1.13(c), the Rule is implicitly saying that in an instance where an attorney *not* charged with investigating violations, but who nevertheless discovers such violations, *may* invoke the permissive grant of Rule 1.13(c).[33]

To employ 1.13(c), an attorney must first survive the four elements of 1.13(b), which bind him to the mandatory up-the-ladder reporting requirement. One of those four elements, of course, is that it be a "matter related to the representation." Therefore, a claim of an alleged violation of law that an attorney inadvertently stumbles upon, even if completely unrelated to the attorney's work assignment, is a "matter related to the representation." This conclusion is also consistent with the broad interpretation.

The Sarbanes-Oxley Act of 2002 (SOX), enacted only a year before Rule 1.13 and containing a similar provision, further supports the notion that the ABA House of Delegates intended the "shall refer" provision of Model Rule 1.13 to include a broad swath of what is "related to the representation." SOX mandated that the Securities and Exchange Commission (SEC) write a rule "requiring an attorney [that appears before the SEC] to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company," and if

31. MODEL RULES OF PROF'L CONDUCT R. 1.13(c). This permitted disclosure can be grouped with the other valid reasons for revealing confidences outlined in Rule 1.6(b). Interestingly, one scholar complains that Rule 1.13(c), as amended in the most recent updates to the Rules, is totally impotent. He argues that because it serves to protect the corporation from harm it might suffer as a result of its misconduct (harm presumably from public relations fallout or criminal or civil liability), rather than a third party whom the misconduct would directly harm, the provision only allows lawyers to report things that are likely to become public anyhow. Monroe H. Freedman, *The "Corporate Watch Dogs" That Can't Bark: How The New ABA Ethical Rules Protect Corporate Fraud*, 8 D.C. L. REV. 225, 230–31 (2004).

32. MODEL RULES OF PROF'L CONDUCT R. 1.13(d). This also applies to lawyers defending organizations against a "claim arising out of an alleged violation of law."

33. This inference is based upon the textual canon of construction *expressio unius*, which holds that the inclusion of one thing indicates the exclusion of others not mentioned. Scott, *supra* note 24, at 352 n.42 (citing Tate v. Ogg, 195 S.E. 496, 499 (Va. 1938) (holding that where a statute applied to "any horse, mule, cattle, hog, sheep or goat," it did not apply to turkeys) (internal quotations omitted)).

these persons do not adequately respond to the report, then to report it to the board of directors.[34]

Although these regulations closely mirror the up-the-ladder requirements of Rule 1.13, SOX does not use the "related to the representation" language, but instead places upon securities lawyers the duty to report *all* securities misconduct they discover. Given the massive public recoil from corporate scandals in the preceding several years, the ABA, in the interest of maintaining the public trust for the profession, had much incentive to amend Rule 1.13. By broadly mandating up-the-ladder reporting of wrongdoing, the ABA marched lockstep with what Congress required of SEC lawyers through SOX.[35] This suggests a broad interpretation of what is "related to the representation."

Lastly, consider the underlying policies of Rules 1.6 and 1.13. Rule 1.6 prohibits lawyers from betraying clients; it is meant to set a solid foundation for "the trust that is the hallmark of the client-lawyer relationship."[36] Serving this purpose, the rule offers an ample blanket of protection covering information relating to the relationship. Rule 1.13 unequivocally names organizations as clients and requires lawyers to act in the organizations' best interest.[37] The organization surely has an interest in addressing wrongdoing where it exists within its own confines. It would seem contrary to this purpose if the up-the-ladder mandate of 1.13(b) allowed an organization's lawyer with knowledge of wrongdoing to keep that information to himself. With this in mind, Rule 1.6's broad interpretation seems appropriate in Rule 1.13.

B. Narrow Interpretation

The second possible interpretation of "related to the representation" is far narrower. This interpretation restricts the category of what might trigger up-the-ladder reports under Rule 1.13 to only those things relating to the actual work assignment or specific task of the attorney. This narrow interpretation would require Broad & Narrow to report up-the-ladder the miss-

34. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245(1) (2006). The SEC's up-the-ladder regulation went into place in February 2003. 17 C.F.R. § 205.1 (2003).

35. *See* Catharine E. Stark, *Regulating Corporate Governance: Amended Rules of Professional Conduct Allow Lawyers to Make the World a More Ethical Place*, 53 CATH. U. L. REV. 1195, 1195–96 (2004) (describing the adoption of the SEC standards by the ABA within a week of their taking effect).

36. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2.

37. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmts. 3–4. There exists the temptation to view the report-out language of Rule 1.13(c) as the primary "gatekeeper" provision. However, 1.13(c)'s safety-valve effect does not define the policy underlying the entire rule. A lawyer best acts as a gatekeeper with special responsibilities to the public by influencing his client through persuasion. *See* Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 U. ST. THOMAS L.J. 358, 358–59 (2009) ("Among the private-sector gatekeeper occupations . . . the legal profession plays a uniquely important role . . . . The responsibility to persuade and influence [corporate clients] pursuant to a lawyer's independent professional judgment is a form of leadership.").

ing e-mails, but not the medical licensure issue (assuming the latter has no bearing on the current litigation). The Lawyer's Deskbook on Professional Responsibility supports this interpretation:

> The text of Rule 1.13 seems to limit the lawyer's obligation to act only to cases in which the misconduct of constituent is connected "to a matter related to the representation" by the lawyer. In other words, if the lawyer for the organization represents the client in a narrow matter, the obligation only arises with respect to constituent action related to the matter and not other matters generally. There is no general obligation for a lawyer to be an officious meddler.[38]

This conclusion—that what is "related to the representation" under Rule 1.13 is far different than what qualifies under Rule 1.6—is supported by understanding the different intents of each rule. Rule 1.6 is *substantive* and Rule 1.13 is *procedural*. Because the function of Rule 1.6 is to *offer substantive protection from public disclosure*, it must widely cover as much information as it can. This is necessary in order to shield clients and minimize their fear of betrayal. It must define a category of information in order to meet its intent of keeping secret things secret. In contrast, the purpose of Rule 1.13 is procedural. By establishing a category of things "related to the representation," it offers very limited substantive protection, instead *outlining when a certain internal procedure must occur*. In other words, it defines a triggering event. A narrow interpretation of the phrase is better suited to serving this procedural end.[39]

A structural argument also supports this conclusion. Comment 6 to Rule 1.13 addresses Rule 1.13's relation to Rule 1.6, and it also uses the words "information relating to the representation."[40] It advises that Rule 1.13(c) is similar to Rule 1.6(b) in that it provides additional permissive disclosure exceptions. It qualifies this comparison, however, by stating that Rule 1.13(c) "does not modify" the grant contained in 1.6(b). This suggests that any terms common to both 1.13 and 1.6 have different meanings. If the category of "information relating to the representation" mentioned by Comment 6 to Rule 1.13 did *not* have a different meaning than that contemplated by Rule 1.6, why would it explicitly say that 1.13(c) does not modify 1.6(b)? If the comment had remained silent on this point, lawyers would be free to understand the "relating to the representation" categories in Rules 1.6 and 1.13 as if they were the same. Comment 6's modification prohibi-

38. ROTUNDA & DZIENKOWSKI, *supra* note 13, at § 1.13–2(b). This is the only identified work that addresses the question precisely and directly.

39. *See* Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, With Remarks on Precedents and Authorities*, 16 CARDOZO L. REV. 1989, 2003 n.24 (1995) ("*Quotiens idem sermo duas sententias exprimit, ea potissimum accipiatur, quae rei gerendae aptior est.* 'Whenever the same words express two meanings, that is to be adopted which is the better fitted for carrying out the proposed end.'").

40. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 6.

tion prevents this, which is consistent with a narrow interpretation of the phrase.

Additionally, the words accompanying "related to the representation" in Rule 1.13 suggest that it has a narrower meaning.[41] A lawyer must "know" of misconduct in a "matter" related to their representation. Model Rule 1.6 places no requirement on the level of an attorney's awareness—it simply protects all information, whether of a single fact or a complex situation. Here, Rule 1.13 requires that a corporate lawyer "know" of misconduct—a word that indicates that the lawyer must be able to assimilate multiple facts about a given situation and form a clear understanding that wrongdoing is occurring.[42] This places upon the lawyer a higher burden than a "reasonable belief" requirement and is certainly more difficult than possessing a single fact. Also, a "matter" has a different meaning than "information." "Matter" is a more precise term than "information," regardless of which of the meanings one understands Rule 1.13 to be using from the two connotations used elsewhere in the Model Rules.[43] If one accepts this, it follows that while all matters contemplated by Rule 1.13 are covered by Rule 1.6 protections, not all information receiving Rule 1.6 protection triggers the Rule 1.13 process. This affirms a narrow interpretation.

VI. The Narrow Interpretation is Correct

The broad interpretation, if correct, produces a result that is logically untenable. Thus, coupled with the above rationale, the narrow interpretation is right. Under the broad interpretation, "related to the representation" in Rule 1.13(b) has the same meaning as "relating to the representation" in Rule 1.6(a), such that if a particular piece of information about a corporate client must be maintained in confidence, it also must be reported up-the-ladder if the harm threshold is met. But, this means that *all* misconduct that meets the harm threshold must be reported. To conclude otherwise would be to recognize that *some* knowledge of wrongdoing does not trigger the "shall refer" duty, and that this knowledge does not warrant Rule 1.6 protection. This conclusion cannot be correct. It would remove any possibility that misconduct a corporate lawyer discovers while working is *not* related to his representation of the organization and undermines the trust-building intent of Rule 1.6.

41. Scott, *supra* note 24 at 362 ("Where the language of statutes varies, that variance should be given meaning.").

42. *See* Model Rules of Prof'l Conduct R. 1.0(f). ("A person's knowledge may be inferred from circumstances" suggests that knowledge is more than simply possessing a single fact. It may require analyzing a complex situation in its entirety in order to form a coherent and accurate picture of the truth).

43. From "Defining the Terms", *supra* Part IV, the two possibilities are that a "matter" may be the case, task, or legal assignment that an attorney is engaged with, or the substantial facts upon which a claim or defense is based.

If *all* misconduct must be reported up-the-ladder, as the broad interpretation suggests, why does Rule 1.13 even bother to add the phrase "related to the representation"? A broad duty to report all misconduct would be just as clearly defined without this wording. The only reason the phrase is necessary is because it means something other than it does in Rule 1.6(a). The mandatory "shall refer" duty, heightened in relation to its permissive nature prior to 2003, only applies to malfeasance that is related to the task or assignment upon which the attorney is working, has oversight on, or is otherwise responsible for. The narrow interpretation of "related to the representation" in Rule 1.13(b) is correct.

Under the proper, narrow interpretation, Broad & Narrow is bound to report up-the-ladder regarding the e-mails that are missing. Not only are they bound to report the e-mails' absence, but they also must report any other knowledge that they inferred from the circumstance, such as particular correspondence that are missing. Broad & Narrow are *not* bound to report up-the-ladder regarding the medical licensure issue.[44] Their situation is distinguishable from that of Mr. Gray, whose employment by Acme, Inc. as inside counsel confers upon him a far wider category of what is related to his representation. If he has the same knowledge of wrongdoing as Broad & Narrow, he is bound to report up-the-ladder regarding both issues, even possibly all the way to the board of directors, if no appropriate action is taken at a lower level.

As a matter of aspirational ethics, Broad & Narrow ought to report up-the-ladder regarding both issues.[45] The Model Rules highlight the legal profession's obligations to a client as being broader than what is mandated or limited by the Rules.[46] Trust builds upon open communication, and while Broad & Narrow do not want to develop a reputation as "officious meddlers," they do want to set the tone within their attorney-client relationship that the best interests of the client maintain a place of primacy. A lawyer ought to consider how well he is managing the risk to his client's reputation

44. In an odd twist on this interplay between Model Rules 1.6 and 1.13, the medical licensure issue would not trigger mandatory up-the-ladder reporting under 1.13, but if Broad & Narrow deemed that the issue was reasonably certain to cause substantial bodily harm (admittedly a very high threshold), they could permissively disclose outside the organization under Rule 1.6(b)—without having first reported up. Such an event, however rare, is conceivable under the Model Rules.

45. They *may* report up-the-ladder regarding the medical issue, even though the Rules themselves no longer address permissive reporting. It is now addressed in the comment. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 4 ("[A] lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization."). The decision to do so is not governed by the Rules, but rather is determined by Broad & Narrow's own professional judgment. The second sentence of the proposed draft comment highlights the permission to report up-the-ladder.

46. *See* Hamilton, *supra* note 37, at 367 (discussing the Model Rules Preamble's social contract for lawyers as counselors and Rule 2.1's exhortation to lawyers to provide candid advice).

through the advice he gives or chooses to not give, taking into account his client's long-term enlightened self-interest.[47] From a business leader's perspective, I would want my legal counselors—both inside counsel and outside attorneys—to ask themselves, "would the boss want to know this?" and "why am I not telling him?" In addition to these pragmatic concerns, Broad & Narrow should report both instances of wrongdoing as a matter of ethics for ethics' own sake. Whether one characterizes this final thought as an imperative of moral philosophy, faith-based values, or golden-rule ethics, reporting up-the-ladder is, in this case, simply the right thing to do.[48]

Given the nature of the violations of law in the hypothetical, both instances of wrongdoing should be addressed to Acme, Inc. By adopting the narrow interpretation of "related to representation," Broad & Narrow can show that they are trustworthy team players, capable of keeping secrets, while simultaneously demonstrating that they are ethically aware and cognizant of their duty to maintain a level of independence. The draft comment that follows seeks to clarify ambiguity existing because of the use of the similar language in Rules 1.6 and 1.13. With it, Broad & Narrow will have a surer understanding of how to act.

VII. Draft Comment

I propose this addition to Comment 6 to Rule 1.13 "Relation to Other Rules": In some instances, a lawyer may possess knowledge that is "information relating to the representation" such that Rule 1.6(a) requires confidentiality but is not sufficiently related to the services a lawyer provides for the organization that the knowledge is of a "matter related to the representation" under Rule 1.13(b), even if it otherwise fulfills the Rule 1.13(b) prerequisites. In these circumstances, the decision to voluntarily refer the matter to a higher authority in the organization is a matter of professional judgment ordinarily reserved to the lawyer.

47. *See id.* at 367–68 n.41.
48. *See id.* at 383–84 n.145.