LEGAL ETHICS RULES AND CORPORATIONS: WHAT'S "CLIENT" GOT TO DO WITH IT?

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The idea of a "client" is the underlying concept that now defines lawyers' identities in American legal ethics. The original ideal of lawyers serving clients is akin to that of doctors serving patients. It derives much of its appeal from the idea of providing personal service. In America, and in much of the law of Western civilization, this is buttressed by the ideal of protecting individual rights. Doctors, however, unlike lawyers with entity clients, can only have patients who are actual persons. Lawyers' clients, on the other hand, can be purely mental constructs—legal fictions such as corporations or government agencies.¹

This is a problem in legal ethics because of the theoretical significance of what we call clients. Clients hire lawyers to achieve client purposes, define the scope of a lawyer's employment, give directions to lawyers as to objectives, and have authority to make decisions, within the law, as to how to proceed and whether to settle.² Lawyers owe the client the duty to communicate, provide necessary information, obtain informed consent, and consult about the means by which the attorney will attempt to achieve the client's ends.³ For a client who is a person, this makes sense. For an entity

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- See ROBERT CHARLES CLARK, CORPORATE LAW § 1.2.3 (1986). When using the term legal fiction to refer to an entity client, it is important to keep in mind that the client is only "fictional" in the sense of being a "legal person" with a conscious ability to act. See id. For example, Ford Motor Company and the U.S. Army Corps of Engineers have consequences in the world. Organizations permit concerted action by individual persons, achieving results that individuals acting alone could not. See id. Organizations, as the Model Rules recognize, act through their constituents and not on their own. Model Rules of Prof'l Conduct R. 1.13(a) (2004). They do not, however, act only through their "duly authorized constituents," id., and therein lies the problem for lawyers.
- MODEL RULES OF PROF'L CONDUCT R. 1.2 (2004); OHIO CODE OF PROF'L RESPONSIBILITY EC 7-7, 7-8 (2004). It now appears likely that Ohio will adopt the Model Rules with substantial revisions as its standards for legal ethics and discipline. *See infra* note 28.
 - Model Rules of Prof'l Conduct R. 1.4 (2004); Ohio Code of Prof'l (continued)

client, it may not. Entity clients are made up of different people whose interests and purposes may conflict.⁴ Some of the people will be more sophisticated than their lawyers about certain matters, and some will not be. Those involved include officers, employees, managers, shareholders, directors, and often both current and former employees with pension or health insurance interests.⁵ Also affected are suppliers, creditors, partners, and others on the outside who have varying interests and are able to sue lawyers for dereliction of duty.⁶

In order to provide coherence, and have someone or some group give instructions, lawyers tend to define a hierarchy within entity clients, a "highest authority" upon whose directions lawyers can rely. But this is different from an individual person deciding, for example, that she wants to be divorced. The decision may or may not be in her best interests, but she has the relevant information and is in the best position to make the decision and take responsibility for the consequences. In organizations, though, especially as they grow larger and more complex, information flow, responsibility, the ability to make decisions based on accurate information, and the ability to monitor future consequences all become more diffuse and harder to pin down. The "highest authority" may be so far removed from actual operations and significant information that it has very little practical choice but to make decisions based on information provided by others.

Jeffrey Toobin's article *End Run at Enron*, concerning the prosecution of Enron officials, illustrates the problem. Enron's former chairman, Kenneth Lay, and former chief executive officer, Jeffrey Skilling, presided over a corporate culture that fostered dishonesty and corruption. But Lay and Skilling did not invest in or directly profit from the company's "off-the-books" partnerships, as did Andrew Fastow, Enron's chief financial

RESPONSIBILITY EC 7-8, 9-2 (2004).

⁴ See John M. Burman, Ethical Considerations When Representing Organizations, 3 Wyo. Law. Rev. 581, 583 (2003).

⁵ *Id.* at 584-85.

⁶ See id.

⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.13(b)-(c) (2004). The concept of "highest authority" within an organization is central to Model Rule 1.13(b) and (c), entitled the "Organization as Client." *Id.* However, like the phrase "duly authorized" in 1.13(a), "highest authority" assumes a legal definition of authority. *See id.* R. 1.13(a)-(c). With personal clients, barring disability, there is no issue of who speaks for a client, and authority is independent of legal definition. The same is not true for organizational clients and other fictional entities (such as classes).

Id. R. 1.13(b).

⁹ Jeffrey Toobin, End Run at Enron, THE NEW YORKER, Oct. 27, 2003, at 48-55.

¹⁰ See id. at 48.

officer.¹¹ The value of all their stock increased, to be sure, as the partnerships hid corporate liabilities,¹² but juries prefer direct personal enrichment or direct testimony of complicity in order to convict of a crime.¹³ When complicated accounting or legal rules prevent understanding by a jury, they are reluctant to conclude that the "highest authority" should have nonetheless understood.¹⁴ As one investigator said, "We have to figure out how to explain why it's illegal even though the accountants and the lawyers said it was O.K."¹⁵

Kenneth Lay in particular paid little attention to details—his function was to schmooze politicians and project a strong public relations image. ¹⁶ Unless Fastow can testify as to direct knowledge by higher authority, it will be difficult to obtain convictions of the higher-ups. ¹⁷ Fastow's indictment alleged that he hid this information from Enron's Board, which included Lay and Skilling, ¹⁸ but he has since reached a plea agreement. ¹⁹ Skilling was closer to the day-to-day operations than Lay, but the pervasiveness of the deceptions still provides an effective defense. ²⁰ The transactions, one investigator said, "were complex and massive, and large groups of officers and employees, representing such diverse functions as finance, accounting, tax, and legal, were assembled to complete them." ²¹ Toobin concludes:

As the Enron investigators are coming to acknowledge, it may not be possible to divide up the systemic corruption within the company into easily understood portions of wrongdoing that can be served up to a jury of ordinary people. All the people at Enron who played parts in these transactions pushed the company a little closer to ruin, and all of them could claim that they were only small cogs in a big machine. The sad truth of the criminal-justice system is

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¹¹ *Id.* at 50.

¹² See id. at 54.

¹³ See id. at 50.

¹⁴ See id.

¹⁵ *Id.* (quoting a white-collar crime investigator).

¹⁶ See id. at 48.

¹⁷ See id. at 51.

¹⁸ *Id*

¹⁹ Id. See also A Family Pleads Guilty, N.Y. TIMES, Jan. 15, 2004, § A, at 32.

See Toobin, supra note 9, at 54. Since Toobin's article, Fastow has reached a plea agreement with prosecutors, making him available to testify, and Skilling and Lay have been indicted. A Family Pleads Guilty, supra note 19; Kurt Eichenwald, Enron Ex-Chief Indicted by U.S. in Fraud Case, N.Y. TIMES, July 8, 2004, § A, at 1.

Toobin, *supra* note 9, at 55.

that when everyone is guilty, no one is.²²

In this situation, questions like "who is the client" and "who can give direction to lawyers" do not have real answers. Who a lawyer's client might be when a chief financial officer is forming off-the-books partnerships is difficult enough. It becomes more complicated as corporations enter into other arrangements: joint ventures, partnerships, or buying and selling all or parts of other corporations and subsidiaries. The solution to the problem in the Model Rules, the "Organization as Client," is deceptively simple and, accordingly, deceptively misleading. Rule 1.13(a) states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This rule is designed to make clear that lawyers have duties to the broader entity and not to particular persons within it. But with partnerships and subsidiaries there are not only multiple personal constituents, but also multiple entities with differing interests. And no entity speaks for itself.

Sarbanes-Oxley was an occasion for changes in the ABA's ethics rules governing lawyers' ability to make disclosures concerning client wrongdoing. ²⁸ But the law itself, especially for lawyers' ethics, has limited

²² Id. While it is often difficult to place responsibility for wrongdoing within complex organizational systems, it does not follow that no one is guilty or responsible for systemic The question of individual guilt within organizational systems that foster wrongdoing is not new. In fact, this question received special emphasis in the aftermath of World War II in the Nuremberg trials and other forums where prison guards as well as Nazi leaders have been held accountable. See Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 YALE L.J. 2009, 2039 (1997). It arises again in recent revelations concerning prisoner abuse in Iraq. See Torture and Abuse: Why They Do It, TIMES (London), Aug. 6, 2004, at 4. Prosecutors have long recognized that links to higher authority can often be established by plea bargains or grants of immunity to those individuals who are in lower positions in the chain of authority. Leo Romero, Procedures for Investigating and Prosecuting White Collar Crime, 11 U.S.-MEX. L.J. 165, 166 (2003). Thus it is not that no one is guilty. Rather, particularly in our system of criminal law, guilt in complex organizations, where governing directives (or "orders") are often far removed from consequences, is difficult to prove. Joseph Sanders et al., Distributing Responsibility for Wrongdoing Inside Corporate Hierarchies: Public Judgments in Three Societies, 21 LAW & Soc. Inquiry 815, 816 (1996).

See Model Rules of Prof'l Conduct R. 1.13 (2004).

²⁴ *Id.* R. 1.13(a).

²⁵ See id. R. 1.13.

See Burman, supra note 4, at 595-96.

²⁷ See id

The Supreme Court of Ohio has appointed a Task Force to study Ohio's current Code of Professional Responsibility with an eye to adopting the ABA's Model Rules, (continued)

application.²⁹

Though there are hundreds of thousands of business corporations in this country, Sarbanes-Oxley applies only to publicly-held corporations that are required to report to the SEC.³⁰ There are numerous corporations and other organizations, large and small, profit and non-profit, to which the law does not apply.³¹ The SEC rules resulting from Sarbanes-Oxley require, with some exceptions, that lawyers report misconduct to the highest corporate authority.³² As of this writing, the Commission is still considering a provision that requires the attorney to withdraw from representation in a way that indicates there is something wrong if the authority refuses to take corrective action.³³

incorporating into the Model Rules some of Ohio's current rules. News Release, Ohio Supreme Court, Moyer Appoints Task Force to Review Lawyer Discipline Code (Mar. 10, 2003), at http://www.sconet.state.oh.us/communications_office/press_releases/2003/0310moyer.asp. Ohio lawyers should be forewarned, however, that the changes adopted by the ABA in 2003 are not the ones currently being recommended by the Supreme Court Task Force in its proposals to adopt the Model Rules. See Ohio Code of Prof'l Responsibility R. 1.13 cmt. (proposed draft 2004), available at http://www.sconet.state.oh.us/attysvcs/profconduct/proposal/rule_1_13.pdf. In its comments to proposed Model Rule 1.13, the Task Force states that the rule "in substance more closely resembles the Model Rule prior to its last revision by the ABA in August 2002." Id. Whether this statement is accurate is open to question—the proposed rule contains references to permitted and required disclosure under other Model Rules, including a newly proposed Rule 1.2 (supposedly incorporating Ohio's current DR 7-102(B) concerning mandatory disclosure of client fraud). See Ohio Code of Prof'l Responsibility R. 1.13 (proposed draft 2004), available at http://www.sconet.state.oh.us/attysvcs/profconduct/proposal/rule_1_13.pdf.

- See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). Most of the Sarbanes-Oxley Act concerns corporate governance. However, the SEC has authority to regulate lawyers practicing before it. § 602. Additionally, the SEC is required to develop rules defining the duties of lawyers. § 307.
 - ³⁰ See § 302.
- Although the law does not apply to most corporations, because it will require changes in the operating procedures of many major corporations with substantial influence, some expect that it will have residual effects on the operating procedures of many corporations to which it does not directly apply. See generally John Paul Lucci, Enron-The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley, 67 Alb. L. Rev. 211 (2003) (discussing the requirements and obligations the Sarbanes-Oxley Act placed on public companies). This is likely to happen both through in-house development of corporate procedures and through legal developments in which procedures required by Sarbanes-Oxley come to be viewed as a norm.
 - ³² 17 C.F.R. § 205.3 (2004).
 - Unified Agenda, 69 Fed. Reg. 38,671 (June 28, 2004). In the latest of several (continued)

To the limited extent that SEC regulations will require any disclosure of clients' confidences, some legal ethics codes, such as Ohio's current code, ³⁴ would not have to be changed at all. For example, Ohio Disciplinary Rule 4-101(C)(2) has for years provided that lawyers may reveal client confidences or secrets if required by law. ³⁵ A "required by law" exception would have been sufficient to conform lawyers' duties under the ABA's Model Rules to Sarbanes-Oxley. What the ABA did instead in its recent amendments was considerably different.

First, though, some legal ethics history is in order. The debate about maintaining client confidences that protect or foster wrongdoing is long-standing in the legal profession. It arises every time the ABA overhauls its ethics codes. In the early 1980s, suggestions that lawyers be required or permitted to disclose certain types of client wrongdoing were rejected and disclosure was limited to situations necessary to prevent a client from committing a crime likely to result in imminent death or substantial bodily harm.³⁶ Thus, a lawyer could disclose a client's intention to murder a witness or adverse party, but the rule excluded Enron-type fraud, likely to cause only financial harm.³⁷

The 1983 Model Rules added other levels of protection for corporate clients that did not exist before in ethics codes.³⁸ Rule 1.13, concerning organizations as clients, required lawyers aware of wrongdoing by corporate personnel to keep disclosures within the organization, running them up the corporate ladder to the board of directors (the "highest authority") if necessary.³⁹ But even if the wrongdoing persisted, the code provided that the lawyer could not disclose, but only resign.⁴⁰

Rule 1.13 introduced still other impediments to disclosure of corporate misconduct. Lawyers who learned that a *personal* client was about to seriously harm someone could disclose information in order to protect the person likely to be harmed, whether or not it was in the interest of the client

permutations in rules proposed since the law was originally passed, outside counsel must notify the SEC of withdrawal, indicating it is for professional reasons. *See id.*

MODEL RULES OF PROF'L CONDUCT (1983). The Model Code of Professional Responsibility, upon which Ohio's code is based, and upon which almost all state ethics codes were based before the promulgation of the Model Rules in 1983, contained no separate provision for organizational clients.

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³⁴ See Ohio Code of Prof'l Responsibility (2004).

 $^{^{35}}$ Id. DR 4-101(C)(2). The rule provides: "A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." Id.

See Model Rules of Prof'l Conduct R. 1.6 (2001).

³⁷ See id.

See Model Rules of Prof'l Conduct R. 1.3 (1983).

⁴⁰ See id. R. 1.13(c).

to have that disclosure made.⁴¹ For organizations, however, the rule was different. The triggering standard for disclosures within the organization was whether the wrongful or illegal action was likely to result in substantial injury *to the organization*.⁴² Thus, even if a cigarette or chemical manufacturer was illegally manufacturing a dangerous product likely to harm people, disclosure was still prohibited unless the illegal activity was likely to substantially harm the organization.⁴³

This set up an impossible standard for lawyers who might have been tempted to blow the whistle. If the corporate determination is that profits outweigh potential harm to the public, and it is better for the corporation to fight individual lawsuits as they arise, then a disclosing lawyer would be violating ethics rules in almost every situation where there is an ongoing enterprise. It is only where the client implodes, as with Enron, or a lawsuit later results in *very* substantial damages, that it becomes clear that the wrongful activity was likely to cause substantial harm to the corporation. This usually happens after the fact, however, and after the usual cover-ups have failed, and thus almost never leaves a lawyer in a position where disclosure can safely be made until it is too late to prevent the harm. Worse yet, with a standard of "substantial injury" to the corporation, larger corporations such as Enron get the most leeway to engage in fraud and crime—they can more easily absorb the lawsuits likely to be brought by injured parties and consider it just another cost of doing business.

After Enron, then, some suggested that lawyers should be given discretion to disclose corporate wrongdoing in a wider variety of

¹¹ Coold D 16(b)(2)

⁴¹ See id. R. 1.6(b)(2).

⁴² See id. R. 1.13(b).

See id. Some argue that Rule 1.13, concerning organizations, does not constitute an independent rule governing organizations and is overridden by the more general Rule 1.6, which permits a lawyer to make disclosures to prevent criminal acts likely to result in imminent death or substantial bodily harm. See Larry P. Scriggins, Legal Ethics, Confidentiality, and the Organizational Client, Bus. Law., Nov. 2002, at 124-25. The "imminent death" provision, however, is unlikely to apply in many situations where dangerous products are put into the stream of commerce, but "substantial bodily harm" could eventually result. George C. Harris, Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing, 11 Geo. J. Legal Ethics 597, 609-10 (1998). This underscores the significance of the provisions in Rule 1.13 that the substantial harm must be to the corporation, not real persons, before a lawyer has a duty to report up the corporate ladder, and that resignation, not disclosure, is the only option. As a practical matter, and whatever the arguments to the contrary, the specific language of Rule 1.13 has prevailed in corporate lawyer decision-making over the more general language of Rule 1.6. Id.

See Model Rules of Prof'l Conduct R. 1.13(b) (2004).

circumstances.⁴⁵ While the general idea was good, its incorporation into the previously existing rules, and especially Rule 1.13, has meant that the changes will do little to improve the situation.

In the summer of 2003, two ABA ethics rules were significantly amended.⁴⁶ Rule 1.6, concerning confidentiality of client information in general,⁴⁷ now permits disclosure to prevent, mitigate, or rectify crime or fraud reasonably certain to result in, or that has resulted in, harm to financial interests, where the lawyer's services have been used in the crime or fraud.⁴⁸ The amendment to Rule 1.13, concerning corporate clients, at first glance appears to track Rule 1.6 and add additional provisions.⁴⁹ If, for example, the "highest authority" fails to take appropriate action concerning illegal activity, the lawyer may disclose the information regardless of whether Rule 1.6 would permit disclosure (that is, whether or not it concerns physical injury or financial harm).⁵⁰ The comments also state that the rule applies whether or not the lawyer's services have been used to further the misconduct (though the information must be related to the lawyer's representation of the client).⁵¹

These changes at first glance appear to give lawyers much more leeway to disclose corporate fraud or wrongdoing. Unfortunately, though, amended Rule 1.13 retains most of the significant limitations of previous Rule 1.13.⁵² Both the initial duty to report up-the-ladder and the permissive disclosure if the "highest authority" does not act are subject to the same requirement as before: only if the conduct is likely to result in substantial injury to the corporation may the lawyer act.⁵³ And even the initial duty to report to higher authority does not exist where the lawyer reasonably believes it is not in the best interests of the organization to do so.⁵⁴ If, in other words, there is a culture of corruption such that higher authority will want to maintain deniability, and the corrupt policy helps rather than hurts the corporation, the corporate lawyer is again trapped in the same veil of corruption created by

⁴⁵ See Christina R. Salem, The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act, 8 FORDHAM J. CORP. & FIN. L. 765, 767 (2003).

⁴⁶ See MODEL RULES OF PROF'L CONDUCT (2004). Ohio lawyers should, however, should see *supra*, note 28.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).

⁴⁸ *Id.* R 1.6(b)(2).

⁴⁹ See id. R. 1.13, 1.6.

⁵⁰ *Id.* R. 1.13(c).

⁵¹ *Id.* R. 1.13 cmt. 6.

 $^{^{52}}$ Compare Model Rules of Prof'l Conduct R. 1.13 (2001), with Model Rules of Prof'l Conduct R. 1.13 (2004).

⁵³ Model Rules of Prof'l Conduct R. 1.13(b) (2004).

⁵⁴ Id

the previous Rule 1.13.⁵⁵

The purpose of Model Rule 1.13 was not, one could assume, to require lawyers to participate in corruption. It was rather, among other things, ⁵⁶ to provide a rationale why lawyers should not be blamed for the fraud of clients: the rationale being that they were bound by ethics rules to keep quiet. ⁵⁷ But ethics rules have also long made clear that lawyers cannot assist clients in fraud, ⁵⁸ and the law in general has long provided that those who are complicit in fraud can be sued by those who have been damaged by their fraud. ⁵⁹ The long term result has been that lawyers have become targets of lawsuits initiated by other lawyers on behalf of *their* clients. Thus, the effect of Rule 1.13 has been to deprive lawyers representing corporations of the opportunity to prevent fraud and to cause them to become embroiled in later lawsuits where the usual consequences of fraud ensue.

Lawyers representing corporations could be placed on the same footing as lawyers representing clients in general by eliminating Rule 1.13 standards of "in the best interests of the organization" and to prevent "substantial injury to the organization." One reason, though, for the standard of substantial injury is that there are too many minor, if not picayune, instances of illegal conduct to have lawyers disclose all violations. But in a regime of permissive disclosure, as contrasted with required disclosure, this should not be an issue, at least for lawyers' organizations. There is no reason to assume that most lawyers will be unable to distinguish minor misconduct from serious problems, and there are already substantial internal constraints on whistleblowing that exert pressure against excessive disclosure.

What is important to keep in mind is that the significant issue is not just

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Another purpose in a market economy where clients can hire and fire lawyers as they choose is to maintain marketability of lawyers among clients who are able to amass large amounts of capital and thus are able to pay. This is a particular problem in corporations where the interests of the nominal client, the "entity," may be at odds with those making the hiring and firing decisions. Where the officers or other constituents are engaged in wrongdoing (as it can only be with an entity client), under normal ethics rules the lawyer would not be bound to protect their interests where they conflict with those of the entity. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f)-(g) (2004). But in reality, it is often the officers who will be under the gun for corporate wrongdoing, and they would prefer to hire lawyers who are bound to keep quiet in any event and not just when constituent behavior is consistent with the interests of the organization.

⁵⁷ See id. R. 1.13.

⁵⁸ See ABA Canons of Professional Ethics Canon 15 (originally adopted Aug. 27, 1908); Ohio Code of Prof'l Responsibility DR 7-102 (1970-2004).

See Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILLANOVA L. REV. 1097, 1117 (2003).

⁶⁰ MODEL RULES PROF'L CONDUCT R. 1.13(b) (2004).

the extent of injury to the corporation, but the extent of the injury to others, both inside and outside a corporation's hierarchy of authority, including investors and injured or defrauded persons with no other corporate connection.

However, there still remains a serious problem in Rule 1.6 and 1.13, and in any other permissive disclosure rule: how to prevent it, as applied, from becoming a mandatory disclosure rule. In the case *In re Original Grand Jury Investigation*, ⁶¹ the Ohio Supreme Court held that Ohio Disciplinary Rule 4-101(C)(2) ("may reveal if required by law or court order") does not give a lawyer discretion to refuse to turn over physical evidence of a crime. ⁶² An Ohio appellate court, relying on that case, later said, "[W]e conclude that the provision which states that the attorney may testify with the consent of the surviving spouse must be interpreted to mean that the attorney's testimony may be compelled under those circumstances." ⁶³ This decision was upheld by the Supreme Court of Ohio. ⁶⁴

This kind of "may means must" interpretation is not unusual in coercive or authoritative social systems. Language takes on a different meaning depending on who or what is seen as making a statement and for what purpose. If we say, for example, that people may not kill people but that soldiers in combat may kill the enemy, we do not mean it is up to the soldier to decide whether to shoot at the enemy. The word "may" can be interpreted as permitting real discretion or as an exception to a general rule promulgated by an authority with the power to compel or prohibit conduct and grant exceptions.

However, if we are talking about professional responsibility and ethical decision-making, discretion is necessary. Legal ethics is thus poised to go in different directions. One is to attempt to reassert ethical principles that assumed lawyers are capable of exercising real discretion to make responsible choices in difficult situations. The other is the purely the "required by law" approach in which lawyers never disclose unless required, but must where required by law. This creates a "bright line test" between prohibited and required disclosure with no discretion in the middle. Either of these directions will inevitably be supplemented by case law development

⁶¹ 733 N.E.2d 1135 (Ohio 2000).

⁶² *Id.* at 1140.

 $^{^{63}}$ State v. Doe, No. 19408, 2002 WL 31105389, at $^{*}2$ (Ohio Ct. App. Sept. 19, 2002), $\it{aff'd}$, 803 N.E.2d 77 (Ohio 2004).

State v. Doe, 803 N.E.2d 777 (Ohio 2004). This case rests on a theory of waiver (by a surviving spouse), and that the attorney-client privilege belongs to the client and not the lawyer. *Id.* at 780. It thus is not as direct an attack on the principle of confidentiality embodied in Disciplinary Rule 4-101 as the ruling in *In re Original Grand Jury Investigation*, where there was no waiver. *Compare In re Grand Jury Investigation*, 733 N.E.2d at 1139-40, *with Doe*, 803 N.E.2d at 780-81.

defining those situations in which discretion or secrecy (as with child abuse or SEC disclosure requirements) must be circumscribed, but the discretionary approach is likely to result in fewer situations where there will be mandatory disclosure.

Fostering real discretion, however, will be difficult to achieve if legal ethics thinking remains stuck in the mud of the idea of a definable client capable of giving directions when representing entities. There have historically been two, sometimes conflicting, standards for legal ethics: lawyers as representatives of clients (on one extreme as purely hired guns); and lawyers as maintainers of a "rule of law," with duties to see that people, including clients, adhere to the law. The discretionary approach would require that neither clients nor particular laws be finally determinative in decisions concerning lawyer conduct, but that the varying interests be weighed and balanced.

The paradigm that has driven legal ethics in America—the lawyer as representative and champion for a personal client charged with wrongdoing by a more powerful government, an ideal reinforced by America's Bill of Rights, has been co-opted and corrupted in an ethics system where organizational clients have been put on the same footing as personal clients. Client autonomy for personal clients means that lawyers defer to reasonable decisions by people in the best position to know what their interests are.

When applied to organizational clients, however, particularly complex ones with different systems of information flow, the ideal of client autonomy or deference no longer works. The "client" is a creature of law assumed to be defined by law and any "decision-making" center is (ultimately) necessarily artificial, itself a creation of law. 66 In a legal system where lawyers are hired and fired mostly by negotiable contracts, though, there is a tendency to defer to aggregations of capital and, in order to attract clients who can afford to pay, create rules that give them control over what lawyers do (as with the 1983 Model Rules prohibiting lawyers from disclosing corporate wrongdoing). 67

The problem with many of today's ethics rules is in their "one size fits all" approach to clients. Instead of distinctions without differences, we

⁶⁵ Edward D. Re, *Professionalism for the Legal Profession*, 11 Feb. Cir. B.J. 683, 690, 692-93 (2001-02).

The most extreme example of artificiality of clients, autonomy, and decision-making ability, however, is not the organizational client, but rather the class. Organizations usually have some modicum of pre-defined structure, defined purpose, and common interest of constituents. In class actions, class members may be united only by a common interest as perceived by others, and in which the members may in fact not be interested at all. This reemphasizes the role of the lawyer in exercising discretion, and of the courts in ensuring that the lawyer is acting in the interests of the class and the law.

⁶⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (1983).

have differences without distinctions. There is only so much that can be done with broad "all-purpose" ethics rules, supposedly applying uniformly to all clients and kinds of clients. Because there are many situations in which disclosure or wrongdoing by corporate constituents should be required or permitted, we are in danger of watering down the confidentiality protections, some based on the Constitution, that are needed to protect other clients.

When lawyers represent entities, the bright line that can exist between a client's interests and the law becomes blurred because the "clients" themselves are creations of law. Where the "client" itself has multiple and conflicting interests, some more important than others, an analysis of "who is the client" is not the right question to ask. Complexity of laws and complexity of clients means that legal ethics can no longer afford the simplistic notion that lawyers always act on behalf of clients. Sometimes they must act on behalf of the law.