

COERCING CLIENTS: CAN LAWYER GATEKEEPER RULES WORK?

FRED C. ZACHARIAS*

Abstract: Recent federal regulations and amendments to the Model Rules of Professional Conduct—most of which have responded to lawyer involvement in corporate scandals—rest on the assumption that lawyers have a role to play in forcing clients to act legally, morally, or appropriately. Lawyers are distinctive, perhaps even unique among professionals, in that they are sometimes legally authorized to force clients into obeying the lawyers' advice. This Article reviews the rules that empower lawyers in this way, with a focus on the corporate context.

For the most part, the recent regulatory changes take a static view of the lawyer-client relationship. They assume that if lawyers are authorized or required to counteract proposed client misconduct, lawyers will do so and less client misconduct will result. This Article demonstrates that the reality is far more complex. Lawyers and clients have incentives to implement coercive rules in ways that serve reasons wholly unrelated to the rules' purposes. Code drafters and those evaluating lawyers' coercive authority, therefore, must confront the fact that attorney-client relationships are dynamic—that is, that a change in the power of one party in the relationship has ripple effects. This practical reality influences both the positions of lawyers in deciding whether to favor or oppose particular regulation and the likely effectiveness of coercive rules.

INTRODUCTION

The allocation of power in the attorney-client relationship is distinctive. Like most service providers, lawyers are employees, agents, or independent contractors. They typically must do their clients' bidding.¹ Like other professionals, lawyers also have special expertise that

* Herzog Endowed Research Professor, University of San Diego School of Law. The Author thanks Professors Bruce Green, Shaun Martin, and David McGowan for their thoughtful comments on earlier drafts of this Article; Siraj Bayaan, Brian Katusian, and Ryan Keller for their research assistance; and the University of San Diego School of Law for its generous research support.

¹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued"); MODEL RULES OF

often leads clients to defer to their recommendations.² Lawyers, however, are unusual in the degree of control they exercise within the relationship. Unlike in medical decision making, for example, some legal decisions are for lawyers, and lawyers alone, to make.³ Other professionals may be able to influence those who hire them, but lawyers have legally recognized authority to pressure clients into accepting their advice—particularly when that advice concerns illegal or wrongful conduct.

I do not mean to overstate the case. Lawyers do not always have coercive authority. Nor do the professional codes explicitly sanction pressure on clients. Nevertheless, the codes do envision lawyers using their position to persuade,⁴ and sometimes force, clients to act in accordance with the lawyers' view of appropriate conduct.⁵ In other instances, the codes simply give lawyers authority to override clients' commands.⁶

Lawyers can exercise coercive power in a variety of ways. They may threaten to resign when clients do not conform to their advice. Lawyers may insist upon particular legal tactics. And, through the coercive mechanism that is most commonly discussed in the literature, lawyers sometimes have the right to reveal otherwise confidential information about the client. Threatening a revelation typically forces the client to act as the lawyer wishes.

PROF'L CONDUCT R. 1.2(a) (1983) (same); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1969) (noting that "the authority to make decisions is exclusively that of the client"); cf. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002) (clarifying that "this Rule does not prescribe how . . . disagreements [about the means] are to be resolved").

² See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002) (stating that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives").

³ See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983) (stating "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so").

⁴ See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) (allowing lawyers to advise clients concerning the moral and political ramifications of their conduct); see also *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (characterizing promoting clients' "compliance with the law" as one of the key justifications for giving lawyers the ability to obtain privileged information from clients); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 369 (1989) (describing the law compliance rationale for attorney-client confidentiality).

⁵ See *infra* notes 29–42 and accompanying text.

⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002) (giving lawyers discretion not to use evidence they believe to be false); MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983) (assigning lawyers control over the means of litigation).

Consider this ability of lawyers to use confidences to pressure clients. Legal ethics codes always have made some provision for disclosure.⁷ Spurred by public reaction to lawyer involvement in recent corporate scandals,⁸ the American Bar Association (the "ABA") adopted amendments to the Model Rules of Professional Conduct in 2002 and 2003 that make explicit an expanded right of attorneys, especially corporate attorneys, to reveal or threaten to reveal information.⁹ Ad-

⁷ E.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002); MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1983); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (C) (1969).

⁸ See Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1099 (2003) (describing how lawyers' mishaps in the Enron debacle invited scrutiny of lawyers in corporate governance); Peter C. Kostant, *Sarbanes-Oxley and Changing the Norms of Corporate Lawyering*, 2004 MICH. ST. L. REV. 541, 542 (noting the lack of effective gatekeeping by lawyers in the Enron scandal); Samantha Ahuja, Note, *What Do I Do Now? A Lawyer's Duty Post-Sarbanes-Oxley*, 38 VAL. U. L. REV. 1263, 1263-64 (2004) (recounting how lawyers and other professionals were thrust into the spotlight due to the events at WorldCom, Tyco, and Enron); cf. FRANK PARTNOY, *INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS* 331 (2003) (demonstrating outside counsel's involvement in the Enron scandal).

⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.6(b), 1.13(b) (2002). The revised Model Rule 1.6(b) provides, in pertinent part:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . .

MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002). The revised Model Rule 1.13 provides, in pertinent part:

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

(c) Except as provided in Paragraph (d), if

- (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or

ministrative regulations implementing the federal Sarbanes-Oxley Act render mandatory some attorney disclosures of corporate misconduct.¹⁰ Pending regulations propose additional requirements.¹¹

One interpretation of these provisions is that society expects lawyers to reveal corporate clients' misconduct on a routine basis.¹² A second interpretation is that the ability to disclose should only be exercised rarely, but that a disclosure rule provides lawyers with a tool they can use to persuade clients to act properly.¹³ Strict proponents of attorney-client confidentiality characterize the process by which lawyers force clients to amend their conduct at pain of exposure as a

fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).

¹⁰ See 17 C.F.R. § 205.3(b) (2005). Under this provision, lawyers who become aware that a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof is reasonably likely must notify the chief executive officer or chief legal officer. If the attorney does not obtain an appropriate response, the attorney must report the violation to an audit committee or the board of directors. At this stage, a failure of the highest authority to correct a violative securities filing only triggers permissive authority to disclose the violation to the SEC. *Id.* § 205.3(d) (2).

¹¹ Under a proposed SEC regulation, a lawyer who does not receive an appropriate response from a corporate client regarding her report of a securities violation or breach of fiduciary obligation to the company must cease representing the company with respect to the company's securities filings and notify the SEC of her withdrawal for "professional considerations." See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,706 (Dec. 2, 2002), *quoted in* 68 Fed. Reg. 6324, 6324 [hereinafter "Proposed SEC Noisy Withdrawal Rule"] (noting deferral of the proposal). For a full discussion of the actual and proposed SEC regulations, see generally Roger Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004) and Fisch & Rosen, *supra* note 8.

¹² See David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825, 1825 (2004) (assuming that it is desirable for lawyers to use their authority to disclose "financial scams").

¹³ See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 n.129 (1988) (arguing that the lawyers' authority to disclose provides them with appropriate leverage in convincing clients to pursue good conduct). See generally Fred C. Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004) (discussing lawyers' role in encouraging appropriate client conduct and the function disclosure exceptions play in reinforcing that role).

form of extortion that undermines the very notion of an attorney-client trust relationship.¹⁴

For the most part, that is as far as the analysis has proceeded. Proponents argue that allowing or requiring lawyers to disclose future client misconduct benefits society and lawyers' ability to act as moral individuals,¹⁵ while opponents argue that it undermines the adversary system and client autonomy.¹⁶ Commentators treat the issue as a static question of whose interests should control.

This Article suggests that disclosure exceptions, as well as other professional regulations that enable lawyers to coerce clients into acting "appropriately," need to be analyzed in greater depth.¹⁷ The prac-

¹⁴ See, e.g., Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 57-58 (1991) (arguing that lawyers should not be able to "blackmail" clients into acting morally); Panel Discussion, *A Gathering of Legal Scholars to Discuss "Professional Responsibility and The Model Rules of Professional Conduct"*, 35 U. MIAMI L. REV. 639, 647 (1981) ("[I]t has been correctly pointed out that the lawyer's real control, and this has been stated candidly by those who support the power of the lawyer to blow the whistle, is blackmail. 'Do it my way' is the only alternative offered a client.") (comments of Monroe Freedman); Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2511, 2515-18 (1994) (comparing models that expect lawyers to accord clients decision-making autonomy with models that expect lawyers to strong-arm clients into adhering to legal requirements).

¹⁵ See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 56, 166 (1998) (arguing that a lawyer who becomes "insensitive to the moral costs of actions she feels she must take risks losing her capacity to assess such costs in situations where she has greater discretion"); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 69 n.3 (1999) (identifying proponents of confidentiality exceptions).

¹⁶ See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 45-69 (3d ed. 2004) (discussing the importance of client autonomy in assessing whether the lawyer has a right to impose "virtue" on the client); Zacharias, *supra* note 4, at 358-60 nn.29-38 (identifying proponents of strict confidentiality).

¹⁷ In an interesting recent article, David McGowan is among the first to acknowledge the importance of addressing "the costs disclosure [to prevent client wrongdoing] creates for lawyers who blow the whistle." McGowan, *supra* note 12, at 1825. Based on his assessment of lawyers' incentives, he concludes that discretionary disclosure rules such as those contained in recent amendments to Model Rules 1.6 and 1.13 "are unlikely to change actual practice very much." *Id.* at 1825-26.

Professor McGowan confines himself to lawyer disclosure, as opposed to other mechanisms of coercion designed to promote appropriate client behavior that this Article addresses. For purposes of his analysis, he assumes that the code drafters actually intend (or desire) corporate lawyers to reveal client misconduct as a routine and that disclosure is the societal benefit that the rules seek to produce. *Id.* He therefore considers the disclosure scenario statically, or two dimensionally. In other words, the only possible outcomes for lawyers are to disclose and bear the costs or not disclose and assume the economic risk of the possibility that the illegality later will be uncovered. *Id.* at 1827-28. This paradigm leads McGowan to consider mainly the immediate economic consequences, or likely consequences, of disclosure (for example, at the moment after disclosure), without addressing

ticalities of attorney-client relationships cannot be reduced to a single paradigm. As professional rules enhance lawyers' power over clients, clients are given reasons to distance themselves from lawyers. Lawyers, in turn, may enjoy their increased status, but may prefer to work to maintain or regain the previous relationship.

Changes in the rules thus have a dynamic, rather than a static, effect. Systemically, according lawyers coercive power may be designed to produce one consequence (for example, the public revelation of client misconduct), but in the long run may achieve different (and perhaps counter-productive) consequences for lawyers, clients, and society by changing the interplay of the participants in the attorney-client relationship. On an individual basis, lawyers' personal incentives will affect how they use the power that the rules give them. Whether and how lawyers exercise coercive power probably depends on context far more than participants in the debates thus far have acknowledged.

This Article attempts to further the discussion by scrutinizing the process of lawyer coercion—including what might loosely be termed "attorney blackmail"—and considering its likely effects on lawyers and clients. Threats of disclosure, resignation, or other consequences clients consider unpleasant usually do not constitute blackmail in the strict legal sense. Because the lawyer who coerces a client ordinarily does not obtain personal benefits when the client submits,¹⁸ and because the lawyer typically demands a client response that the lawyer (or society) has a right to expect¹⁹ or that the lawyer has a right to

psychological, relational, and status concerns or nuances in how different lawyers and clients will respond to variations in the rules. *Id.* at 1827–33.

¹⁸ Under the Model Penal Code, the crime of blackmail is a form of theft, and is limited to situations in which the blackmailer "obtains property of another" by the use of a threat of disclosure. MODEL PENAL CODE § 223.4 (1980); *see, e.g.*, N.H. REV. STAT. ANN. § 637:1 (1955) (noting that theft represents a single offense and incorporates blackmail); UTAH CODE ANN. § 76-6-403 (1953) (stating that blackmail is a form of theft); *Rael v. Sullivan*, 918 F.2d 874, 876 n.1 (10th Cir. 1990) (quoting 31A AM. JUR. 2d *Extortion* § 49 as stating: "Under the common law and most recent statutory codes and proposals, extortion by a private person, or blackmail, is limited to obtaining property . . ."); *State v. Talley*, 466 A.2d 78, 81 (N.J. 1983) (referencing the Model Penal Code and noting theft crimes that involve the involuntary transfer of property). A definition limiting the blackmailer's potential benefit to "property," however, may be too constrained. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 20.4(a), at 1014 (4th ed. 2003) (noting broader statutes that encompass "pecuniary advantage" or "anything of value" or the like" or "any act against [the victim's] will"); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1568 (1993) (noting that "[i]t is also easy, but also wrong, to think that blackmail is essentially a property crime" and providing counter-examples).

¹⁹ The issue of whether it is improper for a "blackmailer" to extort a socially beneficial result—even legally required conduct—is complex. *See, e.g.*, LAFAVE, *supra* note 18,

produce herself,²⁰ the lawyer's threats may not be subject to criminal prosecution. Nevertheless, this Article refers to such coercion as "attorney blackmail" and rules that authorize coercion as "blackmail rules" because those terms best encapsulate the process envisioned by the rules: lawyers are given (and sometimes exercise) power to coerce an involuntary surrender of clients' traditional authority to dictate terms and control the subject of representation.²¹

Part I identifies the ways in which lawyer coercion may occur in the corporate context.²² Part II considers when corporate lawyers would (or would not) want the ability to force clients to change their behavior and lawyers' incentives (and disincentives) to implement the option of making coercive threats.²³ Part III notes the ramifications of these countervailing considerations for the conduct of lawyers and clients, particularly corporate clients.²⁴

Part IV demonstrates that, to the extent it is in society's interest to authorize or require attorneys to pressure clients under some cir-

§ 20.4(a), at 1015–16 (discussing cases and statutes suggesting that an "intent to gain" is not always a requirement of blackmail); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 864–65 (1998) (discussing the issue of "whether blackmail should be criminalized when the blackmailer's ostensible objective is a public, rather than private, good"); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1936 (1993) (arguing that blackmail based on incriminating information is "potentially paradoxical because it might confer social benefits not produced by other kinds of blackmail"); Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1790–92 (1993) (analyzing the argument that plea bargaining and other forms of coercion designed to extract a good result are ordinary, or morally justified, blackmail).

²⁰ One example of this occurs when a lawyer forces the client to reveal wrongdoing that the lawyer has a legal right to reveal herself. See Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1639 n.2 (1993) (discussing, inter alia, why it is wrong to place a condition on doing an optional act); Berman, *supra* note 19, at 796 (analyzing the "so-called paradox of blackmail" that offering to refrain from revealing embarrassing information that one has a right to reveal (or not reveal) may become unlawful if offered in exchange for payment); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1743 (1993) (justifying blackmail law in "paradox" cases on the basis that "people do not invariably have a right to threaten to do or not do the things they are at liberty to do or not do"); Katz, *supra* note 18, at 1568 (discussing examples in which legal objectives may become illegal when offered in exchanged for money); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670–71 (1984) (highlighting the complexity of the paradox).

²¹ Cf. Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 328 (2004) (stating that a mandatory withdrawal rule may enable lawyers to "use the withdrawal requirement strategically to force the corporation to accede to the lawyer's demand, i.e., blackmail").

²² See *infra* notes 29–42 and accompanying text.

²³ See *infra* notes 43–68 and accompanying text.

²⁴ See *infra* notes 69–110 and accompanying text.

cumstances, that conclusion results from a balance of competing factors.²⁵ The professional rules, however, tend to rely on shorthand methods to implement the balance. Corporations and lawyers may favor or oppose rules supporting coercion for reasons relating to their personal incentives, having nothing whatsoever to do with the valid concerns underlying the rules. Lawyers also may implement the rules in ways that undermine the achievement of the rulemakers' goals.

The Article's analysis therefore helps explain why segments of the bar take certain positions in the debates concerning, for example, rules allowing disclosure or threatening disclosure of confidential information. Understanding the personal costs and benefits of coercive authority to attorneys informs the objective analysis of when society should wish to authorize attorney blackmail. Recognizing that the effects of granting coercive authority are dynamic also may help determine whether blackmail provisions should take permissive or mandatory forms. It may enable rulemakers to craft the provisions in ways that best provide incentives for appropriate long-term attorney conduct.

This Article is concerned with all forms of attorney coercion and all contexts in which it occurs. But because most of the recent regulatory developments have focused on issues relating in some way to the revelation of client information—for example, confidentiality exceptions or reporting requirements—and have involved the corporate context, this Article does so as well. The main body of this Article limits itself to situations in which in-house or external corporate counsel might be inclined to threaten action if her client does not reconsider proposed conduct.²⁶

The situation of criminal defendants raises distinct issues, as does the circumstance in which lawyers develop close trust relationships with individual, sometimes unsophisticated, clients.²⁷ Therefore, this

²⁵ See *infra* notes 111–138 and accompanying text.

²⁶ To avoid confusion, this Article will refer to lawyers as female and other actors as male.

²⁷ Criminal defendants may have special constitutional rights that encompass more of a right to be free from lawyer blackmail. See *Whiteside v. Scurr*, 744 F.2d 1323, 1328 (8th Cir. 1984) (holding that a lawyer's threat to impeach a client if he perjured himself undermined the attorney-client trust relationship and therefore constituted ineffective assistance of counsel), *rev'd sub nom.* *Nix v. Whiteside*, 475 U.S. 157 (1986). As a theoretical matter, because of the threatening context in which criminal representation occurs, there may be special reason to assure criminal clients counsel who are independent of the state. Arguably, many of the same justifications apply to other clients who are especially dependent on their lawyers or unable to navigate the legal system without their direction. See SIMON, *supra* note 15, at 170–94 (analyzing the question "Is Criminal Defense Different?"); Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP.

Article initially sets those contexts to the side. Part V, however, offers some thoughts about the degree to which this Article's analysis applies to non-corporate settings and to different techniques of lawyer coercion.²⁸

I. ATTORNEY COERCION IN THE CORPORATE CONTEXT

Rules governing corporate lawyers' obligations typically refer to their targets as lawyers representing an organization.²⁹ By their terms, the rules apply equally to in-house and external counsel. The incentives of the various corporate lawyers implementing the rules often differ, however, as do the methods by which they can (or are expected to) influence corporate conduct.

Corporate attorneys come in many different forms. In-house counsel ordinarily are salaried employees and have the organization as their sole client. In-house counsel may themselves be officers or supervisory personnel (for example, the general counsel), or they may be lower-level staff. The functions of some in-house counsel are limited to addressing legal issues. Other in-house lawyers perform dual "legal" and "business" roles.

In contrast, external counsel typically confine their activities to legal representation. They may have multiple clients, corporate or otherwise. The client organization in question may constitute large or small portions of their practice.

When a corporate attorney learns of proposed corporate conduct or conduct by corporate employees that conflicts with her advice and that she believes is illegal, improper, or unwise, the professional rules provide several possible avenues through which the lawyer can attempt to persuade the client to change its plans. Under Model Rule 1.13:

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

LEGAL ISSUES 165, 167-78 (1996) (questioning the uniqueness of criminal representation for purposes of the lawyer's role).

²⁸ See *infra* note 139-156 and accompanying text.

²⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002) (addressing the "organization as client").

- the lawyer shall proceed as is reasonably necessary in the best interests of the organization.³⁰

Let us suppose that a corporate lawyer deems it necessary that her client's course of conduct change, but the officer with whom the lawyer is dealing demurs—for personal reasons or because the officer believes the corporation would benefit from rejecting the lawyer's advice. In this instance, the lawyer can threaten a variety of steps short of revealing information to persons outside the corporation that might influence the officer to comply. Model Rule 1.13 authorizes the lawyer to inform a higher authority within the organization.³¹ Depending on the lawyer's status within the organization, that may be an easy step for her to take, or it may risk her employment.³² Alternatively, the lawyer may inform a committee established within the organization charged with supervising law compliance.³³ Or she may withdraw from representing the corporation in the matter³⁴—a dramatic step for in-house counsel because it is tantamount to resignation from her sole employment³⁵ and may or may not exert significant influence on the client.³⁶

³⁰ *Id.* at R. 1.13(b); cf. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (1983) (requiring the lawyer to take some remedial steps, but leaving the remedy to the lawyer's discretion).

³¹ MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002).

³² For example, a general counsel who is an officer of the corporation and questions the proposed actions of a lower-level employee may find it easy to raise the matter with the employee's superiors. In contrast, a staff attorney faced with misconduct by a corporate vice-president may feel significantly intimidated by the prospect of challenging the vice-president's conclusions to higher-ups.

³³ Under the Sarbanes-Oxley regulations, for example, lawyers can sometimes obviate their own ethical responsibilities by informing an audit committee or a "qualified legal compliance committee" established for the purpose of evaluating disagreements about the propriety of the corporation's conduct. See 17 C.F.R. §§ 205.3(b)(4), 205.3(c)(1) (2005) (stating that an attorney has fully satisfied her obligation if she reports a violation to a qualified legal compliance committee).

³⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002) (authorizing lawyers to withdraw when a client insists upon pursuing "repugnant" conduct); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (1983) (allowing attorney withdrawal based on "imprudent" client conduct).

³⁵ See Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 307 (arguing that the need of in-house counsel to please management will cause counsel to avoid pursuing management wrongdoing).

³⁶ In other words, a corporation may not care if a particular lawyer resigns, especially when another equally qualified (but presumably more pliable) lawyer will take her place at no significant cost to the client. On the other hand, when a client has invested heavily in having one lawyer represent it, and substitution of counsel cannot be accomplished cheaply (or without substantial delay), then the client must balance the costs of losing the lawyer against the costs of following her advice.

Under some circumstances, counsel can up the ante. A mild step—one which enables in-house counsel to pass the buck somewhat or to enlist support for her opinion—is to suggest that the corporation seek an independent legal opinion.³⁷ More forcefully, the lawyer can effectively require management to seek such an opinion, or to conduct an internal investigation, by issuing her own opinion stating that proposed conduct would breach management's and the board of directors' fiduciary duties.³⁸ Proposed regulations under the Sarbanes-Oxley Act sometimes would also authorize the lawyer to exercise a "noisy withdrawal," under which she resigns and disavows documents that represent or incorporate the improper conduct to an adversary, regulatory agency, or court.³⁹ In the few circumstances in which a direct exception to confidentiality applies, the attorney may threaten to expose the client's misconduct if the client does not accept her counsel.⁴⁰

Significantly, because of the context in which they offer representation, corporate counsel have a broader range of remedial options than lawyers confronting similar misconduct by individual clients. Law-

³⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.13(b)(2) (1983) (listing the option of "advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization").

³⁸ When counsel issues such an opinion, even a CEO who intentionally plans to engage in questionable behavior would hesitate to proceed, because his defenses in a potential shareholder derivative or other suit may become limited and the board of directors similarly will be less likely to ratify his conduct. See A. Gilchrist Sparks, III & John F. Grossbauer, *The Business Judgment Rule and Opinions of Counsel*, in CORP. LAW 1987, at 756-58 (PLI Corporate Law Practice, Course Handbook Series No. B4-6813, 1987) (discussing the role of attorneys in advising corporate officers whether their conduct is likely to satisfy the business judgment rule). At a minimum, therefore, the CEO must take steps to obtain a second opinion that counteracts the effects of counsel's initiative.

A similar process can occur in situations in which a corporation needs a favorable opinion of counsel in order to proceed with a legal filing or transaction. By withholding, or threatening to withhold, the opinion, counsel sometimes can force the client to amend its proposed course of conduct or, at a minimum, to seek a legal opinion from new counsel.

³⁹ Proposed SEC Noisy Withdrawal Rule, *supra* note 11, at 71,706, quoted in 68 Fed. Reg. 6324, 6326 (allowing lawyer to notify the SEC of her withdrawal for "professional considerations" and to disaffirm documents that are "false and misleading"); cf. Patrick H. Pugh, Note, *The SEC Standards of Professional Responsibility for Attorneys: A Balanced Solution to Noisy Withdrawal*, 14 KAN. J.L. & PUB. POL'Y 659, 672-79 (2005) (suggesting an alternative SEC noisy withdrawal rule).

⁴⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2002) (allowing a lawyer sometimes to reveal information when doing so will "prevent substantial injury to the organization"); see also 17 C.F.R. § 205.3(d)(2) (2005) (providing that a lawyer may reveal confidential information to the Commission without the client's consent to the extent the lawyer reasonably believes necessary "[t]o prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors," to prevent perjury, or to rectify the consequences of certain wrongdoing in furtherance of which the lawyer's services were used).

yers for individuals essentially can only attempt to exert influence, withdraw, employ a noisy withdrawal when authorized to do so,⁴¹ or disclose if confidentiality exceptions permit. In most circumstances, noisy withdrawal is tantamount to disclosing the impropriety.⁴² Threatening either disclosure or noisy withdrawal is likely to carry significant weight and is likely to succeed in blackmailing compliance. The silent withdrawal alternative will be effective only when the client either places significant trust in this attorney or fears proceeding with new counsel.

II. CORPORATE LAWYERS' INCENTIVES

In sorting out the reasons why lawyers would desire, or not desire, the power to force clients to accept legal advice, it is important to recognize that short- and long-term incentives differ. Threatening disclosure, for example, may enhance a lawyer's immediate position or power in an organization, but in the long run may cause the organization to confide in, and depend on, the lawyer less frequently or to a lesser extent. Whether the individual lawyer would emphasize a short- or long-term view depends, at least in part, on the lawyer's baseline expectations regarding her future relationship with the organization.⁴³ As a result, what one might classify as a reason for some lawyers to desire a mandatory blackmail option sometimes also might be identified as a reason for other lawyers to wish that the option did not exist.

A. *Economic Incentives*

Corporate attorneys have some financial incentives to desire coercive power. First, it can be used to encourage corporate action that will entail the use of lawyers (for example, implementing a law compliance mechanism) or that may require the corporation to commission further legal work in the specific matter at issue.⁴⁴ At least for

⁴¹ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) (authorizing noisy withdrawals).

⁴² In other words, disavowing documents or aspects of representation alert the adversary that those items have caused a sufficient rift in the attorney-client relationship to justify the lawyer's withdrawal.

⁴³ See *infra* note 56–57 and accompanying text.

⁴⁴ See Susan Saab Fortney, *Chicken Little Lives: The Anticipated and Actual Effect of Sarbanes-Oxley on Corporate Lawyers' Conduct*, 33 CAP. U. L. REV. 61, 75–76 (2004) (arguing that the increased focus on compliance enables the lawyer to bill more hours); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 377 (1997) (arguing that lawyers, particularly in business law settings, may skew legal advice in a way that convinces the client that further assistance from the lawyer is required in order to manage a risk).

outside counsel, this would enhance the lawyer's fee-earning capability. For inside counsel, exercise of the option highlights the lawyer's importance in the organization and provides an opportunity for the lawyer to shine.

Second, both the existence of the option and its initial exercise increases the client's immediate dependence on the lawyer. The client knows that future behavior must meet the lawyer's approval. As a result, the lawyer's position vis-à-vis the client generally, and in fee or salary negotiations specifically, is enhanced.

Third, in some jurisdictions, at least in-house counsel can use the tools made available through a blackmail option to immunize herself from discharge. In other words, to the extent a state allows corporate counsel to sue her employer for retaliatory discharge, the exercise of the lawyer's threat is less easily punishable by the organization.⁴⁵ Even if the organization has valid, separate reasons to discharge the attorney, the timing of a discharge following a lawyer's threat will look suspicious. Manipulative corporate counsel thus can use the blackmail option to her economic advantage; in other words, to forestall discharge.

In the long term, the calculus is different. Under the traditional regime of loyalty and confidentiality, lawyers offer clients the valuable service of being intelligent sounding boards whose advice the client can accept or reject at will. That service is one of the reasons why corporate lawyers, in particular, are allowed to participate in a broad range of business decisions. To the extent lawyers gain the option, or are required, to control the client's actions in these situations, the client will be less inclined to turn to the lawyer for advice until consultation is necessary for legal representation.

Moreover, the existence of coercive authority gives clients an incentive to minimize the information in a single lawyer's hands.⁴⁶ The more a lawyer knows about the client's overall practices, the more

⁴⁵ Although the issue of whether corporate lawyers may file retaliatory discharge claims is contested, some jurisdictions allow such causes of action. *E.g.*, *Gen. Dynamics Corp. v. Rose*, 876 P.2d 487, 490 (Cal. 1994); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 166 (Mass. 1995); *Burkhardt v. Semitool, Inc.*, 5 P.3d 1031, 1042 (Mont. 2000); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 866 (Tenn. 2002).

⁴⁶ See Fisch & Rosen, *supra* note 8, at 1101, 1128 (arguing that mandatory blackmail provisions will reduce the information flow between attorneys and clients); Kaveh Noorishad, *The Sarbanes-Oxley Act and In-House Legal Counsel: Suggestions for Viable Compliance*, 18 GEO. J. LEGAL ETHICS 1041, 1050 (2005) (arguing that Sarbanes-Oxley may cause issuers to give attorneys less information); *cf.* Kostant, *supra* note 8, at 550-51 (arguing that there is no empirical evidence to support the notion that lawyers will be kept out of the loop by management); Ahuja, *supra* note 8, at 1333 (arguing that the Sarbanes-Oxley noisy withdrawal proposal would chill the flow of information to attorneys).

likely it is that a blackmail option will be triggered. Clients therefore become well-advised to spread legal work around, rather than to assign it to a single lawyer. This works to the disadvantage of in-house counsel and law firms that represent individual corporations on an ongoing basis, but may help firms that tend to perform spot work.

Clients also may make distinctions in *when* they consult counsel. Many, perhaps even most, clients will continue to ask lawyers before the fact about the potential illegality of future or hypothetical behavior. The clients have an acute interest in knowing the consequences of proposed action. If they confine the inquiry to this stage, the lawyer will have no basis for questioning the corporation's conduct or making a report up the ladder. Only when a client subsequently informs the lawyer about what it has done, or includes the lawyer in subsequent decision making, does the blackmail option present any risk.⁴⁷ Accordingly, one would expect many clients to alter their use of lawyers to conform to this model.

These phenomena may be especially significant to in-house counsel who play a dual role in corporations—part legal advisor and part participant in the business activities of the corporations. Small corporations sometimes cannot economically justify full-time legal staffs and thus expect line attorneys to perform business functions as well. In larger corporations, staff counsel—or even the general counsel—may perceive their position as a stepping-stone for obtaining business expertise and eventually moving up in the corporate hierarchy in a non-legal capacity. A corporation that fears providing business-related information to lawyers (i.e., because the professional rules may in the future require the lawyers to react to the information) will hesitate to employ lawyers in a dual capacity. The coercive rules thus may enhance the status of lawyers *as lawyers* in the corporation, but reduce their economic opportunities as current or future businesspersons.⁴⁸

Finally, it is important to note that changes in the working relationship between client and lawyers also may affect the closeness of the relationship. Clients who become less dependent on individual lawyers and have less of a history of dealing with them on a regular, intimate

⁴⁷ See John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. Rev. 301, 362 (2004) (arguing that under coercive rules, clients will ask lawyers to advise them regarding future hypothetical conduct, but refrain from discussing actual conduct post hoc for fear that the attorney will need to disclose).

⁴⁸ Cf. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 958–61 (2005) (discussing the way the roles played by in-house counsel have changed during different periods of American history).

basis are less likely to view the lawyers they do retain as essential allies in their working routine. Consequently, the work assigned, and fees paid, to individual lawyers by single companies are likely to decrease.

B. *Incentives Relating to Status Within the Organization*

The existence of coercive power is likely to affect the status of corporate attorneys, sometimes positively, sometimes negatively. On a simple level, authorizing lawyers to supervise an organization's conduct increases the importance of the lawyer as a decision maker within the organization.⁴⁹ Once the organization decides to include the lawyer in addressing a matter, the organization must be prepared to heed the lawyer's advice.⁵⁰ That is not necessarily the case with respect to other, low-level employees.⁵¹

Moreover, in some jurisdictions, the requirement that a lawyer respond to specific types of corporate conduct extends to business decisions, not merely decisions concerning the application of law. Under California's organizational attorney rule, for example, the lawyer may take remedial action whenever an agent of the organization "intends . . . to act . . . in a manner which is likely to result in substantial injury to the organization."⁵² This language suggests to agents of the company that a lawyer who disagrees with the agent's assessment of the effect of a particular business decision is authorized to, and should, go over the agent's head.

The existence of coercive authority thus enhances the lawyer's immediate position in the organization in two ways. First, it makes the lawyer's advice more important than it might be if offered by laypersons within the organization. Second, it suggests that the lawyer has a place in the corporate decision-making process at least equal to that of the corporate agent seeking advice.⁵³ Especially once the lawyer

⁴⁹ As will be discussed, however, the issue is more complex than it appears at first glance because the existence of the authority may cause the organization to use a lawyer less. See *infra* note 56–57 and accompanying text.

⁵⁰ Fortney, *supra* note 44, at 75 (noting that the Sarbanes-Oxley regulations give attorneys "leverage" in dealing with management).

⁵¹ Corporations, of course, accept or reject the advice of ordinary employees at will. Such employees ordinarily are bound by a duty of loyalty (i.e., under agency law) not to reveal the information outside the organization, at pain of dismissal. Unless they personally participate in corporate misconduct, these employees ordinarily have no legal obligation to pursue issues beyond the level of their own superiors.

⁵² CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2004).

⁵³ I do not mean to suggest that the lawyer necessarily will have the same power as the corporate officer. Whether persons higher up in the management hierarchy will listen to

exercises coercion, these effects may enhance the lawyer's image both inside⁵⁴ and outside⁵⁵ the organization.

The picture begins to change as this culture of legal representation matures. The more that lawyers are perceived to be potential monitors of the organization rather than team players within it, the more likely they are to become marginalized.⁵⁶ They will still be used to perform legal work because clients have no choice but to obtain representation when necessary to resolve active cases. To expand their duties within an organization, however, lawyers will have to prove their value based on characteristics other than their trustworthiness and loyalty.

These considerations probably are more significant for in-house counsel. For reasons already discussed,⁵⁷ organizations faced with a serious possibility of being coerced have incentives to spread legal work among various lawyers and to cabin the information each lawyer receives. This militates in favor of sending work to varied external counsel.

The marginalization likely will affect line attorneys more than a general counsel who already is high enough in the organization to be assured a voice in decision making. A general counsel often has become a member of the management team and is perceived to have personal incentives that ally him with management—including having more to lose from opposing management's position.⁵⁸ In contrast,

the lawyer or the officer depends, in large measure, on whom they trust more. What does change in the relationship, however, is that the lawyer gains access, or lines of communication, to persons higher in the chain of command than the lawyer might have had without the authority granted in the rules.

⁵⁴ Once a lawyer's decision to act upon blackmail authority becomes known within the organization, the lawyer's visibility is enhanced. For example, had a lawyer for Enron protested its accounting practices and taken steps to challenge their validity within the firm without repercussion, the lawyer quickly would have been perceived within the organization as a person of status.

⁵⁵ To the extent that the outside world's expectation is that the lawyer's word must be heeded, the lawyer will be treated as a more important, and better qualified, player. This is especially the case in jurisdictions in which the rules specifically assign corporate lawyers a blackmail-supported role in evaluating the corporation's business, as well as legal, decisions.

⁵⁶ Cf. Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1017 (1997) ("Lawyers in a corporate law department, as they are often reminded, are part of the 'corporate team.'").

⁵⁷ See *supra* note 46 and accompanying text.

⁵⁸ See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 284 (1998) (noting that corporate clients face "agency costs from not only the managers, whose self-interest gave rise to agency theory in the first place, but also from in-house counsel").

there may be less reason for management to trust line attorneys and empower them to act against management's interests.

The effects of providing coercive authority also may vary depending on whether in-house counsel is a supervisory or subordinate attorney, especially in large companies. A staff attorney, in essence, serves two masters—her boss and the company (i.e., the boss's boss). Some blackmail rules permit such lower-level employees to satisfy their responsibilities either by reporting to their immediate superiors or by pursuing the matter further, which may displease the supervising attorney but may be in the company's best interests.⁵⁹ Other rules require line attorneys to pursue the matter all the way up the ladder.⁶⁰ The issue of how a blackmail option affects the line attorney's status within the organization thus becomes exceptionally complicated and turns, in part, on the precise phrasing of each blackmail rule.

In general, enhancing lawyers' coercive authority will adversely affect in-house attorneys' personal relationships within the corporation.⁶¹ Even low-ranking employees are more likely to shy from confiding to in-house counsel than before. Consider, for example, an employee in an Enron-like scenario who has doubts about his employer's accounting practices. Would that employee be more likely to discuss the matter with a non-lawyer co-worker who shares his interests (for example, in doing his best for the company but also maintaining his position in the company) or with a lawyer freighted with the obligation to act on information regarding wrongdoing? The answer, of course, depends partly on whether the lawyer's coercive authority is mandatory or discretionary in nature. Yet it seems clear that the employee's general sense of how lawyers act, or must act, will affect the employee's attitude towards staff counsel.⁶²

⁵⁹ See 17 C.F.R. § 205.5 (2005) (stating that subordinate attorneys need only report evidence of a material violation to their supervising attorney, but if they reasonably believe the supervising attorney has failed to comply with the rule the subordinate has the option of reporting up the corporate ladder); *cf.* MODEL RULES OF PROF'L CONDUCT R. 5.2 (2002) (providing that a subordinate lawyer does not violate the professional rules when she "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty").

⁶⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.13(b)–(c) (2002) (requiring lawyers to pursue the matter to "highest" authority).

⁶¹ This analysis, of course, assumes that the corporation and its employees perceive the possibility that the company's lawyers sometimes will exercise their coercive authority.

⁶² See Hazard, *supra* note 56, at 1018–19 (analyzing and distinguishing the practice of in-house and external counsel in terms of their "water cooler" and "back-channel" interactions with other corporate employees and the information available to counsel through such interactions).

C. Personal Incentives

Corporate lawyers may desire coercive authority for purely psychological reasons. The existence of the power may enhance their sense of self-worth. It may reassure them that their role as an attorney does not undermine their own ability to act as moral individuals.

They also have several personal incentives to exercise the power. In the individual case, forcing the organization to act in a moral or legal way may, for the lawyer, be equivalent to acting morally herself. It may also make it easier for the lawyer to avoid personal legal liability for knowing of, or participating in, corporate misconduct. To the extent the lawyer's actions become public, the lawyer's behavior may enhance her personal reputation.

It therefore seems surprising that many lawyers are entrenched in their opposition to rules that would establish coercive authority, especially new exceptions to attorney-client confidentiality.⁶³ One reason may be that with authority potentially comes responsibility. Strict rules requiring lawyers to act in accordance with their clients' desires serve as a protective shield for lawyers.⁶⁴ In contrast, the existence of a blackmail option may open lawyers to personal liability to third persons should they fail to take appropriate action.⁶⁵ Lawyers governed

⁶³ California attorneys who until the year 2004 were governed by a nearly absolute confidentiality rule, for example, consistently fought against a future crime exception and the disclosure requirements of Sarbanes-Oxley. Cf. Letter from the State Bar of Cal., Bus. Law Section, Corp. Comm., to Giovanni P. Prezioso, General Counsel, U.S. Sec. & Exch. Comm'n (Aug. 13, 2003), available at http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-10-08_SEC.pdf (arguing that stricter California confidentiality rules should trump the Sarbanes-Oxley requirements).

⁶⁴ One of the major concerns on the floor of the American Law Institute (the "ALI") debate concerning, inter alia, confidentiality exceptions was the potential for liability that discretionary exceptions make possible. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 66(3), 67(4) (2000) (providing that a lawyer who "takes action or decides not to take action permitted under [a crime or fraud exception to confidentiality] is not, solely by reason of such action or inaction, . . . liable for damages"); cf. *id.* § 54(1) (providing that "[a] lawyer is not liable under § 48 or § 49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule"). Some members of the ALI argued that lawyers should be immunized from liability more generally whenever they exercise discretion that the professional rules accord.

⁶⁵ Discretionary authority to reveal a client's intent to harm a third person can help support an injured third party's contention that liability under *Tarasoff v. Regents of the University of California* should ensue upon the lawyer's failure to prevent the harm. See Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 403 (1995) (discussing the relationship between confidentiality exceptions and *Tarasoff* liability). See generally *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

by limiting but lawyer-protective rules thus have strong incentives to disfavor the extension of coercive power.

The ability to “blackmail” clients into acting in an appropriate fashion, especially if discretionary, also will impose psychological burdens on some lawyers. It requires lawyers to make potentially difficult moral decisions, including decisions that can be unpleasant for the client. Even a lawyer who adopts a rule of thumb that she will always act in the way that the client wishes must at least make that decision consciously. Arguably, discretionary rules may require more case-by-case introspection.⁶⁶ A non-discretionary rule in either direction (that is, one requiring or forbidding lawyer action) essentially allows lawyers to remain amoral and to attribute any bad results to their role in the legal system.⁶⁷

Lastly, according coercive authority weakens lawyers’ ability to perceive themselves as the client’s friend and ally. Particularly in-house counsel, who has a single client and spends each day in the client’s workplace, may come to feel like an outsider. She no longer can be one of the team, because she has a special obligation to monitor the other employees.

D. *Outward-Looking Incentives*

Some lawyers may desire coercive power for reasons independent of their personal interests. Most of the rules that explicitly authorize lawyers to force clients to take particular actions—like the Sarbanes-Oxley regulations—stem from an assessment that the actions required of lawyers will promote socially beneficial conduct that is more important than the harm the actions might inflict on clients or the attorney-client relationship.⁶⁸ Some lawyers share this assessment. In other

⁶⁶ As discussed below, there is room for disagreement about whether discretionary rules require lawyers to exercise the discretion in each case or whether the grant of discretion leaves the lawyer free to adopt any approach. See *infra* notes 159–160 and accompanying text.

⁶⁷ See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 6.1, at 247 (1986) (discussing confidentiality as a shield for lawyers); Zacharias, *supra* note 4, at 373 nn.97–101 (listing authorities that discuss the personal consequences of strict confidentiality rules).

⁶⁸ See Richard W. Painter, *Standing up to Wall Street (and Congress)*, 101 MICH. L. REV. 1512, 1520–21 (2003) (book review) (citing Letter from Richard W. Painter et al., to Harvey Pitt, Chairman, Sec. & Exch. Comm’n (Mar. 7, 2002), signed by forty law professors “seeking a [SEC] rule requiring issuers’ lawyers to report unrectified securities law violations to client boards of directors”); Ahuja, *supra* note 8, at 1333 (arguing that a requirement to report up the ladder serves the public interest and increases confidence in the legal profession); *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2227, 2234–37, 2248 (2004) (arguing that a lawyer’s responsibility to the public sometimes must

words, they too believe that preventing immoral or illegal client conduct (or promoting moral or legal conduct) justifies occasional coercion. Such lawyers, at least, will have the desire for, and the incentive to exercise, a blackmail option in order to serve societal interests.

III. SOME RAMIFICATIONS OF THE COMPETING INCENTIVES

Different forms of coercive authority will affect lawyer behavior in different ways. On the surface, authorizing lawyers to force client conduct seems only to heighten the status of lawyers in the attorney-client relationship and to enable them to exercise individual moral decision making. This seems most apt when the authority is discretionary. The presence of discretionary authority, however, may influence how lawyers act within the attorney-client relationship. The responsibilities that come with the authority may cause lawyers to oppose or avoid implementing an option to blackmail.

First and foremost, a lawyer who has the option to force clients to act in a certain way has psychological burdens that do not affect lawyers bound to secrecy or strict notions of "loyalty." The lawyer must deal directly with moral issues.⁶⁹ She potentially also must consider whether to exercise coercion upon clients with whom she has built a personal relationship, perhaps even friendship.

More importantly, the existence of discretionary authority exposes the lawyer to the possibility of liability for failing to take action. One of the keys to the California Supreme Court's 1976 decision in *Tarasoff v. Regents of the University of California*, the case providing the legal basis for psychiatrist liability for failure to disclose danger created by patients, was the existence of professional rules that *allowed* disclosure.⁷⁰

Thus, despite the initial attractiveness of the enhancement of their status through the grant of discretionary authority, lawyers may seek to avoid situations that trigger coercive authority. They can do so

transcend the attorney-client relationship and that neither the current Model Rule 1.13 nor Sarbanes-Oxley go far enough); cf. Richard W. Painter, *Convergence and Competition in Rules Governing Lawyers and Auditors*, 29 J. CORP. L. 397, 410 (2004) (suggesting that, although it is too early to reach a verdict on Sarbanes-Oxley, customized solutions for each lawyer-client relationship may be more effective than an all encompassing solution).

⁶⁹ Of course, a lawyer or law firm may adopt the position that it will always exercise discretion in accordance with the client's will. Even if such attorneys can avoid making moral decisions on a case-by-case basis, however, the attorney must at least make the initial determination to cede moral independence. *But see infra* note 159 and accompanying text (questioning whether lawyers may cede discretionary authority).

⁷⁰ See 551 P.2d 334, 347 (Cal. 1976).

in two ways. First, lawyers can warn a client not to advise them of triggering information.⁷¹ Second, they can avoid participating in tasks that are likely to put them in an awkward position.⁷²

The nature of the triggering mechanism is key to lawyers' ability to skirt coercive rules. Most such rules depend on lawyers' "knowing" of client wrongdoing⁷³ or being aware of "credible evidence" of wrongdoing that would be "unreasonable" for them to ignore.⁷⁴ In the Enron setting, for example, lawyers for the corporation and auditing accountants were able to convince themselves—and argue after the fact—that, although they might have suspected some of the client's practices, they had a right to rely on the client's factual representations and thus did not "know" of any wrongdoing.⁷⁵ Likewise, even under the subsequent Sarbanes-Oxley regulation, lawyers in Enron-like situations still can take the position that accepting the client's word ordinarily is not "unreasonable."⁷⁶

When the disclosure authority is mandatory, some of the same considerations apply. The psychological burdens may be less, because the lawyer has no choice but to exercise the authority when the trigger is satisfied. The malleability of most triggers, however, continues to allow wiggle room. Moreover, the lawyer still must be cognizant of

⁷¹ See Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1202–03 (2003) (arguing that lawyers involved with Enron consciously avoided learning the facts in order to avoid complicity).

⁷² Cf. Cohen, *supra* note 58, at 282 (noting that lawyers may "act in a self-interested way to use their informational advantage [for example, information gained through attorney-client confidentiality] to evade their responsibilities to their clients . . . [and] to help their clients evade their responsibilities towards others"); James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1092 (2003) (advising corporate lawyers to refrain from scrutinizing closely an issuer's transactions to avoid triggering Sarbanes-Oxley's requirements).

⁷³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002) (allowing disclosure when the lawyer "reasonably believes" it is "necessary" to prevent particular "reasonably certain" results); *id.* at R. 1.13(b) (requiring lawyer to act when she "knows" corporate officers are acting or intend to act in the prohibited fashion); *id.* at R. 3.3(b) (requiring lawyer to act when she "knows" that "a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding").

⁷⁴ See 17 C.F.R. § 205.2(c) (2005).

⁷⁵ See Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 209 (2003) (discussing the attitudes of the Enron lawyers).

⁷⁶ See Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC.*, 103 COLUM. L. REV. 1236, 1275–76 (2003) (discussing weaknesses of the trigger requirements of the Sarbanes-Oxley regulations); see also Cramton et al., *supra* note 11, at 752 (arguing that the vague triggering language of the Sarbanes-Oxley regulations will allow lawyers to avoid their obligations to pursue wrongdoing beyond an initial report); Koniak, *supra* note 75, at 229–30 (discussing the then-proposed trigger language).

her potential legal liability. She therefore also may take steps to avoid blackmail situations.

Under a mandatory regime, the lawyer must consider whether her obligations to the client include warning the client of the blackmail option in advance—that is, “mirandizing” the client—and avoiding participation in potential blackmail situations. Some commentators have suggested, for example, that a lawyer must advise the client of the existence of confidentiality exceptions, even if she does not need to spell out how the client can avoid their application.⁷⁷

In-house counsel, especially one who is herself an officer or supervisory attorney, must internalize the potential operation of a mandatory rule on her working relationship with others in the organization. A mandatory rule, in essence, may require her routinely to go over the heads of other employees with whom she deals on a day-to-day basis. To the extent a good working relationship with the other employees is important for the lawyer’s job performance, she has a special reason to avoid situations in which coercive authority is triggered. The lawyer thus has incentives not only to avoid information, but also to train employee-clients to ask questions and seek advice in a form that will not satisfy the trigger.⁷⁸

⁷⁷ See, e.g., H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1198 n.19 (1999) (noting that “it has been observed that attorneys should give ‘Miranda-like warnings’ when counseling clients”); Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1804 (1988) (arguing that attorneys should warn clients about the manner in which client disclosures may not be privileged); Zacharias, *supra* note 4, at 387 (discussing the relationship between client autonomy and advising clients about confidentiality exceptions); cf. DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* 108 (1977) (proposing a specific promise to be given to clients that “I cannot and will not divulge anything you say to anyone else without your express permission”); FREEDMAN & SMITH, *supra* note 16, at 161–62 (arguing against saying anything to clients about exceptions to confidentiality because that would chill the attorney-client relationship). See generally Lee A. Pizzimenti, *The Lawyer’s Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990) (discussing the duty to warn clients). California’s recently amended confidentiality exception for future crimes, however, seems to envision lawyers sometimes intentionally withholding information about the exception until the client has already revealed the confidence to the lawyer. CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion ¶ 9 (2004) (authorizing lawyers not to advise clients because “under certain circumstances, informing a client of the member’s ability or decision to reveal confidential information . . . would likely increase the risk of death or substantial bodily harm”).

⁷⁸ Thus, for example, lawyers may advise clients to seek advice through hypothetical questions or other mechanisms that enable the lawyers to avoid knowing, or having credible evidence, that the client has, or proposes to, engage in wrongdoing. Cf. Koniak, *supra* note 76, at 1271 (arguing that “lawyers never ‘know’ that their client is committing a crime or fraud, not before a court has ruled that way”).

On the surface, the combination of the triggering mechanisms and the ability of lawyers and clients to signal their desires looks like a simple phenomenon to analyze. Lawyers and clients will decide what they want from one another and let the other know in time for the other to shape his or her behavior. Consider this added complication, however. Transactions often are ongoing. Triggers for different lawyer obligations and authority may occur at various times during a transaction, as may the opportunity for signaling.

Thus, for example, the new version of Model Rule 1.6 authorizes lawyers to make disclosures they "reasonably believe necessary" to prevent crimes or frauds in which the lawyer's services have been "used."⁷⁹ A client might obtain initial advice from a lawyer but then, by excluding her from the actual decision to propose or initiate the conduct or by screening her from details about its execution, avoid putting the lawyer in a position to disclose. After a transaction is complete, clients sometimes may also have incentives to keep their lawyer in the dark about what has occurred, because the self-defense exception in Model Rule 1.6(b)(5) (especially combined with the new authority to prevent harms in Model Rule 1.6(b)(3)) can subsequently empower the lawyer to act coercively.⁸⁰ Controlling the lawyer might be more difficult, however, under Model Rule 1.13, which authorizes the lawyer to act when she "knows" that an officer engages or "intends" to engage in specified misconduct.⁸¹ Although the knowledge threshold is higher than under Model Rule 1.6, once the lawyer knows of a corporate agent's *intent* to act wrongfully, the agent's decision to dismiss or screen the lawyer may not be sufficient to obviate the lawyer's power, because the lawyer continues to have obligations to the actual client, the corporation. Thus, at each stage of their transactions, sophisticated lawyers and clients are likely to be aware of the different triggers and accordingly will cooperatively limit the knowledge transmitted to lawyers.⁸² The willingness of

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3) (2002).

⁸⁰ See *id.* at R. 1.6(b)(5) (allowing lawyers to disclose to "respond to allegations in any proceeding concerning the lawyer's representation of the client"); *id.* at R. 1.6(b)(3) (authorizing disclosures to "prevent, mitigate or rectify substantial injury to the financial interests . . . of another that is reasonably certain to result or that has resulted from" a crime or fraud in which "the client has used the lawyer's services"); cf. *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-95 (2d Cir. 1974) (finding no violation of professional rules in former lawyer's disclosure of fraud when lawyer faced threat of being named as a defendant in a securities class action).

⁸¹ MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002).

⁸² An example of a client's attempt to follow such a procedure is found in *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 106 (Ill. 1991), in which the client promised the lawyer not to ship defective dialysis machines, but then did so nonetheless.

lawyers to signal to clients how they should act may become an important part of the attorney-client relationship.

Finally, the mere potential for the exercise of coercive power over the corporation—whether discretionary or mandatory—may function as an economic glass ceiling for in-house lawyers, particularly low-level staff attorneys.⁸³ It provides incentives for organizations to farm out work. Perhaps more significantly, it gives corporations a disincentive to training and including line attorneys in non-legal roles.

These considerations help explain why lawyers might oppose regulation embodying coercive authority even when the regulation seems to enhance the lawyers' personal power. There are idealistic justifications for opposing blackmail rules; namely, that the rules negatively affect the traditional attorney-client trust relationship that allegedly lies at the heart of adversary ethics.⁸⁴ More personally, however, blackmail rules can negatively affect lawyers' interpersonal connections with clients and their status within a client organization. They affect both how a lawyer will be approached by an organization's employees and the work she will (and should) receive.

Let us consider a bit more specifically the four most commonly discussed forms of corporate blackmail rules, each with two variations, and consider their likely impact on lawyers and clients. These include rules giving corporate counsel discretion to threaten remedial action; rules requiring lawyers to go up the ladder, rules requiring disclosure, and rules requiring noisy withdrawal.

A. Discretionary Rules

Under the old version of Model Rule 1.13, still in effect in many states,⁸⁵ lawyers who learn of corporate illegality must take action, but are given broad discretion regarding what steps to take.⁸⁶ The ability of a lawyer to coerce client conduct by threatening to take action is limited in two ways. First, the lawyer may only proceed "in the best

⁸³ See *supra* note 47–48 and accompanying text (discussing the business role of many in-house lawyers).

⁸⁴ See FREEDMAN & SMITH, *supra* note 16, at 49–51 (discussing the importance of client autonomy in the attorney-client relationship).

⁸⁵ E.g., GA. RULES OF PROF'L CONDUCT R. 1.13 (2000); MICH. RULES OF PROF'L CONDUCT R. 1.13 (2004); VA. RULES OF PROF'L CONDUCT R. 1.13 (2005).

⁸⁶ MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (1983) (listing options that required remediation "may include").

interest of the organization,"⁸⁷ not that of society as a whole. Second, the lawyer's actions may not involve the disclosure of confidences.⁸⁸

This version of coercive authority maximizes the ability of officers and employees to trust and use the corporate lawyer. Ordinarily, officers and employees will be acting (or think they are acting) in the best interests of the company, and so can be confident that they can prevent the lawyer from embarrassing them (for example, by going over their heads). Indeed, the threat of lawyer action probably is less than the parallel threat from other non-lawyer employees who have the same information, because the lawyer's ability to sue for retaliatory discharge when sanctioned for acting is more limited. Lawyers actually have more to fear than other employees if they exercise a blackmail option.⁸⁹ Model Rule 1.13's express limitation on lawyer disclosures further constrains the threat that lawyers pose.

As a consequence, it is fair to conclude that the old version of the rule will maximize corporate clients' use of lawyers and will maximize the economic interests of corporate attorneys. On the other hand, it limits attorneys' independence and status, at least in the case of in-house counsel. External counsel have one potentially effective coercive option available: namely, the ability to resign, if they are willing to lose a single client. In some jurisdictions, this ability to resign is accompanied by the right to disavow fraudulent documents that the lawyers have helped prepare or with respect to which the lawyer's services otherwise have been used.⁹⁰ Although in-house counsel have the same option, they are far less likely to exercise it because of their dependence on the single employer.⁹¹

By making the choice of remedy other than disclosure discretionary, the old Model Rule 1.13 allows corporate officers to pressure a lawyer into selecting the option that least disrupts their plans.⁹² Be-

⁸⁷ *Id.*

⁸⁸ *Id.* at R. 1.13 cmt. (noting that "this Rule does not limit or expand the lawyer's responsibility under 1.6").

⁸⁹ See Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 405 (1992) (noting that attorneys may be more vulnerable to corporate pressure than non-lawyer personnel who have standing to sue for retaliatory discharge after blowing the whistle).

⁹⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) (providing that a lawyer may "withdraw or disaffirm any opinion, document, affirmation, or the like").

⁹¹ See *Developments in the Law—Corporations and Society*, *supra* note 68, at 2246 (arguing that absent a mandatory rule, lawyers will focus on pleasing management).

⁹² Cf. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1003 (2005) ("Management creates the reality for inside counsel.

cause the rules do not require, or even give the lawyer the where-withal, to prevent misconduct unilaterally (for example, through disclosure), the lawyer's natural incentives are to balance her obligation to counteract misconduct against her own interests. Those interests ordinarily will be to ally herself with management and to pursue the desires of those officers who control her employment.

The same syllogism applies to line attorneys who can satisfy their obligations by reporting an issue to supervisory attorneys (or by consulting outside counsel). Although they may be authorized to go over their superiors' heads, there will be ramifications for doing so. The line attorney's personal interests are maximized by allowing the superior to control the moral decision.⁹³

The relationship between management and attorney becomes far more complicated under variations of the rule—like new Model Rule 1.13—that allow (but do not require) disclosure when the company does not adhere to the lawyer's wishes. This approach at once requires supervisory or outside lawyers actually to confront moral dilemmas when a client insists on pursuing fraudulent or illegal conduct and puts these lawyers at risk of personal sanction if they fail to act.⁹⁴ The lawyers can internalize this risk in one of two ways. They may exercise coercion, which in the long run may cost them the client or status in the firm. Alternatively, they can exact payment for assuming the risk by signaling to the managers that they will not exercise the option in exchange for reciprocal loyalty on the managers' part.⁹⁵

One might, therefore, expect the bar to splinter in its view of the desirability of this option. Lawyers who are not prepared to agree to act complicitly with clients and who take their moral obligations seriously actually should prefer not to have the discretionary disclosure option, because it would hurt them economically. In contrast, the option gives a competitive advantage to lawyers willing to cede their discretion.

Management defines the objectives, identifies specific responsibilities for inside lawyers, and determines whether an inside lawyer's performance is acceptable.").

⁹³ See Douglas Michael McManamon, Comment, *Should Attorneys Be Footsoldiers in the War on Corporate Fraud?*, 38 U.S.F. L. Rev. 163, 183 (2003) (arguing that, under the Sarbanes-Oxley regulations, junior attorneys most likely will limit themselves to advising a supervising attorney of corporate misconduct).

⁹⁴ See *supra* notes 69–70 and accompanying text.

⁹⁵ Cf. McGowan, *supra* note 12, at 1825–26 (assuming that, at least for disciplinary purposes, lawyers have total discretion in deciding when to implement discretionary disclosure options and that lawyers will make economically rational decisions about implementation).

Clients, too, are likely to respond in varying ways. If the corporate officer in charge of retaining counsel is committed to ensuring the legality of corporate conduct, he will prefer the lawyer who potentially might disclose. On the other hand, the officer who emphasizes personal loyalty is likely to gravitate to the lawyer willing to bargain away her moral authority.

B. *Rules Requiring Lawyers to "Report up the Ladder"*

A second form of corporate blackmail, reflected in the new Model Rule 1.13 and the Sarbanes-Oxley regulations, establishes a presumption that corporate lawyers must report "up the ladder" when they learn of inappropriate corporate conduct and must pursue the climb to higher authorities until they are satisfied.⁹⁶ The Sarbanes-Oxley regulations differ from Model Rule 1.13 in one important respect: a lawyer may shortcut her obligation to climb the ladder if the corporation has established a qualified legal compliance committee (the "QLCC") and the lawyer reports to it. California adopts a different variation of Model Rule 1.13. It requires the lawyer to report, at most, to the corporation's highest "internal authority,"⁹⁷ presumably excepting independent or public boards of directors that might not be in a position to keep sensitive information confidential.⁹⁸

These rules all share a common trait. They are not discretionary, except in the sense that they allow the lawyer to make the initial determination that the reporting requirements are triggered. Once the trigger is satisfied, the lawyer must report and must (except under the Sarbanes-Oxley compliance committee safe harbor) continue to press her view to the highest corporate authorities unless her view is satisfied or she becomes convinced that she was in error.

The absence of discretion has several effects. It minimizes the psychological burdens that choices impose on lawyers. It makes clear to corporate employers the benefits of not conveying information to

⁹⁶ 17 C.F.R. §§ 205.2(b), 205.3(b)(1) (2005); MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002).

⁹⁷ CAL. RULES OF PROF'L CONDUCT R. 3-600(B)(2).

⁹⁸ See *id.* There are no cases or legislative history interpreting the "highest internal authority" language of R. 3-600(B)(2). The language, however, was adopted in 1989 to contrast with the then-existing Model Rule 1.13, which did not confine disclosure to internal management. California's heavy emphasis on securing attorney-client confidentiality elsewhere in its professional rules supports the notion that Rule 3-600's language was intended to assure that the process of corporate lawyers reporting up the ladder be limited by the need to preserve their corporate clients' secrets.

lawyers, or of cabining the information multiple lawyers receive. It may make the use of one-time outside counsel attractive, because outside counsel can both be dealt with on a need-to-know basis and discharged more easily than full-time counsel. It also encourages organizations to use non-lawyers to fulfill tasks when possible.

When one adds the substitute option of reporting to a QLCC or other internal compliance committee, however, the calculation changes dramatically. Three sets of questions become important. First, is the lawyer personally better off flexing her own muscles (that is, by insisting upon her position up the ladder) or handing off the problem to a committee that will assume the legal and moral responsibility inherent in the blackmail paradigm? Second, is the organization better off having a lawyer or the committee address the matter? Third, and perhaps most important, to what extent can the organization signal its preference to the lawyer and will the lawyer honor that signal?

The existence of the committee structure may be especially attractive to in-house counsel, because it provides an alternative to the use of multiple outside counsel. If corporate management is satisfied that a QLCC, for example, will look after its interests, then inside counsel can inform the management in advance of her preference for its use and thereby fend off the competition of outside counsel and maintain her status within the corporation.⁹⁹ In another sense, the existence of the QLCC *as an option* provides corporate counsel with the ability to make personal tactical choices about when referring an issue to the QLCC will insulate her from criticism and when it will enhance her power.¹⁰⁰

More likely, however, is the possibility that the corporation itself will develop a culture. An organization that wishes to avoid independent analysis of the legality of its operations will establish a QLCC that is deferential, and will signal to its lawyers that any questions should be delivered to the committee. It is easy to provide and enforce such signals to inside counsel.¹⁰¹ The opportunities for rewarding salaried employees (for example, through promotions and bonuses) are frequent.

⁹⁹ Cf. Jill Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 536, 546 (2003) (noting that attorneys have an incentive to encourage clients to establish QLCCs because they minimize the attorney's obligations).

¹⁰⁰ See *id.*

¹⁰¹ See Henning, *supra* note 21, at 376 ("Lawyers are not immune to being co-opted into a corporate culture that will not permit any claim of wrongdoing.").

A course of conduct may be more difficult to establish with outside lawyers unfamiliar with the corporation's routine. Arguably, sophisticated outside counsel can easily and quickly discern management's desires regarding independent investigating committees.¹⁰² Management's willingness to risk a signal, however, may depend either upon the existence of a previous relationship with external counsel or upon the external counsel's reputation for willingness to accept a signal and abide by client desires.

One might assume that management always will hire a law firm with a reputation for malleability and that all economically rational law firms will signal their malleability. But the accuracy of that proposition may well vary with the context in which a firm is hired. When, for example, a corporate client expects a court or administrative agency to shine a spotlight on its actions (e.g., because a shareholder suit has been or will be filed or because an agency has announced plans to scrutinize this category of transaction), the corporation might prefer to engage counsel with a reputation for independence and objectivity.¹⁰³ Conversely, a law firm's overall marketability may depend on the reputation for independence that the firm establishes with regulators in the field in which the firm practices.¹⁰⁴

Whatever form of counsel is used, compliance-avoidance techniques are most likely to be found in corporations whose management is conscious of its own propensity for cutting corners. An attorney who is unwilling to play ball in such an organization will be unwelcome. Her choice not to use the committee alternative not only will be met with resistance, but also may be punished. In contrast, a well-socialized management team that wishes to be notified of poten-

¹⁰² See Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 *FORDHAM L. REV.* 1105, 1129 (2005) ("Clients that wish to test legal limits can select law firms that are willing to overlook problems. And because law firms need clients, they will face competitive pressures to offer lax supervision.").

¹⁰³ See, e.g., Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *FORDHAM L. REV.* 149, 170-71 (1996) [hereinafter Painter, *Game Theoretic*] (arguing that corporations can benefit from being represented by attorneys who have pledged or proven to regulators that they take monitoring obligations seriously); Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 *MINN. L. REV.* 1399, 1402-03 (2000) ("A client that wants a good relationship with investors, regulators and lenders may decide ex ante that secrets should not be kept by lawyers whom it hires to work on public offerings, mergers and similar transactions.").

¹⁰⁴ Painter, *Game Theoretic*, *supra* note 103, at 170-71 (arguing that law firms have a long-term interest in exhibiting law-abiding character to administrative agencies before which they practice).

tial law violations and hopes to meet a high standard of conduct will welcome a reporting lawyer's initiatives. The alternative committee structure thus is unlikely to benefit companies that already are good citizens, or lawyers within them with information about wrongdoing.

C. Disclosure Rules

Disclosure rules are a third form of corporate blackmail. These rules present the extreme situation. A lawyer who exercises the right or obligation to disclose ordinarily knows that doing so will end any possibility of a future relationship with the client. External counsel will be dismissed. In-house counsel probably will be discharged, or at least isolated within the organization. The lawyer's calculation of the personal costs inherent in exercising the blackmail option thus becomes inevitable.

Making the confidentiality exception discretionary has two effects. At least on the surface, it seems to allow the lawyer to include the potential personal costs in her calculus. And it allows lawyers to negotiate their blackmail threat without losing the moral high ground. In other words, a lawyer who threatens to disclose because an ethics rule says she must should not be able to be persuaded to forego disclosure on any basis other than that the client will correct the problem to the lawyer's satisfaction. If the rule is discretionary, however, the lawyer arguably is authorized to accept a compromise solution, including one that benefits the corporate officers and herself.

Outside counsel can perhaps benefit most from these effects. Outside counsel typically are in a better negotiating position than in-house counsel, for several reasons. First, because they have less to lose—one client rather than their entire livelihoods—they have more leverage. Second, the relationship of retained, as opposed to salaried, lawyers almost always has started from an arms-length position of negotiation, one that both parties to the negotiation are conscious of. Third, the company is in a position to exact a range of retribution (all of which is negotiable) against a full-time employee, and so is more able to exert pressure for a favorable settlement. The discretionary nature of the disclosure exception thus does not necessarily make it more likely that outside counsel will disclose than in-house counsel, but it does make it more likely that outside counsel can use the option to benefit themselves or, at least, to produce some movement by the company on the moral issue.

When the disclosure exception is mandatory, disclosure will still cost the salaried employee more than the occasional outside counsel.

But outside counsel's ability to avoid responsibility (that is, to negotiate away the disclosure option) is less significant. In-house counsel, particularly one who is a low-level employee, may be able to share the responsibility with her supervisors and thus spread the costs of confronting management; the company is unlikely, for example, to discharge the whole legal staff. Moreover, if the lawyer has taken some steps, such as reporting part of the way up the ladder, enforcement agencies and plaintiffs' lawyers are more likely to target the higher-ups, rather than the lower-level employees. The in-house lawyer thus has both great personal incentives to minimize her mandatory obligation and potentially greater ability to avoid sanctions if her failure to disclose is discovered. An outside law firm that has a clear obligation to disclose under the rules has lesser incentives to demur and will find it more difficult to escape punishment.

From the organization's point of view, the above considerations cut in several directions. On the one hand, if a disclosure rule is permissive, it is easier for the company to manage the information provided to external counsel to avoid the possibility of a blackmail threat. On the other hand, once given the damaging information, in-house counsel is less likely to exercise the threat to disclose or to negotiate concessions for foregoing the blackmail option.¹⁰⁵

The same calculus applies when the confidentiality exception is mandatory, except that the ability of the lawyers to negotiate and convince themselves that they have a legal or moral right to forgo disclosure disappears. The salaried employee's costs of disclosure are higher than the external firm's, but in foregoing disclosure the employee *knows* that she is doing something unethical and perhaps illegal. The external firm's practical incentives to demur are slimmer.

State law regarding retaliatory discharge lawsuits for lawyers who are sanctioned for disclosing may affect the viability of the blackmail option. In most jurisdictions, external counsel would have a difficult time suing for retaliatory discharge in any event, because the common law rule is that clients should be able to retain only lawyers they trust. In some jurisdictions, the mandatory nature of disclosure may provide in-house counsel with a cause of action if she is discharged, which reduces her disincentives to employ coercion.¹⁰⁶ Interestingly,

¹⁰⁵ See Henning, *supra* note 21, at 327, 368 (noting that a mandatory withdrawal rule "may create a 'race to the bottom' by encouraging corporations to hire weak lawyers").

¹⁰⁶ In *Gen. Dynamics Corp. v. Super. Ct.*, 876 P.2d 487, 502-03 (Cal. 1994), for example, the California Supreme Court conditioned lawyers' ability to sue for retaliatory dis-

however, at least one jurisdiction (i.e., Illinois) relies upon the mandatory nature of disclosure as a grounds for disallowing a retaliatory discharge cause of action,¹⁰⁷ making in-house counsel in such jurisdictions less likely to follow the disclosure rule.¹⁰⁸

D. Noisy Withdrawal Rules

The fourth form of lawyer blackmail in the corporate context is noisy withdrawal. In large measure, threatening a noisy withdrawal is equivalent to threatening to disclose, because third parties ordinarily will be able to discern the reasons for the disavowal of prior representation. In some jurisdictions, however, the right to employ a noisy withdrawal is permissive, not mandatory, and is limited to situations in which the lawyer's services have been used.¹⁰⁹ When the lawyer simply learns of corporate misconduct that has not involved her, she has no roving right to alert third parties.

This discretionary form of noisy withdrawal option essentially puts the lawyers in the same position as other corporate employees. They too have an obligation to keep the employer's secrets, but not to the extent that silence would implicate them in a crime or fraud. The lawyer's remedy is tied to the lawyer's personal right to avoid the imputation of wrongdoing and liability for that wrongdoing. A rule allowing such conduct relieves counsel of ambiguity in other remedial rules that seem to forbid revelation of any corporate information.¹¹⁰

charge on the lawyer making only disclosures permitted under California's attorney-client privilege standards.

¹⁰⁷ In *Balla*, the Illinois Supreme Court reasoned that when a lawyer's disclosure of information to protect third parties is required by the professional rules, there is no need to provide lawyers with an incentive to disclose through a retaliatory discharge cause of action. 584 N.E.2d at 108-09.

¹⁰⁸ David Fish, *The Legal Rock and the Economic Hard Place: Remedies of Associate Attorneys Wrongfully Terminated for Refusing to Violate Ethical Rules*, 30 UWLA L. REV. 61, 75 (1999) (arguing that cases like *Balla* underestimate counsel's economic incentives to avoid disclosing their company's misconduct); Justine Thompson, Note, *Who Is Right About Responsibility: An Application of Rights Talk to Balla v. Gambro, Inc. and General Dynamics Corp. v. Rose*, 44 DUKE L.J. 1020, 1043 (1995) ("By placing attorneys in this dilemma [of reporting at risk of being discharged], the *Balla* court discourages attorneys from making ethical choices consistent with community standards.").

¹⁰⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) (providing that Rules 1.6, 1.8, and 1.16 do not "preven[t] the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like").

¹¹⁰ See CAL. RULES OF PROF'L CONDUCT R. 3-600(C) (2004) (providing that if a client corporation persists in proposed wrongdoing despite the remedial steps the lawyer has

IV. WHEN SHOULD SOCIETY IMPOSE COERCIVE RESPONSIBILITY ON LAWYERS?

Perhaps the most interesting aspect of the above analysis is how little it has focused upon society's actual interests in lawyer monitoring of corporate behavior and the countervailing interests in enabling clients to trust their lawyers. We have seen that different segments of the bar may favor or oppose coercive rules, or types of rules, for totally extraneous reasons. Some rules will lead companies to divert work from in-house counsel to external firms, and vice versa. Some rules allow companies to concentrate work in the hands of a few lawyers or firms, while others encourage companies to spread the work among multiple firms that engage in spot work. Some rules have uniquely deleterious effects on the day-to-day work life of staff counsel.

The discussion also has illustrated that different varieties of coercive authority may have effects on the conduct of companies that are perverse in light of the goals of providing such authority in the first place. Discretionary rules, for example, support the possibility of subtle negotiation between companies and lawyers about the lawyers' threats, or willingness to make threats. It thus becomes likely that companies that wish to act lawfully and morally from the outset (and therefore need less heavy-handed monitoring) are more likely to engage lawyers who might exercise the blackmail option. Companies likely to cut corners will engage lawyers who are willing to negotiate away their power to enforce better conduct.

Alternative avenues of compliance, like QLCC's¹¹¹ or the actions of supervisory attorneys under the Sarbanes-Oxley regulations,¹¹² similarly can be misused by those companies most willing to exert pressure on line attorneys to overlook misconduct. As we have seen, the initial reaction of corporations under Sarbanes-Oxley may be to limit information in the hands of each attorney and to disperse information to multiple outside firms.¹¹³ These firms often may not learn of corporate misconduct but, when they do, are capable of implementing the goals of the blackmail rules. To the extent a maverick company can establish a deferential QLCC, however, the calculus changes. The company will keep matters in-house and signal to staff attorneys that their jobs depend on

taken, "the member's response is limited to the member's right, and, where appropriate, duty to resign").

¹¹¹ See 17 C.F.R. § 205.3(c) (2005).

¹¹² See *id.* § 205.3(b).

¹¹³ See *supra* notes 46, 99 and accompanying text.

their willingness to refer issues to the QLCC. In-house counsel can accede without personal liability or cost. The alternative compliance mechanism thus becomes a loophole.

Finally, as we have seen, actual implementation of coercive authority depends on an interplay between lawyers and companies that has little to do with the societal concerns underlying the rules. In-house counsel, external counsel who provide full service representation, and external counsel who perform spot work compete for business. Each has a different capacity to communicate with a company, negotiate in her own interests, and resist pressure to capitulate to management's desires.¹¹⁴ In this competitive environment, companies will adjust their use of each type of lawyer in a way that minimizes the exercise of lawyer coercion.

All of this suggests that lawyer blackmail rules may have only limited effect on the ultimate lawfulness or morality of corporate behavior. Moreover, to the extent lawyers do try to control corporate conduct, it ultimately may be for self-serving reasons (for example, avoiding personal liability) rather than because lawyers wish to, or must, serve society's goals. This leads to the core question: why would we authorize lawyers to force a client to follow their advice?

The automatic response of lawmakers who promoted regulations pursuant to the Sarbanes-Oxley Act is simply that lawyers have a role to play in preventing clients' illegal acts before they occur.¹¹⁵ But some commentators expect lawyers to play a broader role—in preventing client fraud, legal but harmful acts, perhaps even immoral conduct, in addition to client illegality.¹¹⁶ For the most part, the existing codes draw a bright-line rule regarding illegal conduct: namely, that it is per

¹¹⁴ See Fisch & Rosen, *supra* note 8, at 1127–30 (noting that lawyers' willingness to turn a blind eye to misconduct stems from their dependence on clients, but noting that this dependence may vary among different kinds of attorneys).

¹¹⁵ See, e.g., Lisa H. Nicholson, *Sarbox 307's Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559, 589 (noting lawmakers' view of the growing and important role of lawyers in the governance of issuers); Ahuja, *supra* note 8, at 1333 (noting the public interest in having attorneys report up the ladder); cf. Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. 1505, 1511 n.30 (describing Sarbanes-Oxley as a response to the negative involvement of lawyers in recent corporate scandals).

¹¹⁶ Cf. Cramton et al., *supra* note 11, at 739 (praising the ABA's stricter 2003 version of Model Rule 1.13 making reporting-up mandatory when that would be in the best interests of the organization); REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 39 (2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf. (stating that communication up the corporate ladder "may be a desirable contribution to corporate governance even if the rules of professional conduct do not mandate it").

se undesirable and that lawyers should never be allowed to countenance illegality, at pain of personal repercussions. But the codes seem ambivalent with respect to other forms of questionable client behavior to which attorney coercion might respond, including ill-defined breaches of fiduciary duty¹¹⁷ and poor business decisions.¹¹⁸ Lawyers traditionally have provided representation for clients involved in such behavior and society traditionally has condoned this representation. As a general principle, therefore, society may not be prepared to allow lawyers to make clients behave only in ways that the lawyers deem honest, fair, and moral.

Three broad considerations account for this reluctance. First, society probably does not trust lawyers to be the arbiters of honest, fair, or moral behavior, nor is there any reason to suspect that lawyers are well-suited to that task.¹¹⁹ Second, and related, is the fact that American society places a premium on individual autonomy.¹²⁰ Clients have some right to make their own decisions regarding the fairness or morality of their conduct, though they may have to suffer the consequences if their peers subsequently disagree with actions they have taken. Third, America's litigiousness makes it imperative that clients be able to engage and confide in lawyers.¹²¹ Requiring lawyers to routinely turn against their clients might undermine the ability of clients as a whole to utilize lawyers.

A. *Lawyers as Arbiters of Appropriate Conduct*

One reason society may not be willing to give lawyers broad discretion to make clients behave in ways that the lawyer deems appropriate is that society probably does not trust lawyers to be arbiters of such behavior. If the recent corporate scandals make nothing else clear, it is that lawyers have not uniformly implemented the tools that they have had available to counteract corporate misconduct. Susan Koniak has made a persuasive factual presentation supporting the

¹¹⁷ See 17 C.F.R. § 205.2(i) (2005) (defining what lawyers need to report as evidence of a material violation, a material breach of fiduciary duty, or a similar material violation); Fisch & Rosen, *supra* note 8, at 1113–14 (suggesting that the “similar violation” language of Sarbanes-Oxley renders the provision too vague).

¹¹⁸ See CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2004) (requiring lawyers to act with respect to proposed corporate conduct that the lawyer believes is likely to injure the corporation).

¹¹⁹ See *infra* notes 122–126 and accompanying text.

¹²⁰ See *infra* notes 127–128 and accompanying text.

¹²¹ See *infra* notes 129–138 and accompanying text.

proposition that lawyers participated directly in some of the recent scandals.¹²² Even if one does not accept Koniak's most flamboyant rhetoric, it is undisputable that at least some of the lawyers involved saw their main role as assisting clients to accomplish their ends, without making any moral judgments.

More important than this anecdotal evidence concerning the likely effectiveness of coercive rules, however, are two realities. First, there is no basis for thinking that most lawyers will act objectively to serve societal interests if simply given the opportunity to do so. That traditionally has not been the way lawyers have perceived their role.¹²³ Lawyers are not trained in making moral judgments. Arguably, their education and practice requires them to view issues more in terms of competing arguments than appropriate results.

Second, as illustrated by this Article's analysis, lawyers have personal incentives that sometimes prevent them from judging client conduct objectively. Far from possessing the definitional neutrality of members of the bench, lawyers are naturally aligned with clients. The business reasons for which lawyers ordinarily enter the attorney-client relationship suggest that they will emphasize economic rather than outward-regarding considerations.

These realities have implications for coercive rules. They explain the hesitation of some code drafters to rely on lawyers to do more than counsel against illegal conduct. They also illustrate why reforms that purport to enhance lawyer authority to force appropriate client conduct may not do the trick.

Discretionary rules, like new Model Rules 1.6 and 1.13, may not adequately confront lawyers' natural limitations. To justify making lawyer gatekeeping optional, rulemakers need some special reason to set aside the traditional distrust of lawyers. As this Article's analysis suggests, the corporate setting that has stimulated recent reforms does not look like a promising context for outward-regarding lawyer behavior.

Reformers also have done a questionable job of confronting the way coercive rules will operate in practice. Given the fluid nature of the attorney-client relationship described in this Article, coercive rules

¹²² Koniak, *supra* note 75, at 196–211; see PARTNOY, *supra* note 8, at 331 (documenting the actions of counsel in the Enron scandal); PUGH, *supra* note 39, at 662–64 (discussing the role of lawyers in the Enron scandal).

¹²³ See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1305–06, 1314–27 (1995) (discussing the history of client orientation and arguing that lawyers should be prepared to act in a more objective fashion).

should be written with sufficient precision to ensure that coercive authority works in its intended fashion. Specifically, they should include safeguards to prevent lawyers from avoiding the obligation to implement coercion impartially. In other words, the drafters must take a realistic view of the economics of practice in determining whether lawyers will exercise their options with a view to the drafters' purposes.¹²⁴ The drafters also may need to make distinctions in the rules that take into account the incentives of different types of lawyers.¹²⁵ On this view, even the mandatory SEC requirements seem to fall short.¹²⁶

B. Client Autonomy

The premium society places on client autonomy is a second consideration that might caution against giving lawyers broad coercive power. In the corporate context, however, autonomy considerations do not have the same force as when individuals' freedom to select conduct is at issue. Corporations have economic rights, which benefit all their constituents, but their constituents typically are sufficiently diverse that they would disagree on most moral issues. Preserving the authority of one corporate agent to act autonomously may well deprive other constituents of the same freedom.

Thus, to the extent professional norms require lawyers to abide by corporate clients' decisions, they are not rejecting principles of autonomy so much as deciding who within a corporation is most likely to exercise the corporation's ability to make choices that best accommodate the firm's economic interests and society's separate interest in appropriate outward-regarding conduct. Rules that limit lawyers' ability to force behavior make one of two judgments (or both). First, they may assume that lawyers usually are not in the best position to balance the interests—for example, because lawyers will have limited information about the grand scheme in which a case arises or because lawyers

¹²⁴ Cf. McGowan, *supra* note 12, at 1838 (proposing and analyzing a systematic grant of immunity from liability to lawyers that would provide incentives for them to inform authorities about corporate illegality).

¹²⁵ See Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 841 (2002) (characterizing the ethics codes' general assumption that all lawyers are alike and should be governed by the same rules as counterproductive); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 171 (1997) (arguing that ethics codes should acknowledge differences among types of lawyers).

¹²⁶ See, e.g., Cramton et al., *supra* note 11, at 751–63 (arguing that the trigger mechanisms in the Sarbanes-Oxley regulations allow lawyers too much leeway); Koniak, *supra* note 76, at 1275–78 (questioning the effectiveness of SEC regulations governing lawyers).

have limited economic or moral expertise in implementing the necessary calculus. Second, the rules may simply assume that the lawyers in question are unlikely to implement societal interests any better than management. As we have already seen, in-house counsel often are too tied or dependent on management to challenge management's decisions. External counsel may focus too heavily on their own interests in earning present and future fees.

Rules that allow or require lawyers to influence corporate clients' conduct also may stem from a variety of justifications. Most, but not all, such rules confine themselves to addressing *illegal* client behavior.¹²⁷ Because lawyers are versed in the law, they arguably have special expertise in determining what conduct is appropriate and permissible.

It is important to recognize the limits of this reasoning, however. In most blackmail situations, there is little question about the legality of the conduct itself. Even if there is, the lawyer can eliminate the question by providing legal advice. The real issue—for example, in Enron—is whether the client should, or should be able to choose to, violate the law. On this, the lawyer has no more expertise than the corporate manager. Accordingly, the reason for placing the decision in the lawyer's hands must be something else.

Perhaps the reason consists of a sense that lawyers are more likely to act independently or objectively than the managers, or more in the interests of the silent corporate constituents. As this Article has discussed, however, one cannot assume independence on the part of the lawyer in all circumstances. In-house counsel, in particular, may have as much to lose from insisting on lawful conduct as the corporate manager. If the governing rule has the effect of influencing corporations to spread legal work among many different external firms, the rule may in fact generate a body of relatively independent lawyer decision makers. At the same time, however, these lawyer decision mak-

¹²⁷ There are exceptions, however. California's professional rules, for example, arguably require lawyers to act against economically imprudent corporate decisions. See CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (2004); *supra* note 52 and accompanying text. The Sarbanes-Oxley regulations require lawyers to counteract "material violations" of securities obligations or "breaches of fiduciary duty" by an issuer. 17 C.F.R. §§ 205.2(i), 205.3(b) (2005) (requiring lawyers to report a material violation, defined as a material violation under federal or state securities laws, a "material breach of fiduciary duty," or a "similar material violation" of any federal or state law). Other administrative regulations impose responsibility on lawyers to supersede their clients' decisions to file information that is arguably accurate but misleading. See Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. 15, 16–21 (cataloguing some of these regulations).

ers are also likely to be given less than the optimal amount of information to make decisions.¹²⁸

C. *Facilitating or Enabling the Provision of Legal Advice*

Society's reluctance to overemphasize lawyers' ability to coerce clients may be attributable to a fear of undermining the traditional attorney-client relationship. On one level, coercive regulation—particularly mandatory blackmail rules—simply clarifies ambiguity created by previous ethics regulation that seems to require lawyers to assist corporate clients and remain silent about potential wrongdoing. Lawyers are accountable for their own actions. When they participate in unlawful or tortious conduct, they can be sanctioned.¹²⁹ Authorizing lawyers to counteract the wrongful conduct arguably makes explicit the notion that legal representation does not include enlisting a lawyer as a co-conspirator.¹³⁰

This perspective helps explain those rules that authorize disclosure or noisy withdrawal with respect to aspects of corporate misconduct in which a lawyer's services have been used.¹³¹ It does not, however, justify broader rules that expect lawyers to counteract client wrongdoing in which they have not participated.¹³² This distinction highlights the quandary raised by the whole notion of a blackmail option; namely, the extent to which society wants lawyers to act as a unilateral check on client misconduct.

¹²⁸ See *supra* note 46 and accompanying text.

¹²⁹ See Zacharias, *supra* note 13, at 1396, 1396 nn.51–55 (listing authorities that describe ways in which lawyers can be sanctioned for participating in unlawful conduct).

¹³⁰ George Cohen perhaps best encapsulates the regulatory balance that needs to be struck between confidentiality requirements and disclosure exceptions:

Although clients benefit from confidentiality rules, and the attorney-client privilege and work product doctrine give lawyers market advantages over other groups, these benefits come at a price, namely, the limitations designed to thwart lawyer-client collusion. You have to take the bad with the good. For this to work, however, the "good" has to be good enough for clients and lawyers to buy into the system.

Cohen, *supra* note 58, at 296–97 (footnote omitted). Presumably, from a regulatory perspective, Cohen's "bad" also must be bad enough to justify giving clients and lawyers the benefits of confidentiality. See *id.*

¹³¹ E.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2002); 17 C.F.R. § 205.3(d)(2); Proposed SEC Noisy Withdrawal Rule, *supra* note 11, at 71,706, quoted in 68 Fed. Reg. 6324, 6326 (allowing lawyer to disaffirm false or misleading filings "that the attorney has prepared or assisted in preparing").

¹³² CAL. RULES OF PROF'L CONDUCT R. 3-600(B) (containing no requirement of lawyer participation in the wrongdoing before lawyer permitted to act).

When one views the adversarial system fairly, it is clear that our legal system does not contemplate lawyers routinely policing their clients, because that would lead to the avoidance of legal representation or increased use of lawyers who have reputations for disregarding their professional obligations. The core notion of the system is that we want clients to use and trust legitimate lawyers so that the lawyers can do their jobs and enable the system to accomplish its functions.¹³³

Society does have an interest in having clients consult lawyers about legal issues and receive advice regarding the lawfulness of their conduct. Arguably, society may even be willing to insist that clients follow that advice to the extent that it identifies actions that clients must avoid to satisfy the law. On the surface, however, the interest in promoting law-abiding behavior cuts against rules that would allow lawyers to threaten clients into acting morally or into avoiding wrongful actions for which there is a legitimate argument in favor of their lawfulness.¹³⁴ Clients are unlikely to confide in a lawyer whom they know can force them to abide by her personal moral code.

It is the bright-line nature of these conclusions that highlights the real difficulty inherent in assuming lawyers have more than an advisory role in counteracting client misconduct.¹³⁵ Is there illegal client conduct that a lawyer sometimes should countenance? Some commentators might answer affirmatively with respect to at least three scenarios: lawyers arguably should defer to the client (1) because (or when) coercion would unduly deter this and other clients from seeking legal advice on other issues in the future; (2) when a client, such as the corporation, is acting reasonably by violating the law—for example, because the benefits of non-compliance outweigh the costs;

¹³³ See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE* 68–81 (1988) (discussing the consequentialist justifications for the adversary system); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46–56 (1991) (outlining the theoretical underpinnings of the adversary system); cf. FREEDMAN & SMITH, *supra* note 16, at 13–43 (discussing the theory of the adversary system, but also emphasizing client autonomy considerations).

¹³⁴ Compare 17 C.F.R. § 205.3(d)(2) (2005) (allowing attorneys to report confidential information that the attorney reasonably believes is necessary to prevent the issuer from committing a material violation), with *id.* § 205.3(b)(6)–(7) (absolving some investigating attorneys from reporting under some circumstances when “retained or directed . . . to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer”).

¹³⁵ Arguably, lawyers always have the authority to advise clients to act morally or in a socially acceptable way, and professional rules could impose an obligation on lawyers to do so always. Cf. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) (authorizing lawyers to counsel clients regarding moral and political issues).

and (3) when it is too late for the lawyer to stop the violation of law, or the costs to the client of stopping it at this stage are draconian compared to the benefits to society of full law compliance.

Conversely, is there legal but otherwise inappropriate behavior regarding which a lawyer should unilaterally be able to countermand the client's autonomy? In the corporate context, one can skirt the issue somewhat by concluding that certain corporate decision makers sometimes are not exercising *the client's* autonomy—in other words, are not actually acting in the corporation's interests. More generally, one might conclude that some societal or third-party interests simply are more important than the client's interest in controlling the decision and achieving the result most beneficial to the client.

The problem for rulemakers is that it is hard to draw clear lines that balance society's interest in law compliance or "good results" against the other interests. Consequently, most rules that acknowledge the possibility of grey areas use one of two proxies. Some limit a lawyer's options to situations in which the lawyer's actions are "in the interests of the organization,"¹³⁶ which does not adequately take into account society's interests in behavior that affects the public or third parties. Other rules simply give lawyers discretion to act,¹³⁷ which allows lawyers to base their decisions on personal, potentially venal, incentives. A discretionary rule may be the best solution, but the interests to be balanced should be better defined if the goal is to use lawyers as a surrogate enforcer of societal interests.

Consider, for example, the old version of Model Rule 1.13, which requires lawyers to act but gives them the choice of remedy. The rule requires lawyers to act in the "organization's interest," which presumably allows counsel to consider countervailing costs to the company. The rule, however, does not tell lawyers how to weigh those

¹³⁶ MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2002); cf. 17 C.F.R. § 205.3(d) (allowing lawyers to make disclosures to prevent injury to the property of the issuer or investors).

¹³⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002). It may be that rules that refer to lawyers' ability to exercise discretion intend discretion to be exercised in a particular way. Compare Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 46 (2003) (arguing that discretion must be exercised in a deliberative fashion), with McGowan, *supra* note 12, at 1825 n.1 (arguing that a grant of discretion means that a lawyer may not be disciplined for acting in any manner she sees fit). This issue probably is too complex to resolve uniformly with respect to all discretionary rules because code drafters may have a variety of reasons for according lawyers a range of options. See generally Bruce A. Green & Fred C. Zacharias, *Lawyer Discretion*, 91 MINN. L. REV. (forthcoming 2006) (discussing the justifications for discretionary rules).

costs, or even directly to emphasize them. It thus opens the door to pressure from management.

Now consider the Sarbanes-Oxley regulations, which make it mandatory for lawyers to climb the ladder with concerns about illegal conduct or breaches of fiduciary duty. These rules do not allow lawyers even to consider the effect of climbing the ladder on the institution's willingness or ability to consult counsel.

The discretionary disclosure provisions of new Model Rule 1.13 allow lawyers to disclose (or threaten to disclose) specifically in circumstances in which illegal corporate activity "is reasonably certain to result in substantial injury to the organization."¹³⁸ By limiting its scope to illegal conduct, Rule 1.13 is drawing a defensible bright-line rule: corporate clients have no right to insist on breaking the law. At first glance, the rule also seems to inform the lawyer of how to balance the corporation's interest in confessing its conduct when doing so will be economically damaging—disclosure is only appropriate when the organization will suffer substantial injury as a result of the illegal conduct. Yet upon closer examination, because *any* illegality is likely to cause substantial injury if the client is caught and sanctioned, the rule falls short. It again fails to guide lawyers on how to act when the *net* balance of the injury versus the potential economic gain of maintaining silence favors silence. By leaving the issue entirely to lawyer discretion—indeed, by not even noting the possibility that the substantial injury will be outweighed—the rule allows lawyers to exercise their discretion without reference to the reasons why society might want lawyers to act in a particular direction.

V. OTHER BLACKMAIL CONTEXTS

Much of the recent controversy concerning potential attorney coercion has focused on corporate attorneys and rules like Model Rule 1.13 and the Sarbanes-Oxley regulations. Interestingly, however, these rules actually are relatively well-defined—at least when compared to rules that allow lawyers to coerce clients to accept the lawyers' will in other contexts. Most of the rules governing organizations at least focus directly on breaches of legal duties, which lawyers arguably should not countenance and already are forbidden to assist.¹³⁹

¹³⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.13(c)(2) (2002).

¹³⁹ See *id.* at R. 1.2(d) ("A lawyer shall not . . . assist a client in conduct that the lawyer knows is criminal or fraudulent.").

Consider a few other forms of attorney coercion, however. Typically, lawyers are authorized to resign from representation when a client wishes to pursue avenues the lawyer considers "repugnant,"¹⁴⁰ "imprudent,"¹⁴¹ or with which the lawyer has "fundamental disagreement."¹⁴² At one level, the threat to withdraw hardly seems coercive. The client still has the option to retain other counsel who is willing to do as the client wishes. But often, hiring new counsel will be expensive, cause delay, and may be emotionally difficult for clients—especially individual clients who are unfamiliar or uncomfortable with the process of retaining counsel. Moreover, in some situations, allowing a lawyer to withdraw simply is unrealistic—for example, when a lawyer insists that the client accept a settlement which is close to what the client would otherwise accept, but is not quite at that level. Substituting counsel at this juncture may cause the offer to be reduced, because the adversary will know that the client's costs of proceeding have risen.

What is distinctive about coercion through threatened resignation is that it need not be based, like the lawyer action under the organizational rules, on proposed illegality by the client. The lawyer may make her threat simply because she disagrees strongly with the client's view—as a moral matter or as one of legal strategy. The resignation power thus gives lawyers broad discretion to impose their will on malleable clients.

In exercising this discretion, lawyers presumably have the capacity to consider their personal economic interests; in other words, the extent to which they are prepared to risk their fees and the extent to which their own interests are benefited by client compliance with their directions. Lawyers also have broad leeway to emphasize moral considerations, even though that cuts directly against the notion of client autonomy. Presumably, the codes intend lawyers to restrain their own use of coercion, because lawyers continue to be bound by fiduciary duties to clients and the bar's tradition of honoring client decision making, but nothing in the rules emphasizes those limitations.¹⁴³

By the same token, the more that lawyers are known to use their resignation power to control distasteful clients, the less clients will al-

¹⁴⁰ *Id.* at R. 1.16(b)(4).

¹⁴¹ MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (1983).

¹⁴² MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002).

¹⁴³ *Cf.* Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581, 613 (1997) (noting that courts typically limit clients' potential remedy for a lawyer's withdrawal to actual damages).

low lawyers to learn about them. The traditional paradigm is that clients should feel free to confide information that may not bear directly on the legal issues at hand, leaving it to counsel to determine what is useful.¹⁴⁴ In the criminal defense context, in particular, clients may be hesitant to reveal facts that make them seem "repugnant"—including facts about past criminality, ongoing sexual proclivities, and other vices. One would expect two dynamics to result from lawyers' coercive use of this information: (1) more clients—especially those who are most conversant with lawyers' actual practices—will self-censor, and (2) a market will develop of lawyers with a reputation for not exercising coercion.

The withdrawal power is not the only instance in which lawyers can force clients to accede to their will. The codes, for example, give lawyers discretion not to introduce evidence they believe to be false.¹⁴⁵ By threatening not to put a client on the stand, a lawyer can coerce the client into agreeing to testify in the way the lawyer deems acceptable.¹⁴⁶ More broadly, a lawyer can use her authority to determine the tactics in a case to force a client to adopt an approach to the case that is not in line with the client's desires.¹⁴⁷ Thus, for example, a client might prefer a scorched earth approach or aggressive cross-examination of tender witnesses, but the lawyer may—by threatening to withhold harsh cross-examinations—prevail upon the client to accept a different theory of the case that cedes some substantive positions the client could otherwise insist upon taking.¹⁴⁸

¹⁴⁴ This is the justification for the broad definition of confidential information that is found in all the professional codes. The Model Rules, for example, define confidential information as all information "related to the representation." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002). The Model Code incorporates all "information gained in the professional relationship." MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(a) (1969).

¹⁴⁵ MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983) (stating that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false").

¹⁴⁶ Cf. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002) (including an exception for criminal clients).

¹⁴⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (assigning lawyers authority to determine the means of litigation). The new Model Rules are somewhat less clear on this issue, noting that usually the client will defer to the lawyer on questions of tactics, but leaving unstated who controls the decision if the lawyer and client ultimately disagree. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002).

¹⁴⁸ The dynamic effect of attorney blackmail may become most evident when lawyers assert coercive power by inferring authority from imprecise rules. In *Nix v. Whiteside*, for example, a lawyer confronted by potential client perjury not only threatened to inform the court, but also threatened to impeach the client if he took the stand and testified to a particular story. 475 U.S. 157, 161 (1986). The U.S. Supreme Court apparently approved this process—which starkly changed the participants' relative power status within the attorney-client rela-

In all of these situations, as well as situations in which lawyers are granted discretion to disclose confidential information in order to preserve third-party interests,¹⁴⁹ the power to blackmail clients is far broader than the power identified in organizational rules. It is not limited to illegal choices the client might make, nor limited (at least not ostensibly) in the grounds upon which the power may be exercised. As a practical matter, lawyers therefore can use their authority to insist upon client decisions that the lawyers consider morally required, but that the clients do not. Lawyers also have leeway to take their own economic incentives into account, as in the corporate setting. Although this leeway theoretically is constrained by fiduciary principles, the rules themselves do not specify when and how the discretion to blackmail may be exercised. The codes, in short, leave it to individual lawyers to balance the societal concerns regarding client autonomy and facilitation of legal representation without directly attempting to assure that lawyers act upon those considerations.

In general, it is individual clients who will be most prone to lawyer blackmail. Three characteristics would make a client especially prone to coercion. Clients least familiar with the process of obtaining new counsel and with the alternative representation that may be available are most likely to accede to the lawyer's threats. Those who are limited by cost considerations also are vulnerable; it is the smaller cases in which lawyers will be most willing to chance their fees. Finally, clients who already know that a court will not allow them to discharge a lawyer (for example, because discharge has already been attempted) have the least ability to resist a threat.

When these characteristics are considered together, it appears that it is the poorest and least sophisticated clients whose autonomy is most likely to be restricted by lawyer blackmail. Yet it is precisely the autonomy of these kinds of clients that the rules, and the adversarial ethic they embody, are supposedly designed to protect.¹⁵⁰ By failing to include guidelines or protections for client interests in the terms of blackmail rules, the code drafters may take with one hand what they have purported to give with the other.

tionship. *See id.* at 168-69 (noting the "special duty of an attorney to prevent and disclose frauds"). After the lawyer's threats, one can reasonably assume that the client would let the lawyer call the future shots, but also would revise his trust in and use of counsel.

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002) (permitting disclosure to prevent harm to the financial interests or property of another).

¹⁵⁰ *See* Zacharias, *supra* note 27, at 169, 171, 173-74 (discussing the "criminal paradigm" and its civil parallels).

This Article would be remiss if it did not address, albeit briefly, the most common form of lawyer coercion—psychological pressure imposed by forceful lawyers giving clients (especially dependent clients) advice in a result-oriented fashion. The theory of the professional codes is that clients should set the objectives of representation and that lawyers should enhance client autonomy.¹⁵¹ But the codes also encourage lawyers to exercise independent judgment, remonstrate with clients, and counsel them based on a variety of factors other than the client's immediate desires.¹⁵² As a matter of practice, everyone knows that lawyers often use this authority to persuade or bully clients into making decisions—particularly plea and settlement decisions—that the lawyers consider appropriate.

Presumably, lying to a client in order to produce his agreement would not be countenanced by disciplinary authorities or by courts enforcing fiduciary principles. Suppose, however, that a lawyer simply is forceful. Or suppose that the lawyer uses her authority to withhold information temporarily from a client¹⁵³ so that she can present the options at a time when the client will be more malleable.¹⁵⁴ In theory, client autonomy remains intact because the client is the ultimate decision maker. Yet the lawyer is in control.

It is important to note that the lawyer's action in these scenarios may or may not be in the client's best interests. Consider, for example, the lawyer who forcefully convinces an innocent criminal defendant to plead guilty on the (realistic) basis that conviction is likely. Or consider the lawyer who persuades a client who insists that he is sane to pursue an insanity defense.¹⁵⁵ One can argue both that the lawyer is

¹⁵¹ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation").

¹⁵² See *id.* at R. 2.1 (stating that "a lawyer shall exercise independent professional judgment and render candid advice"). See generally Zacharias, *supra* note 123 (discussing the role of objectivity in legal practice).

¹⁵³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2002) (stating that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests"); *cf. id.* at R. 1.2 cmt. (noting that "[i]n a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14").

¹⁵⁴ The classic example is when a criminal defendant forbids the lawyer even to discuss a plea bargain, but the lawyer nonetheless obtains a plea offer and waits to offer it to the client until the eve of trial, when fear of conviction is likely to make the client more receptive to admitting guilt.

¹⁵⁵ In the Unabomber case, for example, Theodore Kaczynski's lawyers went to great lengths to preserve the option of an insanity plea or the ability to present evidence of mental instability during the guilt phase of trial despite Kaczynski's direct order that they not pursue that course. *United States v. Kaczynski*, 239 F.3d 1108, 1111–12 (9th Cir. 2001); *id.*

serving the client's interests and that the lawyer deprives the client of true autonomy.

For purposes of this Article, we need not resolve these troubling issues. The essential point is that lawyer coercion, for whatever reason, is routine. In some of the cases in which clients might have personal reasons for pursuing one course of conduct, their lawyers may have personal reasons for pursuing another—for example, because lawyers prefer saving a client to letting the client have his day in court.¹⁵⁶ Furthermore, the rules that give lawyers discretion, or even more poignantly encourage lawyers, to advise clients coercively are most powerful with respect to clients who are poor (and thus unable to change lawyers), unsophisticated, and dependent. The professional codes themselves do little to guide lawyers on how they must exercise coercive authority, nor do the codes reconcile that authority with the codes' broader theories of representation.

CONCLUSION

The assumptions underlying the organizational blackmail rules are that the rules will force lawyers to promote lawful behavior by corporate clients. The assumption of the more general coercive provisions in the professional codes is that lawyers will use their power to temper the exercise of client autonomy by encouraging moral decision making by clients. This Article's analysis of the rules and lawyers' incentives in implementing the rules, however, suggests that the reality is likely to be far more fluid.¹⁵⁷ Lawyers have their own interests in the exercise of coercive authority that may be inconsistent with, or undermine, the code drafters' intent. At least sophisticated clients will adjust their behavior to mitigate the lawyer's power over clients that blackmail rules provide.

at 1119, 1122 (Reinhardt, J., dissenting); see also H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 *RUTGERS L. REV.* 719, 729–37 (2000) (discussing the Unabomber case). In so doing, they may have saved his life.

¹⁵⁶ Cf. Langevoort & Rasmussen, *supra* note 44, at 375 (stating that "little if any serious attention has been given to the possibility that self-serving behavior will occur consciously or unconsciously in one of the most basic of the lawyer's roles, that of giving legal advice to a client" and noting that lawyers may tend to overstate legal risk).

¹⁵⁷ See Kim, *supra* note 92, at 1037 (arguing that "the ethical ecology is . . . complex," that "[i]nside counsel are subject to situational pressures arising out of their multiple roles as mere employees, faithful agents, and team players," and that "Sarbanes-Oxley does nothing to mitigate those pressures").

The existence of these dynamics also suggests that lawyers may promote or support the adoption of some coercive rules for reasons that do not align with the rules' substantive justifications. Each possible phrasing of the organizational blackmail provisions will benefit one segment of the corporate bar over another. With respect to the more general rules governing coercive authority of lawyers, most lawyers' personal interests align in favor of discretionary provisions that provide them with leeway to emphasize personal concerns. This consensus, in part, helps explain the relative sparseness in the rule drafting process of consideration of guidelines or specific limits on the exercise of discretion.¹⁵⁸

Consider this question: may a law firm, in its retainer agreement, cede its discretion to disclose confidential information under a confidentiality exception in exchange for a higher fee? Most professional responsibility academics would answer in the negative, arguing that the discretion must at least be exercised and that it should be exercised in light of the public-regarding considerations that the codes clearly intend to emphasize.¹⁵⁹ Some private lawyers, however, would disagree and would view the rules simply as giving a "right" to lawyers that they may exercise in their own interests if they see fit to do so.¹⁶⁰ Particular kinds of lawyers, and lawyers with particular attitudes towards legal practice, can benefit more than others from this characterization of discretion.

¹⁵⁸ Even if lawyers do not overtly sell their authority to disclose for a higher fee, firms can produce the same result by developing a reputation for serving as ultra-aggressive client-centered lawyers.

¹⁵⁹ See, e.g., Levine, *supra* note 137, at 46 (proposing a deliberative model of exercising professional discretion); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 54 (2005) (discussing the obligation of lawyers to in fact exercise discretion); Green & Zacharias, *supra* note 137 (discussing the significance of discretionary rules). Other academics, such as my colleague David McGowan, might conclude that lawyers could (or would) not be disciplined for failure to exercise their discretion to disclose, but might be bound by fiduciary principles to implement the rules in the best interests of their clients. See McGowan, *supra* note 12, at 1827 (arguing that permissive disclosure rules allow lawyers not to disclose without cost to themselves, leaving them to decide whether disclosure will create costs).

¹⁶⁰ See McGowan, *supra* note 12, at 1825 n.1 (suggesting that there is no obligation of lawyers to exercise discretion in a particular way, or even to exercise discretion). The drafters of the new California future crime confidentiality exception have provided fodder for proponents of the proposition that grants of discretion to lawyers are absolute by including a provision that lawyers may never be deemed to have violated the rule by failing to disclose and at the same time adding a comment stating that lawyers are not subject to discipline for revealing information pursuant to the rule. CAL. RULES OF PROF'L CONDUCT R. 3-100(E) & discussion ¶ 5 (2004).

Because client autonomy concerns and the desire to encourage clients to trust and use lawyers are fundamental principles on which the professional codes are based, the failure to define lawyers' coercive authority is anomalous. The failure of the drafting process to contemplate definitions can, perhaps, be explained on public choice grounds—that lawyers, as an interest group, have hijacked the drafting process away from serious consideration of the rules' effects and of the way lawyers are likely to implement them. Future debates on such rules should rely less on platitudes concerning the societal interests at stake and more on how those interests are likely to be served.