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Linda Galler

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LADDER SAFETY: DISCLOSURE OF CORPORATE CLIENT CONFIDENCES

*Linda Galler**

INTRODUCTION

Search Google for tips on how to climb a ladder safely, and you will collect many useful pointers. Before you climb, make sure the feet of the ladder can't slip backward and the top of the ladder doesn't slide or wobble when you put weight against it. Wear shoes with nonskid soles. Face the ladder as you climb. Grab onto the rungs using a hand-over-hand method. Don't let go of one rung before grabbing hold of the next, and so on. Who knew that a seemingly straightforward activity took such planning and concentration? Unfortunately, there seem to be no guides for jumping or stepping off.¹

It turns out that safely navigating a ladder in a professional context also takes preparation and thought. The actual facts in a recent employment dispute² provide a useful backdrop for lawyers working with corporations or other legal entities to consider their ethical obligations upon discovering that an organizational client has failed to act lawfully—for example, by underpaying a substantial tax liability. Ethics rules call on lawyers to report violations up the organizational ladder and permit lawyers, in some circumstances, to disclose confidential information in order to prevent, mitigate, or rectify financial injury caused by a client. But the rules are tricky and the consequences of violating them can be significant.

The American Bar Association's Model Rules of Professional Conduct (the Model Rules), primarily Model Rule 1.13, provide a "how-to" guide for principled behavior on the part of corporate attorneys—a guide to safe climbing, if you will. Such guidance, however, is precatory as it pertains to disclosure of confidential information; failure to comply has no consequence whatsoever in terms of lawyer discipline. In contrast, electing to disclose a client's unlawful behavior in circumstances explicitly permitted by the Model Rules can nonetheless result in professionally devastating outcomes, suggesting perhaps, at a micro level, that prudent lawyers generally should elect not to disclose and, at a macro level, that

* Professor of Law, Hofstra University School of Law. The author gratefully acknowledges thoughtful comments provided by Professor Michael B. Lang on an earlier draft of this Article. Professors Galler and Lang are co-authors of REGULATION OF TAX PRACTICE (LexisNexis 2010).

1. There are plenty of videos, however. *See, e.g.*, "Dog Jumping Off a Ladder," http://www.metacafe.com/watch/22214/pet_star_dog_jumping_off_a_ladder/ (last visited May 16, 2012); "Serge Drunk Jumping Off a Ladder," http://www.youtube.com/watch?v=DjfmN0m_2V8 (last visited May 16, 2012); "Guy Falls Off a Ladder," <http://www.youtube.com/watch?v=1iy9h6l28NM> (last visited May 16, 2012).

2. *Dean v. Feed the Children, Inc.*, No. CJ-09-9704 (Okla. Cty. D. Ct. filed Oct. 14, 2009).

neither the American Bar Association nor Congress have gone far enough in their efforts to utilize lawyers in rooting out corporate malfeasance. In enacting the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),³ Congress appeared to be serious in that regard. Regulations implementing Sarbanes-Oxley, however, do not mandate disclosure outside the corporation and, therefore, have no more “bite” than the Model Rules. Despite some compelling reasons for permitting disclosure of clients’ bad behavior, economics dictate that it should be a rare case in which a lawyer will actually disclose.

I. DEAN V. FEED THE CHILDREN⁴

The plaintiffs (Plaintiff 1 and Plaintiff 2, and collectively, the Plaintiffs) were certified public accountants employed by Feed the Children, Inc. (FTC),⁵ a § 501(c)(3) charitable organization.⁶ Plaintiff 1 held the title of Controller and had worked for FTC since April 2008.⁷ Plaintiff 2 was the Director of Financial Reporting and had worked for FTC since March 2009.⁸

In July 2009, the Chief Financial Officer (CFO) of FTC approached an accounting supervisor (the Accounting Supervisor) about the fact that FTC had not been paying Oklahoma state use tax on purchases in which vendors had not charged the appropriate sales tax.⁹ Plaintiff 1 and Plaintiff 2 were brought into the ongoing conversation.¹⁰ Plaintiff 1, Plaintiff 2, and the Accounting Supervisor all agreed that FTC should contact the Oklahoma Tax Commission to admit that the tax had not been paid.¹¹ It was their collective experience that coming forward typically resulted in the reduction or elimination of penalties and interest.¹²

3. Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745 (2002). The up-the-ladder rules are set forth in § 307 of the Act, *id.* § 307, and part 205 of Title 17 of the Code of Federal Regulations, 17 C.F.R. § 205 (2011).

4. These facts are based on Plaintiffs’ Amended Petition and are assumed to be true for purposes of this Article. The author of this Article neither attempted to investigate the truth of any of the allegations nor takes the position that any such allegations are, in fact, true.

5. Amended Petition, at 1–2, *Dean v. Feed the Children*, No. CJ-09-9704 (Okla. Cty. D. Ct. filed Oct. 14, 2009) [hereinafter Amended Petition].

6. *See* Letter from Stephanie D. Dean, Stefani Hovarter & Stephanie Mendenhall to Oklahoma Tax Commission (Sept. 17, 2009) [hereinafter Letter to Oklahoma Tax Commission].

7. Memorandum from Stephanie Dean, Stefani Hovarter & Stephanie Mendenhall to the Board of Directors of Feed the Children, Inc. 1 (Sept. 17, 2009) [hereinafter Memorandum to the Board]; Amended Petition, *supra* note 5, at 2.

8. *See* Amended Petition, *supra* note 5, at 2; *See* Memorandum to the Board, *supra* note 7, at 1; Amended Petition, *supra* note 5, at 2.

9. Memorandum to the Board, *supra* note 7, at 2.

10. *Id.*

11. *Id.*

12. *Id.* According to Plaintiffs’ court filings, the Oklahoma Tax Commission administered a voluntary compliance program under which taxes and interest are assessed for a three-year period only, and penalties are waived. *Id.* at 1–2.

According to the Plaintiffs, the CFO had indicated that she was aware when she began her employment at FTC in 2001 that Oklahoma sales and use taxes were not being paid.¹³ Her approach had been to inform vendors who were not charging sales tax that FTC was not exempt from such tax so that vendors would charge the appropriate tax on a going-forward basis.¹⁴ Additionally, the CFO reportedly indicated that she had chosen to neither approach the Oklahoma Tax Commission about the past tax liability nor pay the past due use tax in hopes that the statute of limitations would expire without the Oklahoma Tax Commission discovering the noncompliance.¹⁵

Believing that, as of July 2009, the statute of limitations had expired, it would now be safe for FTC to begin filing use tax returns.¹⁶ The Plaintiffs, however, disagreed with the CFO's position, contending that the statute of limitations does not run when fraud or tax evasion are involved.¹⁷ In their view, if the Oklahoma Tax Commission had discovered the liability on its own, it could have assessed tax for the entire period of FTC's existence.¹⁸ Over a seven-year period, Plaintiffs estimated exposure of more than \$1.1 million, not including penalties and interest.¹⁹ FTC filed a monthly use tax return for July 2009 and remitted the tax due thereunder on August 20, 2009.²⁰ A return for August 2009 was prepared for filing on September 21, 2009.²¹

On September 17, 2009, Plaintiff 1, Plaintiff 2, and the Accounting Supervisor took two actions that appear to have precipitated the loss of Plaintiffs' jobs and the subsequent lawsuit.²² First, they sent a letter to the Oklahoma Tax Commission reporting FTC's use tax delinquency.²³ Second, they submitted a memorandum to the Board of Directors of FTC (the Board) outlining their discussions and the events relating to the use tax and making several recommendations to the Board,²⁴ including the following:

1. that the Board undertake a thorough evaluation to determine FTC's actual use tax liability;

13. *Id.* at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1.

18. *Id.*

19. *Id.*

20. *Id.* at 3.

21. *Id.*

22. See Amended Petition, *supra* note 5, at 2–3.

23. Letter to Oklahoma Tax Commission, *supra* note 6.

24. According to the Memorandum to the Board, the Plaintiffs and the Accounting Supervisor believed they were obligated to notify the Oklahoma Tax Commission for three reasons: (1) potential civil and criminal liabilities, (2) potential professional discipline (the Plaintiffs and the Accounting Supervisor are certified public accountants), and (3) the fact that public funds were involved. Memorandum to the Board, *supra* note 7, at 1. This Article makes no attempt to evaluate the accuracy or validity of the Plaintiffs' beliefs in this regard.

2. that the Board retain the services of a tax attorney to represent the organization in dealing with the Oklahoma Tax Commission regarding the use tax;
3. that the Board notify its external auditors of the noncompliance so that it could be properly reflected on the organization's audited financial statements, and
4. that the Board conduct research to determine whether similar tax liabilities exist in any other states in which FTC operates.²⁵

On September 29, 2009, both Plaintiffs were fired.²⁶ Several weeks later, the Plaintiffs sued their former employer for wrongful termination.²⁷

II. WHAT IF THE PLAINTIFFS HAD BEEN LAWYERS?

Other than the parties themselves, no one knows why the FTC Board fired the Plaintiffs. Although possible, it is hard to believe that the Plaintiffs' jobs were lost merely because they brought their disagreement with the CFO to the Board. It is more likely that the Board was displeased with the employees' decision to disclose FTC's tax problem to the Oklahoma Tax Commission without first giving the Board (or anyone else within the organization) an opportunity to reverse the CFO's decision. It is beyond the scope of this Article to comment on the legality of the Board's action. Similarly, this Article does not examine the ethical propriety of certified public accountants disclosing substantial underpayments of tax.²⁸ The issues addressed herein relate only to lawyers' ethics: if the Plaintiffs had been attorneys rather than accountants, would their actions have been consistent with the ethical rules governing lawyers? On a broader level, and perhaps more importantly, what does the answer to the first question reveal about the efficacy of lawyers' ethics rules in influencing lawyers to protect non-clients whose interests are both relevant and affected (e.g., shareholders in the case of a corporate business, or the public fisc as in *Dean v. Feed the Children*)?

Two provisions of the Model Rules are relevant to the question at hand: Rule 1.13 (Organization as Client) and Rule 1.6 (Confidentiality of

25. Memorandum to the Board, *supra* note 7, at 3.

26. Amended Petition, *supra* note 5, at 3.

27. *See generally id.*

28. *But see* AICPA, Statement on Standards for Tax Services No. 6, *Knowledge of Error: Return Preparation and Administrative Proceedings* ¶ 3 (as in effect in 2009), available at <http://www.aicpa.org/InterestAreas/Tax/Resources/StandardsEthics/StatementsonStandardsforTaxServices/DownloadableDocuments/SSTS%202000-2009.pdf> ("A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return. A member should recommend the corrective measures to be taken. Such recommendation may be given orally. The member is not obligated to inform the taxing authority, and a member may not do so without the taxpayer's permission, except when required by law.").

Information).²⁹ Both of these rules were amended in 2003 largely in response to enactment of Sarbanes-Oxley³⁰ and the adoption of Standards of Professional Conduct by the SEC requiring lawyers who practice before the SEC to report up-the-ladder material violations of law by SEC-regulated entities.³¹

III. CLIMBING THE LADDER

Model Rule 1.13 addresses, generally, a lawyer's duties in representing an organization rather than an individual.³² Of particular interest in the situation at hand are paragraphs (b) and (c). Paragraph (b) requires a lawyer to climb up the corporate ladder in the circumstances described:

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.³³

Comment [3] explains that while decisions by, for example, corporate officers generally must be accepted by the lawyer,

when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be

29. Each state's rules may vary from the Model Rules. Lawyers are therefore cautioned to check the provisions in their own states before proceeding as outlined in this Article. The author's own state (New York), for example, does not include the provisions in Model Rule 1.6(b) discussed herein to the extent they pertain to injury to financial interests. In relevant part, New York's version of Model Rule 1.6 provides only that a lawyer may reveal confidential client information "to prevent reasonably certain death or substantial bodily harm . . . [or] to prevent the client from committing a crime." N.Y. RULES OF PROF'L CONDUCT R. 1.6(b) (2009), available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf>. New York's version of Model Rule 1.13(c) permits disclosure only if it would otherwise be permitted under Rule 1.6. *Id.* R. 1.13(c). The analysis presented and conclusions reached herein, therefore, could be quite different if the Plaintiffs had been lawyers admitted and practicing in New York.

30. Section 307 of Sarbanes-Oxley requires that the Securities and Exchange Commission (SEC) adopt minimum standards of conduct for attorneys appearing and practicing before the SEC. Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245).

31. 17 C.F.R. § 205.3(b) (2011).

32. See Model Rules of Prof'l Conduct R. 1.13 (2010).

33. *Id.* R. 1.13(b).

imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.³⁴

In determining how to proceed, Comment [4] suggests that in some circumstances it may be appropriate for the lawyer to ask the constituent to reconsider the matter before the lawyer takes the issue up the corporate ladder:

[F]or example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.³⁵

The Comment cautions the lawyer that “[a]ny measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation of persons outside the organization.”³⁶ In the end, however, Rule 1.13(b) is mandatory; unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, she must refer the matter to higher authority.

In the Oklahoma case at hand, the Plaintiffs appear to have taken the matter directly to the Board rather than to an authority higher than the CFO but below the Board. Although we have no details regarding the organizational structure of FTC, Model Rule 1.13(b) seems to permit the bypassing of intermediate levels where a matter is of great importance. Thus, the fact that the Plaintiffs climbed directly to the top of the ladder rather than stopping at an intermediate rung does not appear to be of any consequence under Model Rule 1.13(b).

A more interesting question is whether the acts themselves would invoke Model Rule 1.13(b) at all. The rule addresses only present and future acts, not acts that have occurred in the past. Nevertheless, the fact that the tax liability remains outstanding (assuming that the statute of limitations remains open) arguably makes the predicate act an ongoing matter.³⁷ Moreover, Model Rule 1.13(b) applies only if the act or refusal to act is likely to result in substantial injury to the organization. The potential financial “hit” in this instance appears to be large, as are the repercussions

34. *Id.* R. 1.13 cmt. [3].

35. *Id.* R. 1.13 cmt. [4].

36. *Id.*

37. Query whether the ongoing or future act (i.e., refusal to bring the matter to the attention of the Oklahoma Tax Commission) must itself violate either a legal obligation to the organization or a law in order for Model Rule 1.13(b) to apply.

from a reputational perspective, should the Oklahoma Tax Commission have discovered the tax delinquency on its own. Therefore, it appears that reporting the issue to the Board would have been appropriate by lawyers in the Plaintiffs' position.

IV. STEPPING OFF THE LADDER

From an ethical perspective, the more complicated question is whether the Plaintiffs, had they been lawyers, would have been permitted to reveal the existence of the tax liability to the Oklahoma Tax Commission. Model Rule 1.13(c) addresses the question of whether disclosure to a non-client third party is permitted once the lawyer has reached the top of the organizational ladder without convincing the client to correct the problem.³⁸ Before contemplating that rule, however, Model Rule 1.6 must be considered both because it lays out the basic rules on lawyer-client confidentiality and also because Rule 1.6 might permit disclosure by acrophobic lawyers, who can under certain circumstances disclose otherwise protected information without setting foot on the ladder at all.

Model Rule 1.6(a) sets out the basic duty of confidentiality owed by lawyers to their clients: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."³⁹ One of two exceptions in paragraph (b) is possibly relevant to the facts at hand, depending on whether one considers the Oklahoma tax issue to have been "cleaned up" or not. Model Rule 1.6(b)(2) permits disclosure of confidential information otherwise protected by Rule 1.6(a) to the extent that the lawyer reasonably believes necessary "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."⁴⁰ Model Rule 1.6(b)(3) applies where the "deed" has been done: a lawyer is permitted to reveal confidential information to the extent that the lawyer reasonably believes necessary "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."⁴¹ Both exceptions permit, but do not require, disclosure.⁴² Where disclosure is permitted, it may occur irrespective of the ladder.

38. Model Rules of Prof'l Conduct R. 1.13(c).

39. *Id.* R. 1.6(a).

40. *Id.* R. 1.6(b)(2).

41. *Id.* R. 1.6(b)(3).

42. *But see id.* R. 4.1 ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material

Both exceptions apply only where the lawyer's services are or have been used by the client in perpetrating a crime of fraud. They do not apply where a lawyer learns of a crime or fraud in a context that is protected from disclosure under the general rule (Model Rule 1.6(a)) and the lawyer's services are or were not involved. Assuming that the facts surrounding FTC's nonpayment of Oklahoma use tax amounted to a crime or fraud,⁴³ the question remains whether the Plaintiffs' services were used in carrying it out. Both Plaintiffs had been employed by FTC for relatively short periods of time (Plaintiff 1 for less than one and one-half years, and Plaintiff 2 for only five months) when they became aware of the use tax situation.⁴⁴ The facts set forth in their memorandum to the Board and their swift action in disclosing the matter to the Oklahoma Tax Commission and notifying the Board suggest that they acted shortly after learning of the problem and that their services had not been involved. Thus, if the Plaintiffs had been lawyers, it is doubtful that disclosure would have been permitted under Model Rule 1.6(b)(2) or (3).

An issue that arises particularly in the context of tax practice relates to language that appears in both paragraphs—disclosure is permitted only if “substantial injury to the financial interests or property of another” actually occurred or is reasonably certain.⁴⁵ When loss of tax revenue is at issue, what amounts to “substantial injury”? Because the phrase refers specifically to injury “of another,” it can be argued that substantiality is measured from the perspective of the injured party, not the client and not a hypothetical reasonable person. Since \$1.1 million is not as likely to be “substantial” when lost by a government, as opposed to an individual, disclosure arguably is not permitted. On the other hand, such a reading of the substantiality requirement necessarily would have the effect of making the exceptions in Model Rule 1.6(b)(2) and (3) irrelevant in the context of tax fraud or crimes. At best, how to resolve the question is unclear.

Model Rule 1.13(c) applies specifically to lawyers climbing organizational ladders pursuant to Model Rule 1.13(b). Model Rule 1.13(c) applies whether or not the lawyer's services are or have been used in furtherance of a violation of law. Thus, it applies in situations in which Model Rule 1.6(b)(2) and (3) may not apply. Paragraph (c) of Model Rule 1.13 provides:

Except as provided in paragraph (d) [which is not relevant for present purposes], if

fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

43. This Article makes no attempt to resolve the question of whether the relevant facts amount to a crime or fraud, or what, as a general matter, constitutes crime or fraud.

44. See Amended Petition, *supra* note 5, at 1.

45. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2010).

(1) despite the lawyer's efforts in accordance with [Model Rule 1.13] paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

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

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.⁴⁶

Revealing information outside of the organization is discretionary, not mandatory. Moreover, Comment [6] cautions that when paragraph (c) is invoked, "the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization."⁴⁷

If the conclusion reached earlier is correct (i.e., that FTC did not use the Plaintiffs' services to commit a crime or fraud), then the only possible avenue for disclosing the violation of law to the Oklahoma Tax Commission would be Model Rule 1.13(c), assuming that the Plaintiffs were lawyers. Yet, Model Rule 1.13(c) permits disclosure only where there is a "violation of law" (not necessarily the same as "crime or fraud"), and only where that "violation is reasonably certain to result in substantial injury to the organization," not to the injured party.⁴⁸ If the lawyer discloses information to a non-client, the disclosure must be of no more information than the "lawyer reasonably believes is necessary to prevent substantial injury to the organization."⁴⁹

The problem for lawyers in the situation at hand is that Model Rule 1.13(c) permits disclosure only after the lawyer has climbed all the way to the top of the ladder and given the highest authority in the organization time to act or refuse to act. In the *Feed the Children* facts, the Plaintiffs sent their letter to the Oklahoma Tax Commission revealing FTC's use tax shortfall before they notified the Board of the organization's use tax liability and their disagreement with the CFO.⁵⁰ The Board had no chance to consider the matter at all. If the Plaintiffs had been lawyers in a jurisdiction

46. *Id.* R. 1.13(c).

47. *Id.* R. 1.13 cmt. [6].

48. *Id.* R. 1.13(c).

49. *Id.*

50. See Memorandum to the Board, *supra* note 7, at 1; Letter to Oklahoma Tax Commission, *supra* note 6.

following Model Rule 1.13(c), their actions could be grounds for professional discipline.

In summary, had they been lawyers, the Plaintiffs would not have been required to disclose the tax liability to the Oklahoma Tax Commission. Disclosure clearly would have violated Model Rule 1.13(c), which required, *inter alia*, that the Board be given a chance to address the matter before disclosure was made. Disclosure would have been permissible under Model Rule 1.6(b)(2) and (3) only if the Plaintiffs' services had been used to perpetrate a crime or fraud, which appears doubtful under the facts. If their services had been used, however, then disclosure—at any time—would have been permitted, as long as the injury to Oklahoma was substantial.⁵¹

V. TO DISCLOSE OR NOT?

If a lawyer has reached the top of the ladder and the conditions in Model Rule 1.13(c) are met, the lawyer may, but need not, reveal information relating to the representation—information that otherwise would be considered confidential—to a non-client. The lawyer can only reveal such information in order to prevent substantial injury to the organization, and the disclosure can be of no more information than the lawyer reasonably believes is necessary to prevent such injury. Should she disclose, or not?

The facts in *Dean v. Feed the Children* reflect a possible, but highly significant, consequence of disclosure—namely, the loss of one's livelihood. The Plaintiffs were fired. If the disclosing lawyer were outside counsel rather than a corporate employee, disclosure could—indeed, likely would—result in loss of a client. Moreover, should word spread, reputational questions inevitably would arise, raising the specter of difficulties in replacing either one's job or one's clients, or both. It is clear, then, that economic considerations dictate against disclosure. Up the ladder? Surely. Off the top? Probably not.

Even if the Model Rules permit disclosure, the real possibilities of being fired or tagged as a lawyer who cannot be trusted with a secret are simply too great for even well-intentioned lawyers. The Model Rules, then, are unlikely to encourage lawyers to disclose.

VI. A CONCLUDING NOTE ON SARBANES-OXLEY

Sarbanes-Oxley and the regulations promulgated thereunder contain an up-the-ladder rule. Although earlier proposals would have required an

51. Model Rule 1.6(b)(4) would have permitted the Plaintiffs, had they been lawyers, to reveal the confidential client information to another lawyer for the purpose of securing confidential legal advice on complying with the Model Rules. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2010). Such disclosure is permitted "because of the importance of a lawyer's compliance with the Rules of Professional Conduct." *Id.* R. 1.6 cmt. [9].

attorney to make a “noisy withdrawal” from representation and to report the withdrawal to the SEC, effectively notifying the SEC of corporate wrongdoing, the rule finally adopted largely mirrors Model Rule 1.13, with additional details. Attorneys are required to report up the ladder within an organization any “material violations of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company.”⁵² If the attorney becomes aware of any material violation by the organization or an officer, director, employee or agent thereof, he or she has the duty to report such violation to the chief legal officer (CLO) and/or chief executive officer (CEO) of the organization. If the attorney does not believe that the CLO or CEO has properly resolved the matter, she must report the violation to the audit committee of the organization’s board of directors or to any other independent committee responsible for such matters.⁵³

The regulations under Sarbanes-Oxley permit, but do not require, disclosure of certain matters outside of the corporation. An attorney may reveal to the SEC, without the client’s permission,

confidential information related to the representation to the extent the attorney reasonably believes is necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors,

(ii) To prevent the issuer . . . from committing perjury, . . . suborning perjury, or committing any act . . . that is likely to perpetrate a fraud upon the [SEC]; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney’s services were used.⁵⁴

The circumstances described above are different from the circumstances meeting the definition of “material violation” and the provisions governing up-the-ladder reporting. Thus, reporting evidence of past material violations is not permitted in all instances.

Some have characterized the Sarbanes-Oxley regulations as encouraging disclosure by attorneys.⁵⁵ Like the Model Rules, however, the provisions of Sarbanes-Oxley *create little or no incentive* for attorneys to

52. Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245).

53. *Id.* § 307(2). Sarbanes-Oxley and the regulations promulgated thereunder apply only where the client is a public company that issues securities.

54. 17 C.F.R. § 205.3(d)(2) (2011).

55. *E.g.*, Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1298 (2007).

disclose legal violations and impose no consequences on those who choose not to disclose. To the contrary, many prudent attorneys, aware of their corporate clients' transgressions, may well climb noiselessly down the ladder and return quietly to their law practices.