

Ethics Issues in Opinion Practice*

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A. INTRODUCTION

Lawyers giving legal opinions, like all lawyers, are subject to many duties. A lawyer who fails to meet his ethical obligations may be subject to disciplinary proceedings; a lawyer who fails to meet the duty of care she owes a client may be liable for malpractice.¹ These duties are prescribed or defined in a variety of sources including rules of professional conduct, decisional law, opinions of committees of practicing lawyers, and governmental agencies before which lawyers practice. Duties owed a client with respect to a legal opinion are in some instances different from duties owed a third party addressee of a legal opinion if that addressee is not a client.²

A lawyer's duties, i.e., the scope of his engagement, concerning a legal opinion may be limited by agreement with his client or agreement with the recipient of the opinion.³ However, some duties will still apply and there are restrictions on the ability to limit the scope of an engagement.⁴ In some situations, a lawyer may be required to withdraw from a representation rather than accept a proposed scope limitation.⁵ Special considerations apply when a legal opinion addresses factual matters or when the lawyer has reason to question whether the client is engaged in fraudulent or illegal activity.⁶

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1. MODEL RULES OF PROF'L CONDUCT pmbll., cmt. 19 (2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 (2000).

2. See MODEL RULES OF PROF'L CONDUCT R. 2.3 cmt. 2 (2003) ("The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else.").

3. *Id.* R. 2.3 cmt. 4; *id.* R. 1.2 cmts. 6–7.

4. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmts. 6–7.

5. See *id.* R. 1.16 cmt. 2; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. e (2000).

6. MODEL RULES OF PROF'L CONDUCT R. 2.3 cmts. 3–4.

B. BACKGROUND

1. The Model Rules of Professional Conduct (as currently amended, the “Model Rules”) set forth certain obligations, prohibitions, and other guidelines concerning a lawyer’s professional conduct.⁷ Failure to comply with the Model Rules is a basis for invoking the disciplinary process.⁸ The Model Rules themselves state that a violation of them does not necessarily give rise to a cause of action against a lawyer nor create a presumption that a legal duty has been breached.⁹ However, evidence of a violation is admissible and unfavorable evidence against a lawyer defending a claim of malpractice.¹⁰ The Model Rules have been adopted by the ABA House of Delegates as a model set of professional standards for the regulation of the profession.¹¹ While all but three jurisdictions have adopted rules of professional responsibility based on the Model Rules,¹² there are state-by-state variations, and in some jurisdictions standards governing the profession are drawn from earlier formulations such as the 1969 Model Code of Professional Responsibility.¹³ The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in a jurisdiction are of course controlling in that jurisdiction.

2. The Restatement (Third) of the Law Governing Lawyers (the “Restatement”) was published by the American Law Institute in 2000.¹⁴ In addition to covering most of the issues dealt with in the Model Rules, the Restatement also addresses the additional issues of disqualification, attorney-client privilege, and liability for malpractice.¹⁵ The Restatement draws significantly on decisional law.

3. The Legal Opinion Accord of the ABA Section of Business Law (1991) (the “Accord”) sets forth a framework to which parties can agree in order to facilitate third-party legal opinions.¹⁶ The ABA Legal Opinions Committee has issued “Guidelines for the Preparation of Closing Opinions,” which provides guidance on opinion preparation and negotiation.¹⁷ The ABA “Legal Opinion Principles,”¹⁸ and the TriBar Opinion Committee’s report, “Third Party Closing Opinions,”¹⁹

7. *Id.* RR. 1.0–8.5.

8. *Id.* pmb1., cmt. 19.

9. *Id.* cmt. 20.

10. *Id.*

11. *Id.* pmb1.

12. For an online list with links to each state’s rules of professional responsibility, see ABA, Center for Professional Responsibility, available at <http://abanet.org/cpr/links.html> (last visited Feb. 19, 2007).

13. *E.g.*, N.Y. LAWYER’S CODE OF PROF’L RESPONSIBILITY (2002), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Lawyers_Code_of_Professional_Responsibility/CodeofResponsibility.pdf.

14. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

15. *Id.* § 6 cmt. i; *id.* §§ 48–58, 68–86.

16. ABA Bus. Law Section, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 BUS. LAW. 167 (1991).

17. ABA Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002).

18. ABA Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter “*Legal Opinion Principles*”].

19. TriBar Opinion Comm., *Third-Party ‘Closing’ Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter “*TriBar Report*”].

(“TriBar Report”), are widely accepted as setting forth customary practice with respect to third-party legal opinions. These and other ABA and state bar reports, as recognized by the Restatement, provide a basis for measuring competence and defining the duty of care in legal opinion practice.²⁰

4. The lawyer’s ethical obligations with respect to legal services (including furnishing a legal opinion) rendered to his or her own client are found in the Model Rules generally. In addition to overriding obligations relating to the representation, such as the duty to avoid conflicts or to preserve the confidentiality of information relating to the representation, the lawyer must provide competent representation²¹ and must act with reasonable promptness and diligence.²² It may be questioned whether the precise extent of those obligations varies depending on the nature of the opinion and the context in which it is given—formal or informal, written or oral, qualified or unqualified, etc. For example, a lawyer giving a sophisticated client a quick, off-the-cuff and informal opinion as to what the law probably is in an area that the client has been informed lies outside the lawyer’s fields of specialty might be held to a less exacting standard than if the same opinion were given to an unsophisticated client in a formal writing after research in connection with a closing and in an area of the law in which the lawyer specializes.

5. Opinions rendered to third parties at the request of the client are governed by Model Rule 2.3 (Evaluation for Use by Third Persons).²³ An “evaluation” within the scope of Rule 2.3 may include a title opinion furnished to a prospective purchaser at the request of the client-vendor, an opinion regarding the legality of securities registered under the securities laws, or a typical closing opinion rendered in connection with a corporate or financial transaction.²⁴ Although the third party to whom the opinion is rendered does not thereby become the client of the lawyer giving the opinion, the lawyer owes a duty to the third party to use care when the lawyer or, with the lawyer’s acquiescence, the client has invited the third party to rely on the lawyer’s evaluation, provided that the third party’s reliance is not too remote from the lawyer’s rendering of the opinion to warrant protection under applicable tort law.²⁵

6. Special treatment has been given to legal opinions given at the request of a client for use (by giving them to third parties) in connection with the marketing of tax shelter investments.²⁶ The Internal Revenue Service has promulgated in Circular 230, as part of its regulation of persons practicing before the IRS, rules

20. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 reporter’s note, cmt. b (2000) (discussing various bar association reports useful to lawyers issuing legal opinions).

21. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003).

22. *Id.* R. 1.3.

23. *Id.* R. 2.3.

24. *Id.* R. 2.3 cmt. 1.

25. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) (2000).

26. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers Before the Internal Revenue Service, 31 C.F.R. §§ 10.0–93 (2006); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1982).

applicable to such opinions.²⁷ This issue is also dealt with in Formal Opinion 346 of the ABA Standing Committee on Ethics and Professional Responsibility.²⁸ In the wake of allegations of abuse in the marketing of tax shelters, the Internal Revenue Service made significant revisions to Circular 230.²⁹

7. Securities law opinions also have been given special treatment.³⁰ In addition, a lawyer “appearing and practicing before the [Securities and Exchange Commission] in the representation of an issuer” is subject to the SEC’s rules of professional conduct governing attorneys (the Part 205 rules, which implement Section 307 of the Sarbanes-Oxley Act).³¹ A lawyer’s right to practice before the Commission can be suspended or denied for misconduct under SEC Rule 102(e).³²

8. A special form of “evaluation” is the opinion given by a lawyer to an auditor in connection with an audit of the client’s financial statements with respect to loss contingencies identified by the client.³³ Such opinions are addressed in the ABA Statement of Policy, which has been accepted as definitive authority as to the lawyer’s duties with respect to such opinions.³⁴

C. THIRD-PARTY OPINIONS

1. Model Rule 2.3 provides as follows:

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.³⁵

27. Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers Before the Internal Revenue Service, 31 C.F.R. §§ 10.0–93 (2006).

28. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (1982).

29. Regulations Governing Practice Before the Internal Revenue Service, 69 Fed. Reg. 75839 (Dec. 20, 2004) (codified at 31 C.F.R. pt. 10 (2006)); Regulations Governing Practice Before the Internal Revenue Service, 70 Fed. Reg. 28824 (May 19, 2005) (codified at 31 C.F.R. pt. 10 (2006)).

30. ABA Section of Bus. Law, *Legal Opinions in SEC Filings*, 59 BUS. LAW. 1505 (2004).

31. 17 C.F.R. §§ 205.1–7 (2006). See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (codified at 15 U.S.C. § 7245 (Supp. IV. 2004)).

32. 17 C.F.R. § 201.102(e) (2006).

33. ABA Comm. on Audit Inquiry Responses, *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information*, 31 BUS. LAW. 1709 (1975) [hereinafter “ABA Statement of Policy”].

34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95, reporters note to cmt. f (2000); see, EUGENE R. ERBTOESSER ET AL., *LEGAL OPINION LETTERS* § 8.1 (M. John Sterba ed., 3d ed. Supp. 2007). The ABA Statement of Policy is reflected in Statement on Auditing Standards No. 12: Inquiry of a Client’s Lawyer Concerning Litigation, Claims and Assessments (Jan. 1976) (codified in 1 AICPA Professional Standards, AU Section 337 (2001) [hereinafter “SAS 12”]. SAS 12 is part of generally accepted auditing standards that have been adopted on an interim basis by the Public Company Accounting Oversight Board. PCAOB Rule 3200T (2004) approved at 69 Fed. Reg. 24199 (May 3, 2004).

35. MODEL RULES OF PROF’L CONDUCT R. 2.3 (2003).

To the same general effect is Restatement section 95, but the Restatement also notes the lawyer's duty of care to the third party.³⁶

2. Also pertinent to third party opinions is Model Rule 4.1, which provides as follows:

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

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 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 1.6.³⁷

3. The lawyer's duties to a third-party recipient of a legal opinion are different in a number of respects from the duties owed by the lawyer to her client. For example, duties concerning loyalty (avoidance of conflicts) and preservation of confidences run only to the lawyer's client.³⁸

D. SCOPE LIMITATIONS AND FACTUAL INVESTIGATION

1. A lawyer generally must abide by a client's decision concerning the objectives of representation, but an agreement for a limited representation does not relieve the lawyer of the duty to provide competent representation.³⁹ Furthermore, the scope of a representation may be limited only to the extent reasonable under the circumstances.⁴⁰ A limitation that prevents the lawyer from reaching conclusions upon which the client can rely is not reasonable.⁴¹ If the client insists on unreasonable limitations on the scope of a lawyer's representation, the lawyer may be compelled to withdraw under Model Rule 1.16(a)(1), and in any event would be permitted to withdraw under Model Rule 1.16(b)(1), (b)(4), or (b)(7).⁴²

2. The Comments to Model Rule 2.3 acknowledge that the scope of an investigation relating to an evaluation (third-party opinion) may be limited.⁴³ Limitations that are material to the evaluation must be disclosed as part of the evaluation.⁴⁴ Comment 4 to Model Rule 2.3 provides as follows:

Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report.⁴⁵

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 (2000).

37. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2003).

38. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 390 (1995) for a discussion of whether these duties extend to affiliates of a corporate client.

39. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2003).

40. *Id.* R. 1.2(c).

41. *Id.* R. 1.2 cmt. 7.

42. *Id.* R. 1.16(a)–(b).

43. *Id.* R. 2.3 cmt. 4.

44. *Id.*

45. *Id.*

3. As acknowledged and addressed in ABA and TriBar materials on legal opinions, a lawyer may negotiate with the opinion recipient concerning the form, assumptions, and scope of investigation underlying a third-party opinion.⁴⁶ The limitations on scope or deviations from customary understandings and practices must be clearly stated in the opinion.⁴⁷

4. Two opinions of the ABA Standing Committee on Ethics and Professional Responsibility hold that scope limitations may require the lawyer to refuse to give an opinion or withdraw from the representation.⁴⁸ Formal Opinion 335 addresses opinions given in the context of sales of unregistered securities.⁴⁹ With reference to the lawyer's responsibility to investigate facts Opinion 335 states:

In any event, the lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. . . .

Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion.⁵⁰

Opinion 335 further indicates it is not appropriate simply to rely without question on facts provided by the client (presumably even if the lawyer clearly so states in the opinion).⁵¹

A properly drafted opinion will recite clearly the sources of the attorney's knowledge of the facts. Where verification is otherwise called for, an attorney should make appropriate verification and should not rely on the use of such phrases as "based upon the facts as you have given them to me" or "apart from what you have told me, I have not inquired as to the facts."⁵²

5. Formal Opinion 346 addresses tax shelter opinions, i.e., tax advice that is referred to either in tax shelter offering materials or in connection with tax shelter sales promotions directed at persons other than the lawyer's client.⁵³ Opinion 346 holds that a lawyer giving such an opinion cannot disclaim responsibility for inquiring as to the accuracy of facts, nor can the opinion be based on purely hypothetical facts:

A lawyer should not issue a tax shelter opinion which disclaims responsibility for inquiring as to the accuracy of the facts, fails to analyze the critical facts or discusses purely hypothetical facts.⁵⁴

46. See *Legal Opinion Principles*, *supra* note 18, at 832; *TriBar Report*, *supra* note 19, at 603.

47. *Legal Opinion Principles*, *supra* note 18, at 832; *TriBar Report*, *supra* note 19, at 603.

48. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1982); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 (1974).

49. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 (1974).

50. *Id.*

51. *Id.*

52. *Id.*

53. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1982).

54. *Id.*

6. A scope limitation that prevents a lawyer, in rendering a tax shelter opinion, from conducting the factual investigation required under Opinion 346 or that prevents a lawyer, in rendering an opinion relating to the sale of unregistered securities, from conducting the factual investigation required under Opinion 335 should be considered unreasonable and may not, under Model Rule 1.2(c), be accepted by the lawyer. Arguably the same result should follow for any opinion furnished to, or likely to be relied upon, by third parties who are not in a position to negotiate the form, content, and other aspects of the opinion. But Model Rule 2.3 and customary practice would seem to support a different result in the case of a negotiated opinion (i.e., an opinion the form of which is negotiated with the third party) in which the opinion recipient agrees to accept the risks of limited inquiry and any consequences of those risks.

Other questions arise if the lawyer knows, or should know, that parties other than the opinion recipient will be relying on the opinion. A disclaimer in the opinion of liability to anyone other than the opinion recipient may not be effective if the lawyer knew or should have known that, given the nature of the transaction and of the opinion, other parties (e.g., the opinion recipient's shareholders or lenders) are intended or likely to be furnished the opinion and will or may rely on it, especially if that intended or probable use and reliance is one of the reasons for requesting the opinion.⁵⁵

7. Where actual facts known to the lawyer are inconsistent with the assumed facts, it is easy to conclude that the lawyer should not issue an opinion relying on the assumed facts. The more difficult setting is where the investigation is limited (because of considerations of cost or timing, for example), and where the lawyer has no reason to believe that the actual facts may be inconsistent with the assumed facts. The lawyer's prior relationship with the client furnishing the assumed facts may be relevant to the reasonableness of the lawyer's reliance on those assumed facts in rendering an opinion.⁵⁶

8. The TriBar Report states that:

If the opinion preparers identify information as "unreliable" they must find other information to establish the facts. Alternatively, they may include an express assumption regarding those facts in order to give the opinion.⁵⁷

The TriBar Report also provides that preparers should not rely on an **unstated** assumption if it is unreliable.⁵⁸ However, a **stated** assumption has a different impact:

By way of contrast, stated assumptions, like opinion exceptions, put the opinion recipient on notice that the opinion preparers have not established the facts being assumed. Stated assumptions, therefore, shift to the opinion recipient the responsibility for confirming the assumed facts for itself or taking the risk that what is assumed might turn out to be untrue. As with opinion exceptions, reliance on a stated

55. *TriBar Report*, *supra* note 19, at 604 & n.29.

56. *Id.* at 613–14.

57. *Id.* at 610.

58. *Id.* at 616.

assumption is subject to the limitation described in Section 1.4(d) on rendering misleading opinions.⁵⁹

The TriBar Report further provides that the risk of misleading an opinion recipient can be avoided by an appropriate disclosure (either within or outside of the opinion letter).⁶⁰

E. CRIME, FRAUD, AND DECEIT

1. A lawyer may not “assist a client in conduct that the lawyer knows is criminal or fraudulent.”⁶¹ The lawyer may not, for example, draft or deliver documents that the lawyer knows are fraudulent.⁶² And if the lawyer discovers that client conduct that she originally supposed to be legally proper is in fact criminal or fraudulent, she must withdraw from the representation.⁶³ In some cases withdrawal alone is not sufficient, and it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any “opinion, document, affirmation, or the like.”⁶⁴

2. Model Rule 4.1 provides that in the course of representing a client a lawyer may not “knowingly: (a) make a false statement of a material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”⁶⁵ Model Rule 8.4 states that it is “professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁶⁶ Although a lawyer must be truthful when dealing with others on a client’s behalf, she generally has no affirmative duty to inform an opposing party of relevant facts, except as may be necessary to make a previous statement not misleading.⁶⁷ A partially true but misleading statement or an omission that is the equivalent of an affirmative false statement constitute misrepresentations.⁶⁸

3. The 2003 amendments to Model Rule 1.6 permit the disclosure of information relating to a representation to the extent the lawyer reasonably believes necessary “(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”; and “(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

59. *Id.*

60. *Id.* at 602.

61. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003).

62. *Id.* R. 1.2 cmt. 10.

63. *Id.* R. 1.16(a).

64. *Id.* R. 4.1 cmt. 3.

65. *Id.* R. 4.1.

66. *Id.* R. 8.4.

67. *Id.* R. 4.1 cmt. 1.

68. *Id.*

the client has used the lawyer's services."⁶⁹ In these circumstances (reasonably certain substantial third-party financial injury resulting from client crime or fraud using lawyer's services) a disclosure otherwise required under Model Rule 4.1(b) is, therefore, not limited by Model Rule 1.6.

4. The Model Rule 1.2 and 4.1(b) strictures apply when the lawyer has knowledge of a client crime or fraud that uses the lawyer's services or which the lawyer is in some fashion assisting.⁷⁰ Model Rule 4.1(a) and Rule 8.4, by contrast, reach any false statement of fact or law by the lawyer, regardless of whether there is a client crime or fraud involved.⁷¹ While these Rules do not make an erroneous opinion a disciplinary violation, they do make it a violation to deliver an opinion that is knowingly based on a false statement of facts or law.⁷² This arguably includes the rendering of an opinion based on a stated assumption that the lawyer knows (or should know) is contrary to fact.

5. The terms "knowingly," "known," and "knows" are defined in the Model Rules as denoting "actual knowledge of the fact in question."⁷³ The definition goes on to state that "a person's knowledge may be inferred from circumstances."⁷⁴ A lawyer may not, in other words, ignore the obvious or turn a blind eye. "Reasonably should know" denotes that "a lawyer of reasonable prudence and competence would ascertain the matter in question."⁷⁵ Considering that what was obvious will be determined with the benefit of hindsight, there may not be much practical difference between what the lawyer is deemed to have known and what the lawyer reasonably should have known.

F. THE ORGANIZATIONAL CLIENT

1. Under Model Rule 1.13 a lawyer engaged by an organization represents the organization "acting through its duly authorized constituents."⁷⁶ Generally, decisions made by constituents (officers, directors, employees, shareholders) of an organization must be accepted by the lawyer.⁷⁷ But

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 imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.⁷⁸

This requires the lawyer, unless he reasonably believes that it is not necessary in the best interest of the organization, to refer the matter to higher authority in

69. *Id.* R. 1.6.

70. *Id.* R. 1.2; *id.* R. 4.1(b).

71. *Id.* R. 4.1(a); *id.* R. 8.4.

72. A false statement of law would presumably be a deliberate (or possibly recklessly erroneous) misstatement of a statute or judicial precedent.

73. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2003).

74. *Id.*

75. *Id.* R. 1.0(j).

76. *Id.* R. 1.13(a).

77. *Id.* R. 1.13 cmts. 1, 3.

78. *Id.* R. 1.13 cmt. 3.

the organization, including, if warranted, the highest authority that can act for the organization (usually the governing board).⁷⁹ If the highest authority insists upon action (or fails to prevent action) that is clearly a violation of law and that the lawyer “reasonably believes . . . is reasonably certain to result in substantial injury to the organization,”⁸⁰ then the lawyer may (but is not required to) reveal information relating to the representation otherwise prohibited by Model Rule 1.6, but only to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.⁸¹ To put it simply, the lawyer must, except with good faith reason not to do so, “report up” or “go up the ladder,” to (if necessary) the highest authority in the organization, and may, with good faith reason, “report out” or “blow the whistle” if the highest authority fails or refuses to act in the organization’s interest.

2. Model Rule 1.13(c)’s “reporting out” provisions do not apply to information acquired by the lawyer in the course of an organizational investigation of an alleged violation of law, or in the course of the defense of the organization or one of its constituents against claims arising out of an alleged violation of law.⁸² Model Rules 1.13(b)’s “reporting up” obligation and Model Rule 1.13(c)’s “reporting out” exception would apply, however, to knowledge obtained by a lawyer in the course of preparing an opinion on behalf of an organizational client.

3. Similar provisions apply under the SEC’s Part 205 rules to lawyers “appearing and practicing before the Commission in the representation of an issuer.”⁸³ As those terms are defined,⁸⁴ the Part 205 rules would apply in many instances to knowledge obtained by a lawyer in the course of the preparation of an opinion in connection with a securities transaction, or with respect to outstanding securities previously issued pursuant to a registration or an exemption from registration.

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

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

81. *Id.*

82. *Id.* R. 1.13(d).

83. 17 C.F.R. § 205.1 (2006).

84. 17 C.F.R. § 205.2(a) (2006).