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Thomas D. Morgan

George Washington University Law School, tmorgan@law.gwu.edu

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The Corporate Lawyer and ‘The Perjury Trilemma’*

Thomas D. Morgan**

Abstract: This paper extends Monroe Freedman’s idea of the criminal lawyer’s “perjury trilemma” to current issues faced by corporate lawyers dealing with perceived pressures on the attorney-client privilege. The duties of criminal defense and corporate lawyers are more similar than they often seem. Corporate lawyers’ duties of honesty in dealing with third parties are closely analogous to criminal lawyers’ duties of honesty in dealing with a court. Both sets of lawyers also have an important interest in fostering open communications with their clients. Where their situations differ is not with respect to lawyer obligations but with respect to their clients’ rights. Corporations, for example, lack a privilege against self-incrimination possessed by individual criminal defendants. Further, many current issues of corporate fraud involve information not privileged at all because of the crime-fraud exception. Finally, corporate clients have a power to compel employees to disclose personally adverse information without the encouragement offered by protecting the information as privileged. These differences between rights of corporate clients and those of individual criminal defendants should lead corporate lawyers to rely less on arguments analogous to those of the “perjury trilemma” as they respond to today’s perceived pressures on the corporate attorney-client privilege.

Introduction

This paper represents a thought experiment that takes one of Monroe Freedman’s most fundamental legal ethics ideas and extends it to a current controversy. Professor Freedman’s contributions are many, but none is more significant than his stating – and proposing a solution to – what he has called “the perjury trilemma.”¹ Asserted in the context of criminal defense representation, the trilemma analysis recognizes that:

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**Oppenheim Professor of Antitrust & Trade Regulation Law, The George Washington University Law School. J.D. 1965, The University of Chicago.

¹The trilemma was originally posed in Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966). He has restated it in Monroe H. Freedman & Abbe Smith, *Understanding Lawyers’ Ethics* 159 et seq. (3rd Ed. 2004) (hereafter *Understanding Lawyers’ Ethics*). I will consistently cite this book throughout this paper, because I understand it to be the most recent comprehensive statement of Professor Freedman’s ideas. The same volume also addresses some of the issues facing corporate lawyers that are the subject of this paper.

“First, in order to give clients the effective assistance of counsel to which they are entitled, lawyers are required to seek out all relevant facts. Second, in order to encourage clients to entrust their lawyers with embarrassing or possibly harmful information, lawyers are under a duty of confidentiality with regard to information obtained in professional relationships. Third, lawyers are expected to be candid with the court.

“A moment’s reflection makes it clear, however, that a lawyer cannot do all of those things – know everything, keep it in confidence, and reveal it to the court over the client’s objections. To resolve this trilemma, therefore, one of the three duties must give way.

“If we forgo the first duty (seeking all relevant information), we would be adopting the model of intentional ignorance. If we sacrifice the second duty (maintaining confidentiality), clients would quickly learn that their lawyers could not be trusted and would withhold damaging information; again, the result is intentional ignorance. Only by limiting the third duty – by allowing lawyers to be less than candid with the court when necessary to protect clients’ confidences – can we maintain the traditional lawyer-client model.”²

While the ABA has yet to embrace this analysis, even in criminal litigation,³ it has been part of legal ethics classes all over the country. Through this analysis, Professor Freedman has shown generations of law students that legal ethics is not just what Garry Trudeau in *Doonesbury* called “trendy lip service to our better selves.”⁴ Studying legal ethics is hard; it requires resolving conflicting values and often produces what seem initially to be less than satisfactory solutions.

My object in this paper is to think about extending the perjury trilemma analysis to lawyers advising corporate clients. The current importance of this inquiry stems from recent corporate scandals involving companies such as Enron, WorldCom, Tyco and the like.⁵ Similar issues were raised a decade earlier in connection with dozens of savings-and-loan associations whose failure was attributed in part to action or inaction by their lawyers.⁶

²*Understanding Lawyers’ Ethics* 161.

³See, e.g., Model Rule 3.3(a)(3) & (b).

⁴A cartoon expressing that thought is found in Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials* (8th Ed. 2003).

⁵Among the extensive literature on these scandals, see William C. Powers, Jr., et al., *Report of Investigation by the Special Investigating Committee of the Board of Directors of Enron Corp.* (2002); Lynne W. Jeter, *Disconnected: Deceit and Betrayal at WorldCom* (2003).

⁶E.g., *In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation*, 794 F.Supp. 1424 (D.Ariz. 1992).

Today's interest in the question arises even more, however, from the government's reaction to those scandals. Recognizing that lawyers had been in-and-around many of the incidents that led to significant losses, both the SEC and the Justice Department have pushed hard to get lawyers both to report misconduct before it happens and to clean it up as soon as it's discovered. The SEC efforts were required by Congress in the 2002 Sarbanes-Oxley Act,⁷ while the Justice Department has held out the carrot of "cooperation" credit under the Sentencing Guidelines⁸ to achieve similar ends. It has demanded that corporate lawyers turn over company information that traditionally would have been viewed as privileged or otherwise confidential.

Obviously, many issues facing corporate legal advisers are different than those typically faced by criminal defense counsel. Many differences, however, turn out to be more apparent than real, a fact that is interesting in itself. Further, the trilemma analysis "travels" remarkably well to this new area of interest.

Some differences turn out to be fundamental, however, and I ultimately conclude that they lead to different conclusions about application of the perjury trilemma to corporate lawyers than those Professor Freedman reached in the context of individuals charged with crime. As a bonus, however, I believe that the analysis illuminates and confirms some of Professor Freedman's most fundamental original insights.

It may help us think through the issues if we posit a hypothetical problem involving a private law firm partner – let's call her Mary – who does considerable legal work helping a pharmaceutical company with its securities issues. The company has several drugs whose patents have recently expired, but it has announced that several new drugs have successfully completed clinical trials. As a result, the client's stock price has remained high. In casual talks with the firm's FDA partner, however, Mary recently learned that the new drugs are associated with possibly serious side effects that the company has not revealed in its public reports. Only further research can tell whether the new findings are caused by the new drugs or are simply coincidental observations, but if the drugs turn out to cause the increased health risks, the company's financial future is likely to be much less bright.

Taking the Third Issue First – The Relevance of Having a Special Duty to the Court

Rather than simply march through the three elements of the Freedman trilemma in order, it seems helpful at the outset to confront what is apparently the most obvious distinction between the role of criminal defense counsel and that of a corporate legal adviser such as Mary. A

⁷Sarbanes-Oxley Act of 2002, Pub.L. 107–204, 116 Stat. 784 (2002).

⁸The original government position was issued in a Memorandum from Deputy Attorney General Eric Holder to Heads of Government Components and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999). It was reaffirmed in a Memorandum from Deputy Attorney General Larry Thompson to Heads of Government Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), and reinforced by recent amendments to § 8C2.5 of the Federal Sentencing Guidelines (Nov. 1, 2004).

criminal defense lawyer acts in court. Most of a corporate adviser's work, on the other hand, does not involve a court at all – at least until things go bad. It involves lawyers and their clients making representations while raising money or engaging in other kinds of business transactions.

Perhaps surprisingly, however, as a matter of legal ethics, that distinction turns out to be almost trivial. It is true that Model Rule 3.3(a) forbids a criminal defense lawyer's making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact of law previously made to the tribunal by the lawyer."⁹ The Rule goes on expressly to forbid a lawyer's offering "evidence that the lawyer knows to be false," and even provides that if a "witness called by the lawyer," including the lawyer's client, "has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."¹⁰

Corporate advisers are not subject to the requirement of Model Rule 3.3(a) when they are not appearing in court. Likewise, Mary's and her clients' extrajudicial statements ordinarily do not involve perjury. They are not made before a judge or pursuant to judicial oath, and such lawyers might believe that they are subject to no requirements at all.

But if lawyers believed that, they would be mistaken. The statements of corporate lawyers are clearly governed by Model Rule 4.1(a), which provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third party."¹¹ A corporate lawyer operating under Model Rule 4.1(a) is subject to the same "knowing" standard – and the same requirement of truth about "material" statements – as is his or her criminal defense counterpart.

Making the duties even closer, Model Rule 1.2(d), like Model Rule 3.3(a)(1), requires lawyers not knowingly to let a client make statements – or otherwise counsel or assist a client in conduct – that the lawyer knows to be criminal or fraudulent.¹² Indeed, Model Rule 4.1(b), like Model Rule 3.3(a)(3), even requires the corporate lawyer to turn a client in, i.e., the lawyer may not "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."¹³

⁹ABA Model Rule 3.3(a)(1).

¹⁰ABA Model Rule 3.3(a)(3).

¹¹ABA Model Rule 4.1(a).

¹²ABA Model Rule 4.1(b). The lawyer may, however, discuss the legal consequences of a proposed course of conduct with the client as part of the client's effort to conform its conduct to the law. See ABA Model Rule 1.2(d).

¹³The obligation is subject to the phrase "unless disclosure is prohibited by Rule 1.6." Since the adoption of ABA Model Rule 1.6(b)(2) & (3) in 2003, however, at least in situations where the client has used the lawyer's services at some point in the past, such disclosure is no longer prohibited.

My point in parsing the rules in this way is not to be pedantic. It is to point out that the tension between the duty of confidentiality and the duty of honesty ultimately has little to do with whether a court is involved. The “trilemma” that Professor Freedman identified applies more broadly than the setting in which he first applied it. The tension between confidentiality and candor is common to all areas of practice, and in that sense, corporate lawyers must come to grips with its realities just as criminal defense lawyers have done.

Moreover, the criminal defense lawyer and the corporate lawyer are alike in yet another way. In both cases, there is an enormous cost to erroneous candor. If a criminal defense lawyer makes a disclosure of the erroneous belief that his or her client is lying, the client will be largely defenseless. The mistake typically will go uncorrected and the client may be wrongly convicted.

Similarly, many people seem to think that having corporate lawyers reveal apparent client fraud is an unmitigated good. If Mary speaks too quickly, however, and falsely leads investors to believe that the company is in trouble when the drug’s possible problems are in fact wrong, the losses suffered by her client, its employees and its other investors could be enormous. Damage to reputations of persons falsely accused – even the damage from delay of important client initiatives while an investigation proceeds – can be significant consequences of excessive disclosure. My point is that the caution about candor called for by the trilemma analysis is as significant in the corporate context as it is in the area of criminal defense.

Of course, Professor Freedman’s trilemma analysis assumed that its conclusion applied even if the lawyer were right that the client was lying. My point is simply that certainty is rare in the real world. A lawyer can sometimes mistakenly believe things to be improper when they are not. That reality is not a call for willful blindness or lawyer indifference. It is a suggestion that we all have the humility to recognize that there can be a downside to lawyer disclosure as well as the clearly sometimes-significant downside to inaction. In both the criminal defense and corporate contexts, then, Professor Freedman was right that there is significant reason to be cautious about making lawyer disclosure mandatory.

The Importance of Acquiring Information – The Conscious Ignorance Issue

Returning then to Professor Freedman’s first insight in the perjury trilemma – that the lawyer must learn as much as possible about the client’s case – the issue is again much the same whether one is dealing with a criminal defendant or a corporate client. Indeed, if anything, the problem of obtaining information is significantly greater in the corporate setting.

The traditional paradigm of criminal defense practice pictures one lawyer representing one individual client. The two meet and talk. The lawyer independently investigates facts, but has a roadmap provided by charges the client faces. In that setting, acquiring information from the client is primarily a matter of the lawyer’s asking good questions and the client’s having sufficient trust in the lawyer to provide reliable answers. Neither is certain, but Professor Freedman’s resolution of the trilemma is designed to give clients a reliable basis for that trust.

Even assuming trust between the lawyer and the client's officials with whom the lawyer deals, however, the problem of acquiring information in a corporate advice setting is inherently more complex.

The first and most basic problem is that, while many corporate lawyers' problems involve some past conduct, the most important ones often involve how the company expects to act in the future. Issues of acquiring information about the future are inherently more problematic than the typical criminal defense lawyer's challenge of acquiring information about the past. The past may be seen from different perspectives, but one can often triangulate from those points of view to come close to understanding what happened. When one is dealing with the future, however, it is often hard even to know what questions to ask. With the benefit of hindsight in egregious cases, it is easy to think that no reasonable person could ever have failed to pursue signs of wrongdoing, but unfortunately, fraudulent conduct does not always fly a red flag.

Indeed, what is now seen as dishonesty may, at the time, look like imagination and initiative. Andrew Fastow, the now-disgraced chief financial officer at Enron, for example, won industry awards for his creativity as a financial manager.¹⁴ I say this not to praise Mr. Fastow or what happened at Enron, but to suggest how challenging the task of distinguishing praiseworthy conduct from dishonesty can be for lawyers, particularly when one has access to only some of the relevant facts.

Second, corporate lawyers typically learn disassociated facts about legally-ambiguous situations from diverse sources. In our example, Mary learned disturbing information from her law partner who had seen the information as interesting but not definitive. Others might describe the same facts differently. I believe that most observers would not believe that avoiding what Professor Freedman calls "conscious ignorance" requires investigating every hunch about a problem. What the Model Rules say is that the lawyer is required to act when he or she "knows" sufficient facts. The requirement is "actual knowledge."¹⁵ In this context, "knowledge" is a broad term. It is not wholly subjective; a lawyer may not intentionally avoid obtaining

¹⁴ For example, Fastow won the 1999 CFO Excellence Award for Capital Structure Management. See CFO Magazine, Oct. 1999, found at <http://www.cfo.com/article.cfm/2989389>.

¹⁵ ABA Model Rule 1.0(f). It is not enough that the lawyer "reasonably should know" something. A "reasonably should know" standard requires the lawyer to be suspicious, indeed to become a detective, and "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." A "reasonably should know" standard would render a lawyer responsible for information that the lawyer by definition did not know and could not have "inferred from circumstances." It would require the lawyer to affirmatively "ascertain" (Model Rule 1.0(j)) information about client conduct that would often by its nature be hidden. In short, it would turn the lawyer into a client's auditor, a role that would transform the ordinary lawyer-client relationship from helper to critic.

Under the SEC's regulations implementing § 307 of the Sarbanes-Oxley Act of 2002, supra n. 7, a lawyer's duty to report suspected misconduct is triggered when "it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation [of the securities laws or a breach of fiduciary duty] has occurred, is ongoing, or is about to occur." 17 CFR § 205.2(e).

knowledge.¹⁶ A lawyer’s “knowledge” may be “inferred from circumstances,”¹⁷ i.e., from other facts that it can be later shown the lawyer knew at the time in question, but knowledge surely requires more than guessing.

The question of upon whose word a lawyer may or must rely thus becomes one of the central questions in modern corporate representation. I believe the present law should be said to be that a lawyer may accept as true the facially reasonable resolution of factual and legal questions by persons who are apparently in a position to make those judgments correctly. That is what corporate officials do all the time in dealing with reports from others in the company.¹⁸ Indeed, in a world with as many issues as typically are involved in the life of a large corporation, any other rule would be unthinkable, but the failure of the Model Rules to clarify the point only magnifies confusion about the issue of conscious ignorance in the current debate about corporate lawyer conduct. In our example, Mary knows at minimum that the ability to market the new drugs is not as certain as the company has been saying, and she has a duty to do something about that.

Third, unlike the traditional one-to-one relationship of the criminal lawyer and the defendant-client in the perjury trilemma, multiple lawyers tend to work on a corporate client’s matters. Talk about a corporation’s lawyers often seems to assume that all have similar duties, comparable access to information, and direct access to high-level company officials. Clearly, that is not true. The typical corporate lawyer lives in a world of divided information. In our example, a food-and-drug lawyer knew a fact about a client that seemed innocent in itself, while Mary, a securities lawyer, knew what representations had been made. If the two lawyers had never happened to share the facts, however, they might not have learned that serious problems for the client lay down the road unless action was taken.

For purposes of conflict of interest analysis, we treat all lawyers in a firm as knowing what the others know.¹⁹ We don’t really believe it is true, but we get away with acting as if it were so because firms maintain client lists and can do conflicts checks to identify the cases that imputed disqualification requires the firm to avoid.

In the case of ordinary information within a law firm, however, imputing knowledge from one lawyer to another is utterly fictional. No lawyer can in fact act on anything other than personal knowledge, so imputation rules can only create duties on lawyers to compare notes. It is probably technologically possible for law firms to arrange electronic files so that every lawyer in the firm could read every other lawyer’s work, but if the lawyers did so, they would have time

¹⁶ABA Model Rule 1.13, Comment [3].

¹⁷ABA Model Rule 1.0(f).

¹⁸Cf. *Smith v. Van Gorkam*, 488 A.2d 858 (Del. 1985) (duty of board member to investigate facts in connection with an important transaction).

¹⁹ABA Model Rule 1.10(a).

to do little else. Professional standards should not permit conscious ignorance, but they surely should reflect a practical balance of the duty to inquire and the need to get on with representing the client effectively.

Fourth, the time and involvement of multiple lawyers in reviewing and assessing the legality of corporate action is expensive. Catastrophic losses to investors and employees from corporate bankruptcies make it easy to think that almost any cost should be incurred to prevent those losses, but one does not have to advocate conscious ignorance to recognize that employees at thousands of corporate clients are not engaged in significant illegality. Giving lawyers a license – albeit stated as an ethical authority or obligation – to act as expensive internal corporate investigators may impose more costs on the nation’s law-abiding clients than it will save at companies involved in lawbreaking. The challenge in thinking about the information acquisition part of a corporate lawyer’s trilemma, then, lies in determining how much innocent information must be examined in order to avoid the charge the lawyer was engaged in conscious ignorance when he or she overlooked a smoking gun.

The Right to Confidentiality in the Corporate Setting

The point of this discussion of the first and third elements of Professor Freedman’s perjury trilemma analysis has been to say that, if anything, a corporate lawyer can identify as much or more with the terms of its analysis as the criminal defense lawyer can. A corporate lawyer’s duty of honesty in dealings with third parties is comparable in breadth and character to that of the criminal defense lawyer’s duty to the court, while a corporate lawyer’s challenge in acquiring information important to the representation may be even greater.

The logical conclusion, one might argue, is that a corporate legal adviser – like his or her criminal law counterpart – must largely ignore any purported obligation to reveal a corporate client’s likely wrongdoing. But that brings us to the second element in the perjury trilemma, the lawyer’s obligation to protect a client’s confidential information. That obligation has always seemed to be the lynchpin in the Freedman analysis. Unless we see the duty of confidentiality as firmly grounded and paramount, we have no basis for subordinating the duty to correct false testimony or the duty to avoid preventing corporate crime or fraud. And it is when we analyze this element of the trilemma that we see that the corporate lawyer’s and the criminal defense lawyer’s obligations diverge.

The argument in support of this second element in corporate representation is often made simply as a restatement of the first element. That is, we are told that confidentiality supports the law’s belief that people are more likely to open up to their lawyers if the lawyers try to protect them against sanction for what they reveal. People simply recast that first-element insight by saying that the lawyer’s second-element duty of confidentiality gives the client that protection.²⁰

²⁰Professor Freedman is in part to blame for this confusion. In the statement of the trilemma quoted at the outset of this paper, he did not include the Fifth Amendment concern as part of the second element. Its centrality to his thesis, however, is clear from §§ 6.17 to 6.19 of *Understanding Lawyers’ Ethics*.

That statement of the argument is at the heart of the recent American Bar Association resolution opposing the alleged invasion of attorney-client privilege and work product protection by the Department of Justice and the SEC. Both doctrines, the resolution said, are “essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice.”²¹

Initially, the argument seems uncontroversial. The leading case on the application of both the attorney-client privilege and the work product doctrine to corporate representation is *Upjohn Co. v. United States*.²² In *Upjohn*, an auditor had found that the company had made improper payments to foreign officials. Upjohn’s general counsel began an internal investigation in which lawyers conducted several interviews.

The resulting report was sent to the SEC and IRS. At that point, the IRS also demanded to see the notes and files underlying the report, but Upjohn refused to turn them over. The court of appeals ordered disclosure of most of the notes, noting that many of the reports were based on interviews of low-level officials whereas the corporate attorney-client privilege applied only to the communications to and from a company’s “control group.”²³ Applying the privilege more broadly to the “subject matter” of the investigation, the court reasoned, would conceal too much information from discovery. For the same reason, the court of appeals also held that the work product doctrine did not protect information from disclosure pursuant to an administrative summons as opposed to traditional litigation.²⁴

But the Supreme Court saw the issues differently. The purpose of the attorney-client privilege, Justice Rehnquist wrote for the Court “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”²⁵ The Court reasoned further that: “In the case of the individual client, the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees below

²¹Recommendation 111 from the ABA Task Force on Attorney-Client Privilege, adopted by the American Bar Ass’n House of Delegates (Aug. 9, 2005).

²²449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

²³*United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979).

²⁴600 F.2d at 1228, n. 13.

²⁵449 U.S. at 389.

the control group * * * who will possess the information needed by the corporation's lawyers."²⁶ Thus, the privilege should extend to communications to the lawyers from those lower level officials as well, and not simply from control group members.

Many lawyers seem to see *Upjohn* as the ultimate word on the application of the attorney-client privilege to corporate representation, and they assume that it equates the role of a corporate lawyer with that of Professor Freedman's criminal defense lawyer. But that conclusion is much too glib. The Court in *Upjohn* itself refused to establish a general rule, saying "[w]e decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so."²⁷

When we don't get distracted by the rhetoric of *Upjohn*, and instead take the second element of the Freedman trilemma seriously, we can see that applying the trilemma to corporate representation differs significantly from its application to representation of individual criminal defendants in at least three ways.

First, encouraging a client to tell the lawyer everything only justifies the lawyer's later silence if the client has a legal right to withhold the information from third parties. If a witness has a legal obligation to tell a court his real name, for example, ordinarily the witness' identity is not something her lawyer may help conceal.²⁸ The lawyer is a client's agent and can only protect what the client has a right to protect. Without a corporate client's right to keep information to itself, then, a lawyer's mere desire to encourage the client to tell the lawyer something would not ordinarily later justify the lawyer's failure to reveal that information to others who have a legal right to know it.

That way of putting the point was not the way Professor Freedman put it in discussions of the perjury trilemma, but it seems to me to be at the heart of his second element, and indeed, it is what makes the second element different from the first. An individual criminal defendant has a Fifth Amendment right not be forced to give evidence against him- or herself. Therefore, a criminal defense lawyer – the defendant's agent – must assert and defend his or her legal obligation not to be forced to testify against the client.

Unlike the individual criminal defendant posited by Professor Freedman, however, a corporation has no Fifth Amendment privilege against self-incrimination.²⁹ As the Supreme Court explained in *Wilson v. United States*: "While an individual may lawfully refuse to answer

²⁶Id. at 391. In addition, the Court concluded, the work product doctrine does apply to administrative investigations such as this one and provided yet another basis to resist the IRS subpoena. Id. at 397.

²⁷Id. at 386.

²⁸See, e.g., *In re Grand Jury Subpoena*, 204 F.3d 516 (4th Cir. 2000); *In re Doe*, 456 N.Y.S.2d 312 (N.Y. Co. Ct. 1982).

²⁹The case usually cited as establishing this proposition is *Hale v. Henkel*, 201 U.S. 43 (1906).

incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.”³⁰ Many later cases have reached the same result.³¹

The distinction is critical. In our example, Mary’s client has a legal obligation to file regular reports with the Securities and Exchange Commission.³² The reports may not be materially misleading. It is not a defense for the company to say it did not want to embarrass itself or cause its stock price to fall. Without the back-up provided by the Fifth Amendment privilege, Professor Freedman’s *tri*-lemma becomes nothing more than an ordinary utilitarian *di*-lemma, backed by perceived practical considerations about getting clients to talk, but no more than that.

Indeed, one may seriously question the practical significance of the corporate privilege in such a setting. When a corporation faces large fines and its executives face prison time for failure to report facts candidly and completely, it is not obvious that expanding the company’s attorney-client privilege is necessary to give the client and its executives an incentive to make such reports.

The second distinction between the legal obligation of confidentiality faced by corporate counsel and that faced by counsel for an individual criminal defendant, is the fact that neither the attorney-client privilege nor the work product immunity applies to communications with counsel concerning a future crime or fraud that the client goes on to commit.³³

If the lawyer talks the client out of the illegal activity, the world never knows about the conversation. Further, once charged with an offense based on past acts, a corporation may hold privileged talks with its counsel as may any other defendant.³⁴ Indeed, that was basically the

³⁰221 U.S. 361, 384 (1911). Justice McKenna dissented, arguing that the records belonged to the company president and were subject to his Fifth Amendment privilege, but all members of the Court agreed that a corporation itself had no such privilege.

³¹E.g., *Wheeler v. United States*, 226 U.S. 478 (1913) (records of a dissolved corporation); *Curcio v. United States*, 354 U.S. 118 (1957) (records of a labor union); *Bellis v. United States*, 417 U.S. 85 (1974) (records of a partnership). The New York Court of Appeals recently held that a law firm could not invoke the privilege against self-incrimination to protect its own records. *Matter of Nassau County Grand Jury Subpoena Duces Tecum* dated June 24, 2003, 4 N.Y.3d 665, 830 N.E.2d 1118, 797 N.Y.S.2d 790 (2005).

³²The governing statutes are the Securities Act of 1933, 15 U.S.C. §77a et seq., and the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq.

³³Restatement Third, The Law Governing Lawyers § 82 discusses the crime-fraud exception to the attorney-client privilege. The corresponding limitation on the work product doctrine is Restatement Third, The Law Governing Lawyers § 93.

³⁴ABA Model Rule 1.13(d) makes clear that the rules permitting disclosure outside the corporation do not apply to a lawyer retained to investigate or defend the corporation against a charged violation of law. The same point is made in 17 CFR § 205.3(b)(6).

situation to which the privilege was found to apply in *Upjohn*.

But in most cases the world cares about – cases in which a lawyer has been accused of either covering up or being too slow to react to corporate wrongdoing – much of the information was not privileged at all. Such information either was not revealed in a communication, i.e., it was something the lawyer discovered almost casually, or it can be seen to have related to criminal or fraudulent conduct.

For many years, of course, even where the privilege did not apply, lawyers tried to avoid a duty to disclose by imposing separate duties of confidentiality on themselves under Model Rule 1.6. Under that Rule, the lawyer's duty not to disclose was unrelated to the client's own right of non-disclosure. In the savings-and-loan cases, many lawyers paid large malpractice judgments after they had relied on what they had hoped was the protection of that ethical obligation.³⁵

Now, however, even Model Rule 1.6 no longer prevents disclosure of a client's fraud, at least if the lawyer's services have been involved in any part of the conduct.³⁶ Likewise, Model Rule 1.13(c) now permits disclosure of serious misconduct even to persons outside a corporate client where the corporation refuses to act in its own interest.³⁷ Those changes in the Model Rules were controversial, but long overdue.³⁸ A similar right of necessary disclosure is also granted in the SEC regulations adopted pursuant to the Sarbanes-Oxley Act.³⁹ No comparable laws or regulations give similar disclosure rights or duties to lawyers for individual criminal defendants. Corporate lawyers' efforts to cloak themselves with principles created for criminal defense lawyers wind up being inappropriate and simply confusing.

The third way that arguments about the need for confidentiality and incentives to get

³⁵E.g., *In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation*, supra n. 6.

³⁶ABA Model Rule 1.6(b)(2) & (3).

³⁷ABA Model Rule 1.13(c).

³⁸*Understanding Lawyers' Ethics*, § 5.10, repeats Professor Freedman's erroneous belief that a lawyer for a corporate client has a right to disclose under Model Rule 1.13(c), where disclosure would be in the client's interest, but not under Model Rule 1.6(b), where the disclosure would protect a third party. There is, in fact, no conflict. A corporate lawyer may disclose under whichever provision the facts justify, or under both provisions if the conditions for each are met. Comment [6] to Model Rule 1.13 provides: "The authority and responsibility provided in this Rule and concurrent with the authority and responsibility provided in other Rules. * * * Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)–(6). * * * If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information."

³⁹17 CFR § 205.3(d)(2). For a comparison of the Model Rules and SEC provisions, see Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 *Geo. J. Legal Ethics* 1 (2003).

people to talk break down where corporate representation is involved is that the corporate client is a legal fiction. Lawyers cannot talk to a corporation. In representing a corporate client, a lawyer talks to individuals, typically none of whom is the lawyer's client.

If a corporation or its lawyer wants information from company officers and employees, it need not get their permission to ask for that information.⁴⁰ Model Rule 4.3 requires a lawyer to make clear that the lawyer does not represent the officer or employee from whom the information is sought,⁴¹ but there is little doubt that the corporation may confront the officer or employee with a choice of providing the needed information or being fired.⁴²

I am putting the point crudely. Not all people the lawyer interviews will have done something wrong and companies do not want to be heavy-handed with experienced, loyal employees. Nor am I saying lawyers should fail to be courteous. My point is simply that a lawyer does not always need an employee's trust in the lawyer in order to get information necessary to represent the corporation effectively or at least to find out who is covering it up.

Indeed, the argument that a company needs to learn important information by throwing its own veil of confidentiality over respondent interviews takes a very short-term view of the interests of a corporate client, at least where there is still some possibility of mitigating harm. The effect of promising confidentiality in cases of corporate wrongdoing will often be that the company will simply suck itself into the wrongdoing. In our Mary example, the previous failure to disclose problems with the test considered by the FDA may be a correctable oversight. For its lawyer to encourage or facilitate behavior that perpetuates the concealment is potentially to do the client a serious disservice.

Ultimately, lawyers and corporate clients must come to realize that it is in the company's interest to obey the law. Corporations have unlimited life for a reason; long-term reputation is an asset. Corporate counsel may – and now often must – report wrongdoing to company managers and other company lawyers;⁴³ that does not violate the privilege at all. At that point, the lawyer's job should be to help the client prevent further wrongdoing and to minimize the consequences of what has already happened.

Ironically, it is lawyers who assert that a corporate lawyer must help protect wrongdoers inside a company by treating their comments as protected against disclosure who miss one of the core elements of the adversary system. Monroe Freedman is fond of citing Lord Brougham in

⁴⁰If the employee is represented by counsel with regard to the matter, Model Rule 4.2 requires the lawyer to contact the lawyer rather than the employee directly, but that does not change the analysis of this issue.

⁴¹ABA Model Rule 4.3.

⁴²See, e.g., Restatement Third, The Law Governing Lawyers §103, Comment *e*.

⁴³Such a requirement is imposed by both ABA Model Rule 1.13(b) and 17 CFR § 205.3.

Queen Caroline’s case.⁴⁴ Listen again to Lord Brougham’s now-immortal argument:

“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing that duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”⁴⁵

Lest we forget, in the case of a corporate lawyer, that client is the corporation itself. Employees and even officers who have made serious mistakes are not the client.⁴⁶ The fact that effectively representing the corporate client might impose upon individual corporate constituents “the alarms, the torments, the destruction” about which Lord Brougham spoke, must not distract the lawyer from representing his or her corporate client.

Model Rule 1.13 today is not perfect, but it describes remarkably well the lawyer’s obligations. When a lawyer knows that a corporate client, or one of its officials, is engaged in a serious violation of law as described in Model Rule 1.13(b),⁴⁷ the lawyer is required by that Rule to “proceed as is reasonably necessary in the best interest of the [corporate client].”⁴⁸

Lots of things are illegal, of course, that one might not want to require lawyers to correct. Breaches of contract are a violation of contract law, for example. In some cases, the damages for breach might be large, but losses from a failure to breach might be larger. Thus, the decision to breach might seem more a business judgment than a matter for lawyer intervention. Even criminal conduct varies in seriousness. If paying speeding tickets is cheaper than driving slowly,

⁴⁴See *Understanding Lawyers’ Ethics*, p. 71.

⁴⁵Lord Henry Brougham, Trial of Queen Caroline 8 (1821).

⁴⁶ABA Model Rule 1.13(a).

⁴⁷ABA Model Rule 1.13(b). The conditions for action are 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.”

⁴⁸In the context of the securities laws, it is often difficult to anticipate violations in otherwise innocent acts. Forming a subsidiary corporation does not violate the securities laws, for example, but the subsidiary might theoretically later be used as a vehicle for conduct that would constitute a violation. The company will clearly be liable for such fraud, as will executives who participated in it. However, surely little would be gained by making every lawyer who formed the subsidiary also liable for any uses to which it is later put. That was the point of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), that rejected lawyer “aiding and abetting” liability under § 10(b) of the Securities Exchange Act, a decision that I believe was clearly correct.

for example, it may be a wise business decision not to put governors on trucks.⁴⁹

As lawyers have learned from experience under rules requiring reporting of lawyer misconduct, a duty to report everything frequently results in a practice of reporting nothing.⁵⁰ Model Rule 1.13(b)'s requirement to proceed "as the lawyer reasonably believes to be in the best interests of the organization" is broad, and while its content is imprecise, the duty exists whether or not a failure to act would itself "assist" the wrongdoing. Even today, a lawyer does not have the option to look the other way if he or she knows of serious risk of the kinds defined above, and in the case of "reasonably certain * * * substantial injury" to the client, the lawyer may report outside the corporate client.⁵¹

Conclusion: Resolution of the Lawyer's Trilemma in the Corporate Setting

In a sense, the conclusion of this paper is obvious. Unfortunately, however, the conclusion is not acknowledged by the ABA Task Force on the Attorney-Client Privilege or by some corporate lawyers. The situations faced by counsel for individual criminal defendants and counsel for corporations engaged in fraud are fundamentally different, and the rules applicable to the first situation do not govern the second.

But it took us a while to get to that conclusion because it turns out that the cases are really only different with respect to questions of the client's identity and its underlying rights. In reaching that conclusion, this paper confirms Professor Freedman's trilemma analysis insight at

⁴⁹ABA Model Rule 1.2(d) seems to prohibit assisting any criminal conduct by the client. Many lawyers' answer to this specific question might turn on whether the speeding creates a serious risk of death to the truck drivers and third parties. ABA Model Rule 1.6(b)(1).

⁵⁰That, for example, is why DR 1-103 of the Model Code of Professional Responsibility that required reporting of all lawyer misconduct was changed in ABA Model Rule 8.3 to only require reporting of misconduct that "raises a substantial question as to [a] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

⁵¹Model Rule 1.13(c). I believe people go wrong in assuming that if "authority" to disclose is good, a "requirement" of disclosure is better. That simply does not follow. It conflates two concepts – requirement and authority – that the current rules correctly recognize as separate. Indeed, probably the most persuasive argument for having the authority to disclose is that one may be able to use that authority to get a corporate official to change the conduct that would otherwise be reported. A rule of mandatory disclosure eliminates that important combined carrot and stick.

Restatement Third, The Law Governing Lawyers § 66 makes clear that the prevailing rule on disclosure to other than corporate officials is *discretionary* disclosure, not mandatory. Its Comment *g* explains:

"[Disclosure] would inevitably conflict to a significant degree with the lawyer's customary role of protecting client interests. Critical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action. Subsequent re-examination of the reasonableness of a lawyer's action in light of later developments would be unwarranted; reasonableness of the lawyer's belief at the time and in the circumstances in which the lawyer acts is alone controlling."

its most fundamental level. Professor Freedman has always said that what lawyers say their duties are should not be our focus.⁵² It takes a focus on clients' rights to get us to the right result.

Once again, Monroe Freedman is right.

⁵²E.g., *Understanding Lawyers' Ethics* §2.04.