Sample Joint Representation Language for Engagement Letter

Joint Representation. Please note that where a lawyer or law firm is asked to represent more than one client in the same matter, special considerations arise. The information that we now have about this case indicates that the interests of [identify all joint clients], respectively, in this matter are the same. I do not believe that our firm's representation of one client in this matter would materially limit our responsibilities to the others, nor do I believe that joint representation would adversely affect the exercise of my professional judgment on behalf of any party. Therefore, I do not believe that a conflict of interest prevents this firm from jointly representing [name each client].

During the course of my joint representation, any information that either [name each client] provides to us within the scope of the attorney-client relationship will be subject to and protected by the attorney-client privilege. As such, we will not disclose it to third parties without your joint consent. This privilege does not apply, however, to the disclosure of information between the jointly-represented parties. In other words, we must be free to disclose any information shared with us by one client with the other clients.

Finally, it is possible that in the future I may learn of information that indicates that [name each client] have differing interests in this matter. If this occurs, I will so inform you and discuss with all parties whether I can continue the joint representation. Depending on the nature of the information, we may need to withdraw from representing one of you or both of you. If that occurs, we will provide you with appropriate notice of our intent to withdraw, and will cooperate in transitioning the matter to successor counsel.

Sample Upjohn Warning (Interview Script)

Before we begin, I need to explain who I represent and the purpose of this interview.

I am counsel for [Company Name]. I do not represent you personally. My role is to represent and provide legal advice to the company.

This interview is part of an investigation conducted so that I can provide legal advice to the company.

Our conversation is protected by the attorney-client privilege and attorney work-product protections. However, those protections belong solely to the company, not to you personally.

That means the company alone may decide whether to waive the privilege and disclose the substance of this interview to third parties, including government agencies or others.

In order to preserve the privilege, you should keep this interview confidential and should not discuss our conversation with others, except as authorized by the company or its counsel.

If at any point you would like personal legal advice, you may consult with your own attorney.

Do you understand these points, and are you willing to proceed with the interview?

Rule 1.13: Organization as Client

Client-Lawyer Relationship

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

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

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

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

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment | Table of Contents | Next Rule

Rule 4.2: Communication with Person Represented by Counsel

Transactions With Persons Other Than Clients

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment | Table of Contents | Next Rule

Rule 4.3: Dealing with Unrepresented Person

Transactions With Persons Other Than Clients

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment | Table of Contents | Next Rule

Syllabus

UPJOHN CO. ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79–886. Argued November 5, 1980—Decided January 13, 1981

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U. S. C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" The court also held that the work-product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the

questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389–397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While 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 it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 390–392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. Pp. 392–393.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394–395.

2. The work-product doctrine applies to IRS summonses. Pp. 397–402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language

or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman* v. *Taylor,* 329 U. S. 495, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

600 F. 2d 1223, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 402.

Daniel M. Gribbon argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith,* and *Robert E. Lindsay.**

*Briefs of *amici curiae* urging reversal were filed by *Leonard S. Janofsky, Leon Jaworski,* and *Keith A. Jones* for the American Bar Association; by *Thomas G. Lilly, Alfred F. Belcuore, Paul F. Rothstein,* and *Ronald L. Carlson* for the Federal Bar Association; by *Erwin N. Griswold* for the American College of Trial Lawyers et al.; by *Stanley T. Kaleczyc* and *J. Bruce Brown* for the Chamber of Commerce of the United States; and by *Lewis A. Kaplan, James N. Benedict, Brian D. Forrow, John G. Koeltl, Standish Forde Medina, Jr., Renee J. Roberts,* and *Marvin Wexler* for the Committee on Federal Courts et al.

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae.*

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U. S. 925. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We 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. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter

began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8–K disclosing certain questionable payments.[1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political

[1] On July 28, 1976, the company filed an amendment to this report disclosing further payments.

contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a–18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F. 2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was

within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." *Id.*, at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose 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. As we stated last Term in *Trammel* v. *United States,* 445 U. S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher* v. *United States,* 425 U. S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt* v. *Blackburn,* 128 U. S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the

law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, *United States* v. *Louisville & Nashville R. Co.,* 236 U. S. 318, 336 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F. 2d, at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia* v. *Westinghouse Electric Corp.,* 210 F. Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co.* v. *Kirkpatrick,* 312 F. 2d 742 (CA3 1962), cert. denied, 372 U. S. 943 (1963), reflected a similar conceptual approach:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel, supra,* at 51; *Fisher, supra,* at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts

with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4–1:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also *Hickman* v. *Taylor,* 329 U. S. 495, 511 (1947).

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 beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc.* v. *Meredith,* 572 F. 2d 596 (CA8 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he interviews employees not having "the very highest au-

thority", their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with "the very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.'" *Id.*, at 608–609 (quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g.*, *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g.*, *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 440–441 (1978) ("the behavior proscribed by the [Sherman] Act is

often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").[2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g., Hogan* v. *Zletz,* 43 F. R. D. 308, 315–316 (ND Okla. 1967), aff'd in part *sub nom. Natta* v. *Hogan,* 392 F. 2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F. R. D. 82, 83–85 (ED Pa. 1969), aff'd, 478 F. 2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

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[2] The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

The communications at issue were made by Upjohn employees [3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*" (Emphasis supplied.) 78–1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas.[4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investiga-

[3] Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a–38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

[4] See *id.*, at 26a–27a, 103a, 123a–124a. See also *In re Grand Jury Investigation*, 599 F. 2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena*, 599 F. 2d 504, 511 (CA2 1979).

tion." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a–166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company.[5] Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely differ-

[5] See Magistrate's opinion, 78–1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

> ent thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia* v. *Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (ED Pa. 1962).

See also *Diversified Industries,* 572 F. 2d, at 611; *State ex rel. Dudek* v. *Circuit Court,* 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman* v. *Taylor,* 329 U. S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93–1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); *Trammel,* 445 U. S., at 47; *United States* v. *Gillock,* 445 U. S. 360, 367 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attor-

ney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a–28a, 91a–93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602.[6]

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman* v. *Taylor*, 329 U. S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510. The Court noted that "it is essential that a lawyer work with

[6] The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, *supra*.

a certain degree of privacy" and reasoned that if discovery of the material sought were permitted

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511.

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States* v. *Nobles*, 422 U. S. 225, 236–240 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b)(3).[7]

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States* v. *Euge*, 444 U. S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26 (b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable

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[7] This provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

to summons enforcement proceedings by Rule 81 (a)(3). See *Donaldson* v. *United States,* 400 U. S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78–1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in *Hickman:*

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U. S., at 511.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman,* however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.,* at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." *Id.,* at 512–513. See also *Nobles, supra,* at 252–253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); *id.,* at 516–517 ("the statement would be his [the

attorney's] language, permeated with his inferences") (Jackson, J., concurring).[8]

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78–1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

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[8] Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78–1 USTC ¶ 9277, p. 83,599.

Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g., In re Grand Jury Proceedings,* 473 F. 2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (ED Pa. 1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g., In re Grand Jury Investigation,* 599 F. 2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . . ; such documents will be discoverable only in a 'rare situation' "); cf. *In re Grand Jury Subpoena,* 599 F. 2d 504, 511–512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26 (b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we

think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante,* at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante,* at 394–395. Because of the great importance of the issue, in my view the Court should make clear now that, as a

general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, *e. g., Diversified Industries, Inc.* v. *Meredith,* 572 F. 2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc.* v. *Decker,* 423 F. 2d 487, 491–492 (CA7 1970), aff'd by an equally divided Court, 400 U. S. 348 (1971); *Duplan Corp.* v. *Deering Milliken, Inc.,* 397 F. Supp. 1146, 1163–1165 (SC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several *amici* have suggested in their proposed formulations*—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly

*See Brief for Petitioners 21–23, and n. 25; Brief for American Bar Association as *Amicus Curiae* 5–6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as *Amici Curiae* 9–10, and n. 5.

before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante,* at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 514 **January 8, 2025**

A Lawyer's Obligations When Advising an Organization About Conduct that May Create Legal Risks for the Organization's Constituents

When advising an organization, lawyers necessarily provide their legal advice through constituents such as employees, officers, or board members. At times, the organization's decisions may have legal implications for its constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer conveys advice. This situation implicates both the lawyer's duties to the organization client and the lawyer's professional obligations in interacting with the nonclient constituents of the organization.

The Model Rules of Professional Conduct set forth a general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under Rule 2.1. Where a lawyer—in-house or outside counsel—is giving advice to an organization client about future action of the organization, these provisions may require the lawyer to advise the organization when its actions pose a legal risk to the organization's constituents.

When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice. Rules 4.1, 4.3, and 1.13(f) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role.

An organization's lawyer may want to instruct or remind an organization's constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyers' role. Educating an organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.

I. Introduction

Lawyers provide legal advice to organization clients[1] on a number of aspects of the organization's operations. For example, both in-house counsel and outside counsel advise

[1] As used in Rule 1.13 and this opinion, an organization is a legal entity that includes but is not limited to corporations, governmental organizations, unincorporated associations (such as limited liability companies), and other types of associations. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [1] & [9]. Depending on the jurisdiction, it may also include partnerships. *See*, *e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-361, at 1 (1991) ("A partnership is an organization within the meaning of Rule 1.13. Generally, a lawyer who represents a partnership represents the entity rather than the individual partners. Confidential information received by the lawyer while representing the partnership is 'information relating to the representation' of the partnership that

organization clients about contracts and contractual negotiations, regulatory requirements and other legal requirements, litigation and disputes with third parties generally, and a host of other matters. Because organizations act through individual constituents, such as board members, officers, and employees, lawyers give advice to those organizations directly through individuals, including those individuals who are authorized to act on the organization's behalf.

Although an organization's lawyers convey their advice to individuals who are likely to act on the basis of the lawyers' advice, in this scenario, the actual client is the organization itself, not any individual constituent, except when the individual becomes a co-client. Model Rule 1.13(a) explains that the organization is "acting through its duly authorized constituents." Therefore, when the organization's lawyer communicates information and advice to those constituents, it is the organization the lawyer is advising through individuals who are duly authorized to communicate with the lawyer and to act on the organization's behalf. However, as discussed below, individual recipients of the lawyer's advice may not always understand that the advice is intended solely for the organization's benefit and is based solely on consideration of the organization's interests, and that the advice is not intended for the individual constituent's own personal benefit or formulated out of concern for the constituent's personal interests. The individuals' lack of an adequate understanding is particularly significant when lawyers are advising about decisions and actions that have legal implications not only for the organization clients but also for the nonclient individual constituents personally. Although any misunderstanding on the part of the organization's constituents may arise out of the complexity of the situation itself, and not because the lawyer is intentionally misleading, the lawyer may have an obligation under the circumstances to attempt to prevent or rectify the constituents' misunderstanding.

This opinion focuses on situations where (1) a lawyer—in-house or outside counsel—is giving advice to an organization client through a constituent about future action the organization may choose to take; (2) the lawyer knows or reasonably should know that the constituents are likely to have their own legal interests at stake – for example, where the lawyer is advising the organization about possible future conduct for which the constituents may be subject to personal civil or criminal liability; and (3) the lawyer does not intend to create a client-lawyer relationship with the constituent or otherwise to assume fiduciary or contractual duties to the constituent.[2]

The questions in this situation are two-fold. First, whether and when the duty to competently advise the organization under Model Rules 1.1, 1.4, and 2.1 includes a duty to advise the organization about the legal implications of its proposed conduct for its constituents. Second, whether and when the Rules regulating lawyers' dealings with nonclients, specifically Model Rules 4.1, 4.3, and 1.13(f), require an organization's lawyer to take measures designed to avoid or correct

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normally may not be withheld from the individual partners."). This opinion's guidance may also have relevance in some situations to certain government lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. [9].

[2] This opinion addresses a lawyer's advice to an organization regarding future conduct. It does not address a host of other situations in which counsel for an organization interacts with organization constituents. Among other things, the opinion does not address when a lawyer speaks with an organization constituent in the course of conducting an internal investigation of alleged misconduct on the part of the organization or in the course of other fact gathering. Nor does the opinion address when an organization's counsel attends a deposition of an organization's constituent and counsel represents only the organization or counsel represents the organization and the constituent. Nor does the opinion address the possibility that an organization's lawyer might give a legal opinion to a nonclient constituent of the organization. *See* note 12, *infra*.

the constituent's misunderstanding of the lawyer's role or mistaken belief that the lawyer is protecting the constituent's personal interests.

II. Preliminary observations

The situation addressed in this opinion is unique and challenging. Other than when a lawyer represents an organization client, or otherwise communicates through a client's agent, it is unusual for lawyers to convey or communicate extensive advice to individuals who are not their clients, and even more unusual to convey advice that has legal implications for the nonclients. Prudent lawyers refrain from giving legal advice to nonclients about their conduct,[3] because doing so risks inadvertently creating a client-lawyer relationship. Although the lawyer will be acting with undivided loyalty to the lawyer's intended client, recipients of the lawyer's advice may end up relying on it to their detriment, mistakenly believing that the lawyer is acting in their best interest.

Lawyers who give advice intended for the organization's benefit cannot avoid communicating that advice for the organization client through individuals who are not clients, but who are constituents of the organization. There is no way to advise the organization client other than by conveying that advice through individuals who are constituents or representatives of the organization. At least from these individuals' perspective, this unavoidable situation may create uncertainty as to the lawyer's role and/or about the significance and application of the lawyer's advice.

The same ambiguity about the lawyer's role does not inhere in all interactions between organization lawyers and organization constituents. Lawyers representing organizations who are interacting with the organization's constituents do not always communicate advice to these constituents about their conduct on behalf of the organization. For example, the organization's lawyer does not give legal advice to organization constituents in the situation typified by *Upjohn v United States*,[4] where an organization's lawyer conducts an internal investigation to obtain information needed to advise organization decision makers about how to deal with allegations of entity misconduct. The lawyer's role is not to give advice to the constituent but simply to obtain information from the individual constituent to conduct litigation on behalf of the organization or to enable the lawyer to later convey advice to some other representatives of the organization.[5]

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[3] *See, e.g.*, Ky. Bar Ass'n Formal Ethics Op. KBA E-450 (2020), addressing under Rule 4.3 the difference between providing legal advice to a nonclient as opposed to the permissible truthful explaining to a nonclient the meaning of a document the lawyer has prepared for the lawyer's client. *See also* Tex. Disciplinary Rule of Professional Conduct R. 4.03 cmt. 3 (effective October 1, 2024), a non-conforming addition to the comment to the Texas equivalent of Rule 4.3, stating: "[t]his Rule maintains the traditional distinction between "legal advice" and "legal information" and does not restrict the latter. "Legal information" includes providing information about court rules, court terminology, and court procedure; directing to legal resources, forms, and referrals; offering educational classes and informational materials; recording on forms verbatim; reviewing forms and other documents for completeness and, if incomplete, stating why the form or document is incomplete; and explaining how to navigate a courthouse, including providing information about security requirements and directional information and explaining how to obtain access to a suit file or request an interpreter." This opinion does not attempt to address this distinction.

[4] 449 U.S. 383 (1981).

[5] Even in this different situation, however, there may be ambiguities for lawyers to address. The organization's lawyers interview constituents to gather facts from them, not to advise them. Even so, prudent lawyers are careful at the outset of these interviews to avoid misunderstandings about their role. Courts have recognized the importance of so-called "Upjohn warnings" to avoid inadvertently misleading individuals who are questioned and to avoid

In the context of a formal internal investigation of alleged wrongdoing, the divergence of the organization's interests and those of the individual constituents who are suspected of wrongdoing should ordinarily be clear. However, such divergence of interest in other contexts may often be less clear. The individual constituent's obligation is to act in the best interest of the organization, and the individual solicits or accepts the lawyer's advice with that objective in mind. To the extent that the individual has personal legal interests at stake, they may be largely aligned with those of the organization. For example, a constituent who is making representations on behalf of the organization to the government or to a private party may face civil liability or even criminal liability if the representations are false or misleading, and therefore the individual will have an interest in avoiding such misrepresentations. In most cases, the organization will have similar interests in avoiding civil or criminal liability based on misrepresentations made on its behalf.

However, even if the interests of the organization and the individual are generally aligned, they are not necessarily identical in situations where the individual has legal interests at stake. There is particularly likely to be a divergence of interests in situations where the lawyer's advice on actions the organization could take in the future may expose the individual constituent to legal risk. For example, when a lawyer advises a constituent regarding what representations to make on the organization's behalf in a government filing or in a transactional document, the individual may have an interest in proceeding carefully, because the personal cost of being accused of misconduct will be high. Taking a less cautious or more aggressive approach may be in the interest of the organization but such an interest may not be shared by the individual signing his or her name to the disclosure, because the benefits and risks of an aggressive approach may be different for the individual. The organization's decision makers may sympathize with the individual's interests out of general concern for its constituents' welfare or because protecting the constituents is important to the effective operation of its business or avoiding civil or criminal liability. But the organization's decision makers may also strike a different balance between promoting the organization's interests and protecting its constituents, and this may lead the organization, acting through its decision makers, to tolerate greater risk than the individual constituent.

III. Lawyers' duty to give competent advice to the organization clients about constituents' legal interests

To a large extent, the Rules of Professional Conduct establish duties to clients, not to individuals whom the lawyer does not represent. For example, a lawyer owes a client the duties of competence and confidentiality, and a duty to avoid conflicts of interest, which are codified in the professional conduct rules. *See, e.g.,* Model Rules 1.1, 1.6 & 1.7. But lawyers generally do not owe these duties to nonclients.

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unintentionally establishing a client-lawyer relationship with them. *See, e.g.*, Under Seal v. United States (*In re* Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005); *see also* Sehyung Daniel Lee, *The Benefits of a Miranda-Type Approach to Upjohn Warnings*, 13 COMM. & BUS. LIT. 12 ("According to the American Bar Association, it is recommended that counsel give the Upjohn warnings at the outset of the employee interview, with the minimum warnings that (1) counsel is retained by the company, not the employee; (2) the attorney-client privilege is in effect; and (3) the privilege is held by the company, which alone can decide to waive it.") (citing ABA WCCC WORKING GROUP, UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES (July 17, 2009), *available at* https://www.crowell.com/a/web/4TMx7dpADUfammfw6nzEZX/abaupjohntaskforcereport.pdf).

An organization's lawyer does not owe the organization's constituents a duty of competence or other duties established by a client-lawyer relationship unless the lawyer also represents a constituent as a client.[6] The Model Rules emphasize that lawyers representing an organization do not owe the obligations of the client-lawyer relationship to the organization's constituents simply by virtue of the lawyers' interaction with such constituents. As previously noted, Rule 1.13(a) explains that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Although Model Rule 1.13(g) acknowledges that an organization's lawyer is permitted to also represent one of the organization's constituents, subject to the provisions of Model Rule 1.7, the conflict-of-interest rule governing dual representations, the organization's lawyer does not owe duties of loyalty and confidentiality to an individual constituent in the absence of a client-lawyer relationship with that individual. Indeed, Rule 1.13(g) drives home the understanding that, absent steps taken to establish a dual representation of both the organization and one or more of the organization's constituents, the only client is the organization itself.

The question we address here is whether the professional responsibilities of a lawyer representing *the organization* require the lawyer to inform the organization when proposed future conduct may pose legal risk for the organization's constituents. In addition to Model Rule 1.1, which requires a lawyer to "provide competent representation to a client," other provisions specifically address a lawyer's advisory role. First, Model Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Additionally, Model Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Previously issued formal ethics opinions have addressed a lawyer's role as an advisor in various contexts. They have recognized that an essential aspect of a legal advisor's role is to assist clients in conforming to the requirements of civil and criminal law, which in turn entails assisting clients in recognizing and responding to the risk that their conduct may run afoul of the law. ABA Formal Ethics Opinion 491 explained that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance."[7] However, competent lawyers and their clients are not obligated to avoid all legal risk. A lawyer providing competent advice may identify a course of conduct that presents some legal uncertainty and so advise the client so that the client is fully informed, and the

[6] An organization's lawyer may enter into a client-lawyer relationship with an organization constituent inadvertently or by implication, but such a relationship is not established simply by virtue of representing the organization and communicating with the constituent. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f, at 131 ("An implication that such a [personal client-lawyer relationship with a constituent] exists is more likely to be found when the lawyer performs personal legal services for an individual as well or where the organization is small and characterized by extensive common ownership and management. But the lawyer does not enter into a client-lawyer relationship with a person associated with an organization client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person.").

[7] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 491 (2020) (quoting N.Y. City Bar Ass'n Prof'l Ethics Comm. Formal Op. 2018-4 (2018)).

competently advised client may decide to engage in conduct where the legal implications are unclear.[8] For example, ABA Formal Ethics Opinion 85-352 (1985) noted that "a lawyer, in representing a client in the course of the preparation of the client's tax return, may advise the statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law."

When an organization's lawyer advises an organization about whether to engage in future conduct, the lawyer should generally advise the organization about legal considerations that are important to the organization's decision. As we recently noted in ABA Formal Ethics Opinion 512 (2024), "Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include 'the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.'" Further, "Comment [5] to Rule 1.4 explains, 'the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.'"

When giving advice in areas of legal uncertainty, it may be important for a lawyer to both identify legally relevant considerations and to assist a client in identifying other relevant considerations. *See* Model Rule 2.1. At the same time, the lawyer may not be presented with the entire picture when providing legal advice and, consequently, may not be in a position to provide an exhaustive analysis of all of the possible ramifications of a particular course of action. In the end, similar clients, although equally well-advised, may choose different paths, whether because they have different tolerance for legal risk or because they weigh other relevant considerations differently.

It may be important to an organization client to know not only when potential future conduct creates legal risk to the organization but also when the conduct creates legal risk to the organization's constituents, such as employees, officers, or board members, who will be acting on the organization's behalf. Whether this information or any other information *must* be provided to an organization's decision maker under the Rules will be a fact-based determination. The Rules do not specify in detail what must be disclosed as a matter of competent, necessary, or candid advice; the Rules set forth only a general standard. Whether an organization must be advised of how its proposed conduct will legally affect organization constituents may turn, in part, on the extent and gravity of the legal risk to the constituents. An organization's lawyer may know from past experience whether the organization's decision makers would want or expect to be told when proposed conduct has significant legal implications for the organization's constituents. If the

[8] *See, e.g.*, William H. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for Upjohn*, 61 BUS. L. 95, at 107-108 (2005) ("Given the complexity of the modern regulatory environment, and the fine distinctions upon which the legality of a particular course of conduct may turn, the waters that transactional lawyers help their clients navigate are frequently dark and murky indeed. . . .[For example], when a healthcare client turns to a transactional lawyer for advice about structuring a transaction with a referral source, it is highly unlikely that the lawyer will be able to say, "Yes, what you want to do is absolutely, without question, okay," and not much more likely that the lawyer will be able to say, "No, if you do that you're going to jail." Instead, what the lawyer must do is obtain as much information as possible, evaluate the facts and circumstances, and advise the client as to ways in which a legitimate transaction might be structured to minimize the risk of a violation and as to factors which would be more or less likely to cause the transaction to be perceived as illegitimate.")

lawyer does not definitively know, the lawyer can discuss with the relevant organization decision makers whether the organization would want to know of significant legal risks to its constituents. A lawyer should not assume without any basis that an organization's decision makers are or are not indifferent to legal risks to its constituents. Many organizations' decision makers have an interest in the constituents' welfare and seek to treat the constituents fairly. Many would want to take account of the potential costs and disruption if its constituents encountered legal problems because of their work for the organization.[9] Moreover, particularly if the client is an organization of a sufficiently large size, the organization may have contractual duties of indemnification in place as to the constituents impacted that could both reduce the costs or disruption for those constituents and be directly relevant to the risk to the organization itself.

Wholly apart from whether the lawyer's advice will fall below the standard of minimally competent representation under Rule 1.1, necessary communication under Rule 1.4, or candid advice under Rule 2.1, a lawyer may often include the legal risks to nonclient constituents among the subjects of discussion. In certain circumstances, even if the importance of this information is uncertain, the organization's lawyer may conclude as a matter of professional judgment that the organization is best served by being advised, through its duly authorized decision makers, when a proposed course of conduct poses a significant legal risk to constituents; to make a well-informed decision, the decision makers might want to have the opportunity to consider that they are putting individual constituents at legal risk, and the nature and extent of the risk. In such cases, the decision makers ultimately may or may not take account of the risk to individual constituents in making the decision, but the decision may not be as well-informed if is the decision makers are not at least made aware of the risk.[10] Of course, the duties of the decision makers to determine whether the

[9] Pursuant to Rule 1.2(b), a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Depending on the circumstances, it might be reasonable for the lawyer and the organization to agree that the scope of the representation will not include advising the organization about the potential legal liability of the organization's constituents. For example, a closely held corporation that is evaluating a potential sale of the business might agree that the lawyer representing it in that transaction is not obligated to advise it of potential tax liabilities that could result from the transaction for employees and officers of the corporation who hold stock in the corporation. In some instances, evaluating the potential liability of an organization's constituents could require the lawyer to undertake factual investigation, conduct legal research, or complete other tasks that otherwise would not be required to advise the organization. The organization should not be obligated to incur the legal fees for that work and should have the option to avoid that expense by limiting the scope of the representation. In other instances, the organization constituents who would face potential liability arising from the organization's action might be represented by their own counsel, which may also make it reasonable for the organization to exclude advice about their liability from the scope of the work to be performed by the organization's lawyer. In these and other circumstances, any limitation on the scope of the lawyer's representation must comply with the professional responsibility rules, including Rules 1.1 and 1.2(c), and with other law. To satisfy the requirement of informed consent, the lawyer must explain the material risks of excluding particular advice from the representation and ensure that the organization client consents to limiting the scope of the lawyer's advice with an understanding of those risks. *See* Rule 1.0(d) (defining "informed consent").

[10] An organization's lawyer may not always be presented with all of the material facts for a determination of whether there are or might be personal risks facing a nonclient constituent through whom the lawyer is providing the organization client with legal advice. As explained in paragraph [19] of the Scope section and reiterated in ABA Formal Ethics Opinions, a lawyer's decisions should not be judged in hindsight but rather with information known or readily available at the time and, likewise, a lawyer should not be subject to discipline "because of a course of action, objectively reasonable at the time it was chosen, turned out to be wrong in hindsight." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 513 (2024) at 8, n. 23, quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 491 (2020), at 9.

organization wishes to engage the lawyer to analyze the legal risk to constituents is governed by organization law rather than the Rules of Professional Conduct.[11]

IV. Lawyers' responsibility to nonclient constituents when giving legal advice to the organization

When a lawyer's advice about an organization's conduct implicates the legal liability of individual constituents, the individuals through whom the lawyer gives advice to the organization will often be the very ones who will be undertaking, directing, or assisting the action in question and who may therefore have personal risk of civil or criminal liability. As discussed, that individual is not a client (unless the lawyer intentionally or inadvertently establishes a client-lawyer relationship), and therefore, the organization's lawyer will not owe that individual the ethical duties that lawyers owe to clients. Nevertheless, lawyers representing organizations may have obligations or restrictions when giving advice to the organizations they represent through nonclient constituents, as lawyers sometimes do in interacting with other nonclients in the course of a representation.

Lawyers are "officer[s] of the legal system," not just "representative[s] of clients." Model Rules, Preamble, para. [8]. Consequently, they are subject to requirements and restrictions when dealing with others on a client's behalf, including, most obviously, a "require[ment] to be truthful." Model Rule 4.1, cmt. [1]. Other Rules require lawyers, in certain situations, to avoid misleading a nonclient or exploiting a nonclient's misunderstanding about the lawyer's role. The most generally relevant of these is Model Rule 4.3, which forbids a lawyer from giving "legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."[12] When the lawyer is representing a client in a matter with an unrepresented person, Comment [1] to Rule 4.3 advises:

> An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested

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[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. [1] ("[Rule 1.2(a)] confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.").

[12] This opinion addresses circumstances in which the lawyer knows or reasonably should know that the organization's constituent is likely to have legal interests at stake if the individual acts on the lawyer's advice. Although the interests of the organization and its constituent differ in this situation, Rule 1.7, which addresses concurrent conflicts of interest, may nevertheless allow the organization's lawyer to provide personal legal advice to the constituent as the organization's co-client, with the respective clients' informed consent. *See* Rule 1.7(b). If the lawyer does jointly represent both the organization and its constituent, the constituent is entitled to all of the rights of a client under the Rules of Professional Conduct. A lawyer who provides personal legal advice to the organization's constituent, where forbidden by Rule 1.7 or without complying with the rule's requirement of informed consent, may also create a client-lawyer relationship inadvertently. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (discussing client-lawyer relationship formation when the lawyer fails to "manifest lack of consent" to forming the relationship). Additionally, Rule 2.3 permits a lawyer to "provide an evaluation of a matter," *i.e.*, a legal opinion as distinguished from legal advice to "someone other than the client" in certain circumstances. This opinion does not address whether, and, if so, in what circumstances, an organization's lawyer may provide a legal evaluation or opinion to a nonclient constituent of the organization regarding the law relating to that constituent's legal liability.

> authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

Other Model Rules address specific situations where a nonclient may misunderstand the lawyer's role. Model Rule 1.13(f) specifically addresses the lawyer representing an organization in interactions with nonclient constituents, providing: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." The accompanying Comments [10] and [11] explain:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
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> Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

The concerns underlying Rules 4.1, 4.3, and 1.13(f) are implicated when a lawyer for an organization conveys legal information to nonclient constituents about proposed conduct by that individual on behalf of the organization and the lawyer knows or reasonably should know that the constituent is likely to have legal interests at stake.[13] The situation may give rise to any number of misunderstandings or erroneous assumptions regarding the lawyer's role.[14]

Individual constituents may or may not be aware that they have their own legal interests at stake. They might erroneously assume that they have no personal legal risks, because they may think that if they did, the lawyer would tell them. Or, if the individuals understand that they have legal risks along with the organization, they might assume that they can rely personally on the

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[13] Both "knows" and "reasonably should know" are defined terms in the ABA Model Rules of Professional Conduct. Knows "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Reasonably should know "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." ABA MODEL RULES OF PROF'L CONDUCT R. 1.0(f) & (j). Paragraph [19] of the Scope section of the Model Rules explains, "[t]he Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation."

[14] For a prior writing calling attention to this issue, see Melissa E. Romanovich, Note, *Corporate Law's Forgotten Constituents: Reimagining Corporate Lawyering in Routine Business Contexts*, 90 FORDHAM L. REV. 301 (2021).

lawyer's advice and that they therefore have no need for separate counsel. Although the organization's lawyer may not intend to foster these misunderstandings, such misunderstandings may be difficult to avoid when the lawyer is advising constituents about how they should act on behalf of the organization. Some constituents who are experienced in interacting with the organization's lawyers will instinctively and correctly understand that the organization's lawyer does not represent them personally and recognize the possible need for independent counsel, if they have concerns about their own liability. But others, without being told otherwise, may not understand this without an adequate explanation that their actions on behalf of the organization may have personal consequences, especially if they are not experienced in interacting with the organization's lawyers.[15]

Individual constituents' misunderstandings may be harmful to them because, when the interests of the organization and individual constituents diverge, the constituents cannot rely on the organization's lawyer's advice to protect their interests. For example, it may be reasonable for an organization to engage in conduct that poses legal risks for both the organization and its constituents. In the same situation, however, individuals might act more cautiously in light of the legal and other risks to themselves. One reason is that the organization may have defenses—such as an advice-of-counsel defense—that are unavailable to the unrepresented individual constituent.[16] Another is that the consequences of acting aggressively in the face of risks may be less significant for the organization than for the individual, or that the organization will derive greater benefit from acting aggressively.

In this situation, the Model Rules require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyers' role.[17] This is not because the organization's lawyer is intentionally misleading the constituents or otherwise acting wrongfully. It is because, for many organization constituents who receive and act on the lawyer's advice to the lawyer's organization client, the situation may be confusing or misleading with regard to the lawyer's role absent reasonable efforts by the lawyer to correct that misunderstanding.[18]

The Model Rules do not provide any particular formula for avoiding or dispelling constituents' possible misunderstandings. Under the circumstances, the lawyer may need to discuss with the nonclient constituent that: the lawyer represents only the organization, and not the constituents; the constituents may have a personal legal risk if the constituents act on behalf of the organization in the matter under discussion; the lawyer is rendering advice to the organization *through* the individual constituents, not to, or for the benefit of, the individual constituents; in

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[15] The latter is more likely to occur in the case of closely held corporations.

[16] *See, e.g.*, United States v. Wells Fargo Bank N.A., 12-CV-7527, 2015 WL 3999074, 2015 U.S. Dist. LEXIS 84602, at *8-9 (S.D.N.Y. 2015) ("Allowing any employee to waive the [corporation's] privilege by asserting an advice-of-counsel defense could also create an incentive for plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege.").

[17] This is wholly apart from whatever duty the lawyer may owe to the organization client, as a matter of competence, to avoid or rectify this sort of confusion or ambiguity in dealing with constituents of the organization.

[18] In this regard, an organization's lawyer should recognize that the nonclient constituents who may be acting on the lawyer's advice to the organization, potentially to their personal detriment, may not be limited to constituents, such as officers or directors, who may be more familiar with the organization's lawyer's role. To the extent the lawyer is conveying legal advice on behalf of the organization client through those constituents who have fewer interactions with the lawyer, there may be a greater likelihood that such a nonclient constituent may misperceive the organization lawyer's role.

giving advice to the organization, the lawyer is taking account of the interests of the organization, not necessarily those of the individuals; and if individual constituents want legal advice about how a proposed course of conduct will affect their personal legal interests, the constituents must seek that advice from their own counsel, not from the organization's lawyer.[19]

The objective is not to advise constituents about how to act in light of personal legal risks but simply to give them information to prevent them from erroneously relying on misunderstandings of the lawyer's role. Indeed, as Rule 4.3 makes clear, the lawyer shall not provide legal advice to the nonclient other than to advise the nonclient to secure independent counsel. As the comments to Rules 4.3 and 1.13 reflect, an organization's lawyer is not providing legal advice when informing the constituents, in a way adequate for them to understand, that their interests may differ from those of the organization and that "the lawyer represents only the organization, not them." At the same time, these comments do not limit or specify what information may or must be provided in any given situation to avoid or dispel misunderstandings. With this objective in mind and depending on the circumstances, a more in-depth conversation may be necessary to satisfy the lawyer's duty to undertake "reasonable efforts to correct" a constituent's misunderstanding of the lawyer's role as lawyer to the organization.[20]

As discussed above, in providing advice to the organization, the lawyer will sometimes explain that when individual constituents act on behalf of the organization, their acts may have legal implications for them as well as for the organization. When this is so, it is especially important for the lawyer to avoid certain misunderstandings and make reasonable efforts to rectify them. For example, when addressing the legal implications of the organization's acts for its constituents, the lawyer may emphasize that the lawyer is taking into account only the organization's interests; that is, the lawyer is giving advice only with the organization's best interest at heart, and that is true even insofar as the lawyer discusses how the organization's acts might affect its individual constituents' interests. Therefore, if constituents want personal legal advice about how their acts will affect their own legal liability, they should speak with their own lawyer, whom the organization may or may not be willing to compensate. Of course, some constituents will already have a clear understanding of the lawyer's role based on prior experience or may need only a reminder, if that. But that cannot be taken for granted in all situations. It is important for organizations' lawyers to be sensitive to ambiguities in their advice-giving role and to approach each situation, in light of the particular circumstances, in a manner that appropriately avoids any obvious or likely confusion on the part of the constituents who receive the lawyers' advice.

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[19] This opinion does not address whether, when, or how an organization's lawyer should explain either the lawyer's obligations to the organization regarding the duty of confidentiality and the attorney-client privilege, or the constituent's obligation to keep their communications confidential in order to protect the organization's attorney-client privilege.

[20] As we previously recognized in a different context, a lawyer's communications are of little value if the person to whom they are directed does not understand them. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 500 (2021) ("If a lawyer does not communicate with a client in a mutually understood language, it is doubtful that the lawyer is exercising the thoroughness and preparation necessary to provide the client with competent representation."). *See also* MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. [3] (when a lawyer serves as a third-party neutral, in addition to explaining that the lawyer does not represent the parties to the dispute resolution process, the lawyer may be required to provide additional explanation to unrepresented parties who are not frequent users of dispute-resolution processes, and particularly to first-time users).

This is no easy undertaking. Lawyers seek to develop a relationship of trust and confidence with their clients, so that the clients will understand that their lawyers are seeking to act in their clients' best interest and so that clients will have confidence in their lawyers' advice. In the case of organizations' lawyers, they will be seeking to develop the trust of constituents through whom the lawyers advise the organization and who implement the lawyers' advice. But at the same time, it is important for lawyers to avoid nonclient constituents' misunderstandings regarding the lawyers' role, so that constituents do not regard the lawyers as their own personal lawyer. Particularly given this delicate balance, in applying the Model Rules, organizations' lawyers' interactions with organization constituents should be viewed deferentially based on "the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." Model Rules, Scope ¶ [19].

Finally, although the Model Rules do not require it, the lawyer for an organization would be well advised to instruct constituents about the lawyer's role on other occasions when the lawyer interacts with constituents, and not only at times when constituents might rely to their detriment on a misunderstanding of the lawyer's role. Educating the organization's constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where the lawyer is advising the organization on matters with legal implications for constituents. Among other things, lawyers for the organization should avoid referring to individual constituents as their clients, and these lawyers should correct individual constituents who refer to the organization's lawyers as the constituent's own lawyers. When an organization's lawyers interact with the organization's decision makers in settings in which the lawyers are not conveying advice, the lawyers can nevertheless take the opportunity to clarify their role, such as by explaining that they represent the organization, not the individual constituents, and that the individuals cannot rely on the lawyers to look out for their individual interests, even when those interests may appear to coincide with those of the organization. These sorts of explanations may help the constituents better understand the lawyer's role later, when the lawyer is advising the organization on matters that have personal legal implications for the nonclient constituents of the organization.[21]

V. Conclusion

When lawyers for an organization advise the organization, the organization's lawyers necessarily provide the advice to the organization through constituents such as employees, officers, or board members. At times, the organization's decision about how to act may have legal implications for the organization's constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer is conveying advice. This situation implicates both the lawyer's duties to the organization client and the lawyer's professional obligations in interacting with the nonclient constituents of the organization.

The Model Rules of Professional Conduct set forth a general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under

[21] *See*, *e.g.*, Sarah H. Duggin, Shannon "A.J." Singleton & James D. Wing, *The "Cooperation Revolution" and the Professional Ethics of Giving Advice on Executive Protection Issues*, 77 BUS. LAW. 1079, 1101-1102 (Fall 2022) (discussing ways in which in-house counsel can navigate the issue of nonclient constituents misunderstanding the organization lawyer's role).

Rule 2.1. Where a lawyer—in-house or outside counsel—is giving advice to an organization client about future action the organization may choose to take, the Rules may require the lawyer to advise the organization about constituents' potential legal risk. This will be a fact-based determination.

When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice. When the lawyer knows or reasonably should know that constituents are likely to have their own legal interests at stake, Rules 4.1, 4.3, and 1.13(f) require an organization's lawyer to take reasonable measures to avoid or dispel constituents' misunderstandings about the lawyer's role.

An organization's lawyer would be well advised to instruct organization constituents about the lawyer's role early and often during the relationship, not only at times when constituents might rely to their detriment on a misunderstanding of the lawyers' role. Educating organization constituents who may receive the lawyer's advice in the future will lay the groundwork for later situations where lawyers may be advising the organization on matters with legal implications for the organization's constituents.
