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What Is A Board Attorney's Duty When The Board Takes Action Detrimental To The Organization The Board Represents?

What Is A Board Attorney's Duty When The Board Takes Action Detrimental To The Organization The Board Represents?

Abstract

In 1973, board members of the Ford Motor Company circulated a memo that addressed an issue in the manufacturing of one of its cars, the Ford Pinto.

KEYWORDS: duty, withdraw, fraudulent Act

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ARTICLES AND SURVEYS

NOTES AND COMMENTS

WHAT IS A BOARD ATTORNEY'S DUTY WHEN THE BOARD TAKES ACTION DETRIMENTAL TO THE ORGANIZATION THE BOARD REPRESENTS?

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REBEKAH L. WELLS**

I. INTRODUCTION

In 1973, board members of the Ford Motor Company circulated a memo that addressed an issue in the manufacturing of one of its cars, the Ford Pinto.[1] The Ford Pintos had defective gas tanks and some, when hit from behind, exploded, causing serious injury or death to the occupants.[2]

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1. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361 (Ct. App. 1981).

2. *Id.*; *see also* Ben Wojdyla, *The Top Automotive Engineering Failures: The Ford Pinto Fuel Tanks*, POPULAR MECHANICS (May 20, 2011),

The board members, aware of the defect and the ramifications for Pinto occupants, decided against fixing the faulty design.[3] Ford estimated that the settlement of future lawsuits by occupants of the Pinto would cost it less money than fixing the defect.[4]

Predictably, Ford was sued in several products liability cases.[5] Ford's lawyers, who were employed by Ford during the time the board members made their decision not to fix the gas tanks, were not sued.[6] However, the case presents a legitimate question as to the role that Ford's lawyers played in the situation.[7] Did they know of the defective design?[8] If they did, what were their duties and to whom did they owe them?[9]

Almost forty years later, case law shows that if the Ford Pinto case existed today, Ford's lawyers may have experienced serious ramifications for their failure to protect the organization from the wrongdoing of its board members.[10] Legal analysis shows that a lawyer has a duty to proceed in the best interests of an organization, and this duty can be broken down into three remedial measures—discovery, disclosure, and disengagement.[11]

II. WHAT IS AN ORGANIZATION?

An organization is a formal or informal group of people with a common interest.[12] It includes "for-profit and nonprofit corporations, limited-liability companies, unincorporated associations, . . . general and limited partnerships, professional corporations, business trusts, joint

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http://www.popularmechanics.com/cars/a6700/top-automotive-engineering-failures-ford-pinto-fuel-tanks/.

3. *Grimshaw*, 174 Cal. Rptr. at 361; Wojdyla, *supra* note 2.

4. Wojdyla, *supra* note 2.

5. *See Grimshaw*, 174 Cal. Rptr. at 383.

6. *See generally id.*

7. Grimshaw, 174 Cal. Rptr. at 371; *see also infra* Part III.

8. *See* Fla. Bar v. Brown, 790 So. 2d 1081, 1084 (Fla. 2001) (per curiam); FLA. RULES OF PROF'L CONDUCT r. 4-8.4 (2010); FLA. RULES OF PROF'L CONDUCT r. 4-1.2 (2006).

9. *See Brown*, 790 So. 2d at 1084; FLA. RULES OF PROF'L CONDUCT r. 4-8.4 (2010); FLA. RULES OF PROF'L CONDUCT r. 4-1.2 (2006).

10. *See In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1453 (D. Ariz. 1992).

11. *See Brown*, 790 So. 2d 1086–87; FLA. RULES OF PROF'L CONDUCT, 4-1.13, 4-4.1, 4-1.2(d) (2006); FLA. STAT. § 112.311 (2015); RESTATEMENT (THIRD) OF AGENCY § 5.03–.04 (AM. LAW INST. 2005).

12. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (c) (AM. LAW INST. 2000).

ventures, . . . similar organizations, . . . [and] social club[s]."[13] It also includes government organizations.[14]

A. *The Organization's Constituents*

Pursuant to the comment to Rule 4-1.13 of the Florida Rules of Professional Conduct ("Florida Rules"), individuals who are part of an organization are referred to as *constituents*.[15] They include officers, directors, employees, shareholders, stockholders, and members.[16] Constituents who make decisions on behalf of the organization are either elected or appointed.[17] Those constituents are often referred to as the Board of Directors ("Board").[18] The Board may be comprised of several constituents or just one, as in the case of an individual who owns 100% of a corporation's stock or a sole member of an LLC.[19]

B. *The Board's Duty to the Organization*

The Board has a fiduciary duty to make decisions that are in the best interests of the organization.[20] "Directors and officers must act in the best interests of the corporation, not the employee."[21] If there is only one constituent who sits on the Board, for example, the sole owner and shareholder of the organization, then that person also has a fiduciary duty to make decisions in the best interests of the organization, even though, in

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13. *Id.*

14. *See id.*

15. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 cmt. (2006); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (b).

16. FLA. RULES OF PROF'L CONDUCT r. 4-1.13 cmt. (2006); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (b) (AM. LAW INST. 2000).

17. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 cmt (2006); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (b).

18. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 cmt. (2006).

19. *Id.*; *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (b).

20. FLA. STAT. § 607.0830(1)(a)–(c) (2015).

> A director shall discharge his or her duties as a director, including his or her duties as a member of a committee: (a) In good faith; (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

Id.; *In re* Aqua Clear Techs., Inc., 361 B.R. 567, 575 (Bankr. S.D. Fla. 2007). "A trustee of a business trust, like a director and officer of a corporation, owes the trust and its investors fiduciary duties of care and loyalty." Forbes v. Forbes, 341 P.3d 1041, 1051 (Wyo. 2015).

21. Grant v. Bessemer Tr. Co. of Fla., 117 So. 3d 830, 837 (Fla. 4th Dist. Ct. App. 2013).

effect, he or she does not have to answer to anyone else.[22] A government Board also has a fiduciary duty to make decisions that are in the best interests of both the organization and the public.[23]

The Board may engage attorneys to help it carry out its duties.[24] Those duties may include—but are not limited to—drafting opinion letters, ensuring compliance with regulatory agencies, advising on practical matters, or even representing the organization in litigation.[25]

III. ATTORNEY'S ETHICAL DUTY TO HIS CLIENT

"As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[26] That is all well and good, but the question that has been around since there have been rules of professional conduct is: How far does zealous advocacy go?[27]

One could argue that zealous advocacy ends just where an attorney's ethical obligations begin.[28] That is somewhat analogous to what philosopher Zechariah Chafee, Jr. said when he wrote, "[y]our right to swing your arms ends just where the other man's nose begins."[29]

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22. *See* FLA. STAT. § 607.0830; *Grant*, 117 So. 3d at 837.

23. FLA. STAT. § 112.311(6) (2015).

> It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

Id.

24. FLA. STAT. § 607.0830(2)(b).

> In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: . . . "(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence."

Id.; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(b) (AM. LAW INST. 2000).

25. *See* FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015); FLA. RULES OF PROF'L CONDUCT r. 4-1.2 (2006); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96(b).

26. FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015).

27. *See id.*

28. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2014).

29. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

There comes a point when an attorney must draw a line in the sand to separate zealous advocacy from unethical behavior.[30] "While counsel does have an obligation to be faithful to [his clients'] lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty of zealous representation over all other duties."[31] "We must never permit a cloak of purported zealous advocacy to conceal unethical behavior."[32] Differentiating between unethical behavior and zealous advocacy is extremely important, since some clients may want their attorneys to continually cross that line and do things that might not only be unethical, but also illegal.[33] Attorneys must never forget that they are also officers of the legal system.[34]

Separating zealous representation from unethical behavior is not an easy task, as the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") points out in paragraph nine of the Preamble.[35] It clearly recognizes that an attorney must balance his ethical responsibilities "while earning a satisfactory living."[36] That is critical for attorneys just starting their own practices since, by alienating clients, they risk losing fees and future referrals they desperately need to pay both office and living expenses.[37]

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30. *See* Fla. Bar v. Buckle, 771 So. 2d 1131, 1133 (Fla. 2000) (per curiam); Visoly v. Sec. Pac. Credit Corp., 768 So. 2d 482, 485 (Fla. 3d Dist. Ct. App. 2000).

31. *Visoly*, 768 So. 2d at 492.

32. *Buckle*, 771 So. 2d at 1133.

33. *See* Fla. Bar v. Brown, 790 So. 2d 1081, 1088 (Fla. 2001) (per curiam); *Buckle*, 771 So. 2d at 1133–34; *Visoly*, 768 So. 2d at 492.

34. Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) (providing that an attorney has a duty to refrain from advocacy that undermines or interferes with the functioning of the judicial system).

35. MODEL RULES OF PROF'L CONDUCT pmbl. 9 (2014).

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these [r]ules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the [r]ules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Id.

36. *Id.*

37. *See id.*

It is also critical for attorneys employed by a Board, since they can be discharged at any time if they fail to do what the Board wants.[38] This is especially true for public boards, such as Boards of County Commissions, School Boards, City Councils, etc., since attorneys representing these boards are quite often employees, especially in larger governmental agencies.[39] Therefore, they do not have practices that include other clients, which could soften the blow of losing any one client.[40]

It is safe to assume that many attorneys have faced the problem of choosing between retaining a client and upholding their own integrity as well as the integrity of their profession.[41] What they do could very well determine the future of their entire legal careers.[42]

Not all duties involve the attorney-client relationship.[43] For example, a lawyer has a duty to maintain the integrity of the legal profession by refraining from acts of fraud, deceit, or misrepresentation.[44]

IV. BOARD ATTORNEY'S DUTY TO THE ORGANIZATION

A. *Basic Duties*

Pursuant to Rule 4-1.13(a) of the Florida Rules, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[45] When a lawyer represents an organization, he has a duty to the organization itself, not to the individual constituents.[46] General duties are triggered, such as duties of competence, diligence, and care to the organization.[47]

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38. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 32, 96 (AM. LAW. INST. 2000).

39. *See* FLA. STAT. § 607.0830(2)(b) (2015); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. b.

40. *See supra* text accompanying notes 38–39.

41. *See* FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. c.

42. *See* Office of Disciplinary Council v. Davis, 614 A.2d 1116, 1122 (Pa. 1992).

43. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.2 (2006).

44. *Id.* r. 4-8.4(b)–(c) ("A lawyer shall not: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .").

45. FLA. RULES OF PROF'L CONDUCT r. 4-1.13(a) (2006).

46. *See* Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1385 (10th Cir. 1994); Pelletier v. Zweifel, 921 F.2d 1465, 1491 n.60 (11th Cir. 1991).

47. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. (e) (AM. LAW. INST. 2000).

Other duties are triggered only when the attorney's client, the organization, or an organization's constituent has committed a criminal or fraudulent act.[48]

B. *Duties When the Organization Commits a Criminal or Fraudulent Act*

1. Duty to Disclose

According to Rule 4-4.1(b) of the Florida Rules, "[i]n the course of representing a client, a lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[49] While the rule does not define the meaning of assistance, it implies that disclosure is a form of non-assistance.[50] Furthermore, "a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation."[51]

"In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud."[52] "If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under [4-4.1](b), the lawyer is required to do so, unless the disclosure is prohibited by Rule 4-1.6."[53]

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48. FLA. RULES OF PROF'L CONDUCT r. 4-4.1(b) (2006); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(4) (2006); FLA. RULES OF PROF'L CONDUCT r. 4-8.4(a), (c) (2010).

49. FLA. RULES OF PROF'L CONDUCT r. 4-4.1(b) (2006); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.6(b)(1)–(2) (2015) ("A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary: to prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another.").

50. FLA. RULES OF PROF'L CONDUCT r. 4-4.1 cmt. (2006).

51. *Id.*

> [A] lawyer . . . *shall withdraw* from the representation of a client if: . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(4)-(5) (2006); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(1) (2006) ("Except as stated in subdivision (c), a lawyer . . . *shall withdraw* from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or law. . . .") (emphasis added).

52. FLA. RULES OF PROF'L CONDUCT r. 4-4.1 cmt. (2006).

53. *Id.* r. 4-4.1(b); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.6 (2006)

2. Duty to Withdraw

When a client crosses the line into a criminal or fraudulent act, and refuses to disclose and remedy the act, the Florida Rules states that an attorney may be required to withdraw.[54] There are two separate scenarios that mandate withdrawal.[55]

In the first scenario, the client persists in his course of action, which involves the lawyer's services, and the lawyer *reasonably believes*[56] that the action is criminal or fraudulent.[57]

In the second scenario, the client has used the lawyer's services to commit a crime or fraud.[58] Notably, the Florida Rules do not include any reference to a lawyer's belief as to whether or not the client's act is criminal or fraudulent.[59] It is also different from the first scenario in that the client's act is in the past—*has used*.[60] Unfortunately, what constitutes a *lawyer's services* is not defined in either scenario.[61]

Even when a client is not committing or has not committed a criminal or fraudulent act, an attorney may still be required to withdraw if his representation of the client will result in violation of the law or the Florida Rules.[62]

3. Duty Not to Assist

When a lawyer knows that a client is committing an act that is criminal or fraudulent, he is mandated *not to assist* his client in the conduct.[63]

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54. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(4) (2006).

55. *Id.* at (a)(4)–(5) (2006).

56. FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015) ("*Reasonable belief* or *reasonably believes* . . . denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.") (emphasis added).

57. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(4) (2006); FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015) ("*Fraud* or *fraudulent* denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.") (emphasis added); FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. cmt. (2015) ("For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.").

58. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(5) (2006).

59. *Id.*

60. *Id.*

61. *Id.* 4-1.16(a)(4)-(5) (2006); *see also* FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015).

62. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(1) (2006) ("Except as stated in subdivision (c), a lawyer . . . shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or law . . . .").

63. FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006). "A lawyer *shall not* counsel a client to engage, or *assist a client, in conduct that* the lawyer knows or reasonably

In order to understand the definition of *not to assist*, it must be determined what *to assist* means.[64] In *Florida Bar v. Brown*,[65] the lawyer represented an organizational client.[66] One member of the organization's Board concocted a scheme to donate a large amount of money to a political campaign.[67] He requested that the lawyer ask his employees at the law firm to donate $500 to a political campaign, with the understanding that he would reimburse the lawyer and his employees at a later date through the lawyer's *premium billing* of the organization.[68] The lawyer and his family also donated $500.[69] The constituent's scheme violated section 106.08 of the Florida Statutes, "which limits [campaign] contributions to . . . $500 per person and provides criminal penalties for [anyone who contributes] in excess of that amount."[70]

"The Bar charged Brown with violating eleven provisions of the Rules Regulating the Florida Bar."[71]

> [T]he referee recommended that Brown be found guilty of violating [R]ule 4-1.2(d)—lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, [R]ule 4-8.4(a)—lawyer shall not violate or attempt to violate the rules of professional conduct, or do so through the acts of another—[R]ule 4-8.4(c)—lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
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> . . . The referee [then] recommended that Brown receive a public reprimand from the Board of Governors and be placed on probation for six months, with the conditions that Brown complete eight hours of continuing legal education and refrain from supervising other attorneys at his firm during the probationary period. [The Bar petitioned] for review, seeking review of several

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should know is *criminal or fraudulent*." *Id.* (emphasis added). "A lawyer *may not continue assisting a client in conduct that* the lawyer originally supposed was legally proper but then discovers *is criminal or fraudulent*. *The lawyer must*, therefore, *withdraw* from the representation of the client in the matter." *Id.* at r. 4-1.2 cmt. (emphasis added). "In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like." *Id.* "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed." *Id.*

64. *See* Fla Bar v. Brown, 790 So. 2d 1081, 1088 (Fla. 2001) (per curiam).
65. 790 So. 2d 1081 (Fla. 2001) (per curiam).
66. *Id.* at 1083.
67. *See id.*
68. *Id.*
69. *Id.*
70. *Brown*, 790 So. 2d at 1084; *see also* FLA. STAT. § 106.08 (1993).
71. *Brown*, 790 So. 2d at 1083.

> of the referee's factual findings and recommendations as to guilt, as well as the recommended sanction.[72]

The Florida Bar contended that Brown was in violation of "[R]ule 4-8.4(b)—lawyer shall not commit criminal act which reflects adversely on lawyer's honesty, trustworthiness, or fitness,"[73] "[R]ule 4-1.1—lawyer shall provide competent representation—for failing to realize the fraudulent nature of the reimbursement scheme,"[74] and "[R]ule 4-1.13(b)—corporation's lawyer to proceed in best interests of corporation when lawyer knows that officer is engaged in illegal conduct—for failing to report . . . illegal activity to a higher authority."[75]

The court approved the referee's findings of fact as to guilt.[76] The court stated that, "[b]y failing to question the legality of [his client's] request, Brown assisted his client in conduct that Brown should have known was criminal or fraudulent."[77] However, the court modified the discipline and suspended Brown from the practice of law for ninety days.[78]

In essence, the court interpreted *assisting* as a failure to act.[79] In this case, it was the failure to question the nature of the client's conduct.[80] It is not an option for an attorney to do nothing when his client commits a criminal or fraudulent act.[81] He must do something, whether it means dissuading his client from the act,[82] disclosing the act,[83] or disengaging.[84]

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72. *Id.* at 1084; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006); FLA. RULES OF PROF'L CONDUCT r. 4-8.4(a)(c) (2010).

73. *Brown*, 790 So. 2d at 1084; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-8.4(b) (2010).

74. *Brown*, 790 So. 2d at 1086; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.1 (2006).

75. *Id.*; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

76. *Brown*, 790 So. 2d at 1087.

77. *Id.* at 1088.

78. *Id.* at 1089.

79. *See id.* at 1088.

80. *Id.* at 1087.

81. *Brown*, 790 So. 2d at 1088.

82. FLA. RULES OF PROF'L CONDUCT r. 4-1.2, cmt (2006) ("In some cases . . . [i]t may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like.").

83. FLA. RULES OF PROF'L CONDUCT r. 4-1.6(b)(1)–(2) (2015) ("A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary: [t]o prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another."); FLA. RULES OF PROF'L CONDUCT r. 4-4.1(a)–(b) (2006) ("In the course of representing a client a lawyer shall not knowingly: . . . [f]ail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . .").

84. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)(4)–(5) (2006).

Do the rules change for attorneys when a constituent, as opposed to a client, commits a criminal or fraudulent act?[85] The answer depends on who is making that determination, the Florida Bar or the court.[86]

C. *Duties When a Constituent Commits a Criminal or Fraudulent Act*

A lawyer's duties are different when a constituent commits a criminal or fraudulent act.[87] Basically, a lawyer has a duty to proceed in the interests of the organization.[88] Since *proceed* is not defined, it is unclear what it means.[89] The fact that it is not defined may be intentional, so as to allow flexibility on the part of the Florida Bar as it determines the facts on a case by case basis.[90]

To emphasize, Rule 4-1.13(b) of the Florida Rules revolves around a lawyer's knowledge of the constituent's violation, nature of the violation,

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> [A] lawyer . . . *shall withdraw* from the representation of a client if: . . . [t]he client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud; or . . . the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud.

Id. (emphasis added). "Except as stated in subdivision (c), a lawyer . . . *shall withdraw* from the representation of a client if: . . . [t]he representation will result in violation of the Rules of Professional Conduct or law." *Id.* at r. 4-1.16(a)(1) (emphasis added). "A lawyer *shall not* counsel a client to engage, or *assist a client*, *in conduct that* the lawyer knows or reasonably should know is *criminal or fraudulent*." FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006) (emphasis added). "A lawyer *may not continue assisting a client in conduct that* the lawyer originally supposed was legally proper but then discovers *is criminal or fraudulent*. *The lawyer must*, therefore, *withdraw* from the representation of the client in the matter." *Id.* at r. 4-1.2 cmt (emphasis added). "In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like." *Id.* (citing FLA. RULES OF PROF'L CONDUCT r. 4-1.1 (2006)). "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed." *Id.*

85. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

86. *See* Fla. Bar v. Brown, 790 So. 2d 1081, 1088 (Fla. 2001) (per curiam); Felts v. Nat'l Account Sys. Ass'n, 469 F. Supp. 54, 67 (N.D. Miss. 1978); *In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 794, F. Supp. 1424, 1453 (D. Ariz. 1992).

87. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006).

88. *Id.* A lawyer has a duty to proceed in the "best interest of the organization" when he

> knows that [a constituent] 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 is likely to result in substantial injury to the organization.

Id.

89. *See id.*

90. *See id.*

and the result of the violation.[91] The obvious question is, therefore, what is knowledge?[92]

The preamble to Rule 4 of the Florida Rules states, "*[k]nowingly*, *known*, or *knows* denotes actual knowledge of the fact in question."[93] "A person's knowledge may be inferred from circumstances."[94] The ABA Model Rules has a similar provision.[95] Unfortunately, however, there are no comments in either the Florida Rules or the ABA Model Rules that define knowingly, known, or knows.[96]

Professor George M. Cohen suggests that lawyers' ethical knowledge is less than stellar.[97]

> The state of lawyers' ethical *knowledge* is poor. By that, I mean that the [ABA Model Rules] and the authorities interpreting it do a poor job of defining *knowledge*; of explaining or justifying the use of the knowledge standard in the rules; and of relating the knowledge requirement to, and reconciling it with, other ethical and legal requirements. As a result, many lawyers have less *knowledge* of their ethical and legal obligations than they ought to have. Moreover, lawyers who understand the knowledge problem, such as drafters of ethics codes, are apparently unwilling to do anything about it. The reason is that lawyers often view the knowledge standard as an important means of limiting lawyer responsibility.[98]

Cohen poses three questions and states that the ABA Model Rules should be revised to answer the questions, providing better guidance to lawyers.[99]

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91. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

92. *See id.*

93. FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015).

94. *Id.*

95. *See* MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2014). "*Knowingly*, *known*, or *knows* denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *Id.* (emphasis added).

96. *Id.*; FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015). "The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative." FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015).

97. George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 115 (2014).

98. *Id.* at 115–16.

99. *Id.* at 117–18.

> First, does the knowledge standard include recklessness or willful blindness, which lies between *know* and *reasonably should know*? Second, how does the knowledge standard apply if a lawyer otherwise has a legal or ethical duty to inquire and fails to satisfy it? Third, how does the knowledge requirement interact with rules of imputation?

Cohen states that *recklessness* should be incorporated into the definition of knowledge in the ABA Model Rules, or at least incorporate this "standard whenever a duty to inquire or a duty to communicate otherwise exists under the rules or other law."[100]

Cohen believes that a "deliberate breach of an otherwise existing duty to inquire" is "one way to show recklessness or willful blindness."[101] According to one author, "[t]he ordinary meaning of the word [recklessness] is a high degree of carelessness. It is the doing of something, which, in fact, involves a grave risk to others, whether the doer realizes it or not. The test is therefore objective and not subjective."[102]

Cohen also emphasizes that an attorney has a duty to communicate, and that is the basis for imputation,[103] which is defined as "[t]he act or an instance of imputing something, [especially] fault or crime, to a person; an accusation or charge."[104] The doctrine of imputed knowledge is defined as:

> The rule that a principal is deemed to know facts known to his or her agent if they are within the scope of the agent's duties to the principal, unless the agent has acted adversely to the principal. The doctrine serves as a bridge for the applicability of defenses that a third party may assert against a principal in which knowledge is a necessary element, including *in pari delicto*.[105]

It is worth noting that imputing knowledge to another is not a new concept, since it is well established in agency law.[106] Cohen continues by stating:

> The imputed knowledge doctrine can apply to lawyers in several ways. First, lawyers are agents of their clients and so clients are bound by what their lawyers know. Second, lawyers practicing in firms are agents of those firms, and so a lawyer's knowledge may be imputed to the lawyer's firm.[107]

With regard to imputation, it is important to note at this point that when an organization's constituent commits a criminal or fraudulent act, the

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Id. at 117 (emphasis added).

100. *Id.* at 118.

101. Cohen, *supra* note 97, at 118.

102. R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS, 194 (17th ed. 1977).

103. Cohen, *supra* note 97, at 118.

104. *Imputation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105. *Doctrine of Imputed Knowledge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

106. RESTATEMENT (THIRD) OF AGENCY § 5.03 (AM. LAW INST. 2005).

107. Cohen, *supra* note 97, at 139.

Florida Rules do not mandate that an attorney is required to disclose, discover, or disengage.[108] However, in civil cases that involve constituents who commit criminal or fraudulent acts, the courts have not been as lenient as the Florida Rules.[109] Unlike the Florida Rules, courts have held that an attorney has a duty to discover, disclose, and disengage.[110]

In *Brown*, the Florida Bar requested that the court find that the attorney failed to disclose the constituent's act to a higher authority.[111] However, the court declined by stating that the attorney was not mandated, according to the Florida Rules,[112] to disclose or withdraw when a constituent committed an illegal act.[113] The rules state that the attorney "may refer the matter to a higher authority."[114]

As previously stated, the court in *Brown* agreed with the referee's finding that the attorney violated Florida Rules 4-1.2(d), 4-8.4(c), and 4-8.4(a).[115] Interestingly, although it was the constituent who committed the wrong, not the organization, the court charged the attorney with violation of the duty *not to assist*, which applies only when a lawyer assists a *client* who commits a fraudulent or criminal act, not a constituent.[116]

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108. Fla. Bar v. Brown, 790 So. 2d 1081, 1086 (Fla. 2001) (per curiam); FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006).

109. *See In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1465–66 (D. Ariz. 1992); Felts v. Nat'l Account Sys. Ass'n, 469 F. Supp. 54, 70 (N.D. Miss. 1978).

110. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453 (holding that attorneys have a duty to disengage when a constituent commits fraud); *Felts*, 469 F. Supp. at 67.

> The duty of the lawyer includes the obligation to exercise due diligence, including a reasonable inquiry, in connection with responsibilities he has voluntarily undertaken . . . . He must make a reasonable, independent investigation to detect and correct false or misleading materials. Moreover, the greater the relationship and duty to the purchaser of securities, the higher the standard of care for investigation and disclosure.

Felts, 469 F. Supp. at 67 (citations omitted).

111. *Brown*, 790 So. 2d at 1086.

112. *Id.*; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

113. FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

114. *Brown*, 790 So. 2d at 1086; FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006).

115. *Brown*, 790 So. 2d at 1088; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006); FLA. RULES OF PROF'L CONDUCT r. 4-8.4(a), (c) (2010).

116. *Id.* at 1083–84, 1088; FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006). "*A lawyer shall not* counsel a client to engage, or *assist a client*, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent." *Id.* (emphasis added). "*A lawyer may not continue assisting a client* in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter." *Id.* at r. 4-1.2 cmt. (emphasis added).

The court in *Brown* appears to have intentionally and implicitly imputed the constituent's act to the organization.[117] Imputation dictates that the organization—the client—be treated as if it had committed the acts of fraud and crime itself.[118] As a result, the court should have ruled that the attorney had a duty to disclose and withdraw, which is triggered when a client commits a fraudulent or criminal act.[119]

In civil cases, the courts have adopted a standard to determine whether to impute a constituent's act to the organization.[120] In general, when a constituent has committed fraud on *behalf of the organization*, it will be imputed to the organization.[121] On the other hand, if a constituent has committed fraud *against the organization*, it will not be imputed.[122] Did the court in *Brown* adopt this standard as well?[123] Whether or not the court incorrectly imputed the constituent's act to the organization, its decision in *Brown* established precedent.[124]

When deciding how to discipline an attorney who represents an organization, the court has shown that, in a disciplinary case, it has the authority to impute the constituent's act to the organization and, therefore, subject the attorney to rules that involve the acts of a client.[125] Under these rules, disclosure and disengagement are not merely presented as suggestions.[126]

Once a lawyer determines that he must proceed in the best interests of the organization, he must determine *how* to proceed.[127] While it is not specifically defined how he should proceed, as discussed below, the duty to proceed can be broken down into three remedial measures—discovery,

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117. *See Brown*, 790 So. 2d at 1086–87.

118. *See* Cenco, Inc., v. Seidman & Seidman, 686 F.2d 449, 456 (7th Cir. 1982).

119. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.16(a)–(b) (2006); FLA. RULES OF PROF'L CONDUCT r. 4-1.6(b) (2015).

120. *See Cenco*, 686 F.2d at 456.

121. *See id.*

122. *Id.* (holding that the fraudulent acts of an organization's constituents may be imputed to the organization when the fraud is committed "on behalf of a corporation" rather than *against the corporation*). This is also known as the *adverse agent doctrine*. *See* RESTATEMENT (THIRD) OF AGENCY § 5.04 (AM. LAW INST. 2005).

123. *See* Fla. Bar v. Brown, 790 So. 2d 1081, 1086 (Fla. 2001) (per curiam).

124. *See id.* at 1086, 1089.

125. *Id.* at 1088.

126. *In re* Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1453 (D. Ariz. 1992); *Brown*, 790 So. 2d at 1088.

127. *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453.

disclosure, and disengagement.[128] When a lawyer utilizes these measures, he protects the organization and, thereby, fulfills his fiduciary duty.[129] Consequently, he protects himself from potential civil liability and disciplinary action.[130] To be clear, a lawyer is not required to adopt any or all of the three remedial measures.[131] It is his choice.[132] But precedent shows that if he does, he is more likely to protect the organization and himself from both civil and criminal liability.[133]

A lawyer may fulfill his duty to proceed in the best interests of the organization with the adoption of just one remedial measure, or he may adopt more.[134] For example, if a boat is sinking because of a hole, a person may patch the hole, which may prevent the boat from sinking. But he may also empty water out of the boat, wear a life preserver, and call for help. It depends on the situation. Finally, a lawyer may utilize the remedial measures in the order that he deems best.[135]

V. DISCOVERY

The first remedial measure, discovery, applies when a lawyer suspects that a constituent is committing a wrongful act.[136] A lawyer should investigate, question the wrongdoer, and educate himself on the applicable laws.[137] When a lawyer sees red flags, he should investigate a constituent's suspicious activity.[138] A lawyer may claim that he did not have knowledge

128. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453; *Brown*, 790 So. 2d at 1086; FLA. RULES OF PROF'L CONDUCT r. 4-1.16 (2006).

129. *See Brown*, 790 So. 2d at 1086.

130. *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1457.

131. *See Brown*, 790 So. 2d at 1086; FLA. RULES OF PROF'L CONDUCT, r. 4-1.16 (2006); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 (AM. LAW. INST. 2000).

132. *See Brown*, 790 So. 2d at 1086; FLA. RULES OF PROF'L CONDUCT r. 4-1.13, 4-1.16 (2006); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96.

133. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1453, 1457 (D. Ariz. 1992) (holding that attorneys have a duty to disengage when a constituent commits fraud); *Brown*, 790 So. 2d at 1084, 87–88 (holding that a lawyer had a duty to discover a constituent's fraud).

134. *See Brown*, 790 So. 2d at 1086.

135. *See id.*; FLA. RULES OF PROF'L CONDUCT r. 4-1.13(b) (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96.

136. *See Brown*, 790 So. 2d at 1088; FLA. RULES OF PROF'L CONDUCT r. 4-1.2(d) (2006).

137. *See Brown*, 790 So. 2d at 1088.

138. FDIC v. Clark, 978 F.2d 1541, 1549 (10th Cir. 1992); Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 451 (7th Cir. 1982) (auditors failed to discover fraud); *In re* Cauthen, 229 S.E.2d 340, 344 (S.C. 1976) (per curiam) (finding that the lawyer should have known that the client was committing fraud).

of suspicious activity, but "knowledge may be inferred from the circumstances."[139]

A lawyer may also claim that he was unaware at the time that he was violating any of the Rules of Professional Conduct.[140] However, a lawyer has a duty to know the rules.[141] "[W]e find no merit in [a] claim that ignorance of the Rules of Professional Conduct excuses [a] violation."[142] "It is every lawyer's professional obligation to be aware of and be familiar with the *Rules of Professional Conduct* . . . ."[143] "We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct."[144] "We would be remiss at this point if also we did not reject out of hand the Board's curious suggestion that Respondent's ignorance of professional rules constitutes an excuse for his conduct."[145]

Similarly, in *In re Lewis*,[146] the court noted: "Just as an accused cannot use ignorance of the law as a defense, so too an attorney cannot rely on ignorance of the [R]ules of [P]rofessional [C]onduct as an excuse."[147]

In addition, a lawyer may claim that he was not aware that he was violating any laws.[148] That defense does not pass muster.[149] The lawyer in *Brown* testified that he was not familiar with the campaign laws.[150] Therefore, he did not know that the constituent was committing fraud.[151] However, the court concluded that the nature of the scheme "should have caused [the attorney] to question the legality of the scheme."[152] Noting the lawyer's substantial experience in the practice of law, the court held that the red flags triggered the lawyer's duty to discover a constituent's fraud by questioning the act.[153]

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139. FLA. RULES OF PROF'L CONDUCT r. 4 pmbl. (2015) ("*Knowingly*, *known*, or *knows* [means] actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

140. Ainsworth v. State Bar of Cal., 762 P.2d 431, 439 (Cal. 1988).

141. *Whelan's Case*, 619 A.2d 571, 573 (N.H. 1992).

142. *Ainsworth*, 762 P.2d at 439; La. State Bar Ass'n v. Thalheim, 504 So. 2d 822, 826 (La. 1987) ("Ignorance of the Disciplinary Rules which set forth the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action is no excuse.").

143. *In re* Anonymous, 637 N.E.2d 131, 132 (Ind. 1994) (per curiam).

144. *Whelan*, 619 A.2d at 573.

145. Office of Disciplinary Counsel v. Davis, 614 A.2d 1116, 1121 (Pa. 1992).

146. 562 N.E.2d 198 (Ill. 1990).

147. *Id.* at 213.

148. Fla. Bar v. Brown, 790 So. 2d 1081, 1084 (Fla. 2001) (per curiam).

149. *Id.* at 1087.

150. *Id.* at 1085.

151. *Id.* at 1086.

152. *Id.* at 1087.

153. *Brown*, 790 So. 2d at 1087.

The court in *Brown* noted that the lawyer had failed to question the constituent's scheme, "blindly acquiesce[ed] to his client's wishes without fully considering the consequences and impact of such actions," failed to "fully consider the . . . legality of [the constituent's] request," and "should have known that the scheme was potentially fraudulent as well as illegal."[154] Consequently, since he did not investigate the legality of the constituent's act, the lawyer was found to have assisted his client in the criminal act.[155]

Common sense dictates that when a lawyer sees smoke, he has a duty to discover the source of it. If he does not, the organization may get burned through significant financial loss,[156] and the lawyer may get burned through disciplinary action[157] or a civil lawsuit.[158]

VI. DISCLOSURE

The second remedial measure, disclosure, may be accomplished through reporting the constituent's act to a *higher authority*, which is normally "the [Board] or similar governing body."[159]

There are few disciplinary cases that address the issue of an attorney's duty to disclose to a higher authority when a constituent commits a wrongful act.[160] In *Brown*, the court concluded that the respondent attorney did not have a duty to disclose the constituent's criminal and fraudulent act to a higher authority in the organization.[161] The issue of disclosure to a higher authority has been addressed more frequently in civil liability cases where an attorney has been sued for the acts of a wrongdoing constituent.[162]

If the higher authority does not respond, the lawyer may consider reporting to the *highest authority*, which may include "the independent directors of a corporation" or elsewhere.[163] In some situations involving representation of a government organization, it has been suggested that the

154. *Id.* at 1087–88.

155. *Id.* at 1088 ("By failing to consider the legality of [the constituent's] request, [the lawyer] assisted his client in conduct that [he] should have known was criminal or fraudulent . . . .").

156. *See id.* at 1088.

157. *Id.* at 1089.

158. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453 (where plaintiffs sued attorneys for breach of fiduciary duty and the court upheld the claim because the attorneys had a duty to discover the constituent's fraud).

159. FLA. RULES OF PROF'L CONDUCT r. 4-1.13 cmt. (2006).

160. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453; SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 714 (D.D.C. 1978).

161. *Brown*, 790 So. 2d at 1086.

162. *See In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453.

163. FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006).

public may be the highest authority.[164] But what if the wrongdoers are the highest authority?[165] Should a lawyer disclose the wrongdoing to parties outside of the organization?[166] In some cases, where creditors, shareholders, federal regulators, or investors are involved, a lawyer may be permitted to disclose to them in order to mitigate damages.[167]

In *SEC v. National Student Marketing, Corp.*,[168] the law firm had represented an organization in a merger with another organization.[169] During its representation of the organization, the law firm discovered that the constituents had deceitfully misrepresented that the organization had a net-profit in order to obtain shareholders' and investors' approval of the merger.[170] Despite the constituents' obvious fraud, the law firm assisted with the closing of the merger.[171] The court held that the law firm aided and abetted the constituents' violation of securities law through its failure to disclose the fraud to the shareholders or SEC.[172]

Restatement (Third) of Law Governing Lawyers section 96 declines to answer whether a lawyer should disclose a constituent's wrongful act to third parties, stating "[w]hether disclosure [to parties outside of the organization] is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position."[173] Clearly, the Restatement views disclosure outside the organization's walls as an inherently risky endeavor.[174]

Of the three remedial measures, disclosure is the remedial measure with the greatest potential for harm to the organization.[175] In other words, there is such a thing as overcorrection, and the risk with disclosure is

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164. Tyler Younts, *Duties and Responsibilities of City Attorneys*, N.C. INST. FOR CONST. L. (Aug. 12, 2013), http://www.ncicl.org/article/898#_ftn1[https://web.archive.org/web/20150910051653/http://www.ncicl.org/article/898#ftn1].

165. *See* Cohen, *supra* note 97, at 134 n.83.

166. *See id.*

167. *See In re* Silva, 636 A.2d 316, 317 (R.I. 1994) (per curiam) (duty to disclose); *In re* Price, 429 N.E.2d 961, 964 (Ind. 1982) (per curiam); *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453 (duty to disclose); SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 711 (D.D.C. 1978) (duty to disclose to shareholders).

168. 457 F. Supp. 682 (D.D.C. 1978).

169. *Id.* at 700.

170. *Id.*

171. *See id.* at 713–15.

172. *Id.* at 714–15.

173. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (AM. LAW. INST. 2000).

174. *See id.*

175. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96.

significant.[176] The third remedial measure, disengagement, does not present the difficult issues involved with disclosure.[177]

VII. DISENGAGEMENT

The third remedial measure, disengagement, may take various forms such as withdrawal, disaffirmation of any opinion, document, or affirmation that may have been used to further the wrongful act, counseling the constituent to obtain a second legal opinion, or asking him to reconsider his actions.[178]

If a lawyer withdraws, he may include a notice of the withdrawal.[179] This is referred to as a *noisy withdrawal*, and it serves to alert others that a constituent may have committed a wrong.[180] It may be analogized to a trial lawyer who moves to withdraw the moment that his client commits perjury on the stand.[181]

In *In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*,[182] the defendants included a corporation, its subsidiary, lawyers who represented the corporation and subsidiary, and accountants who audited the corporation, among others.[183] Plaintiffs included people who purchased securities stock or debentures of the corporation, as well as a receiver of the corporation and its subsidiary.[184] While the majority of purchasing plaintiffs purchased their stock through a savings and loan company, which was a subsidiary of the corporation, others purchased stock through brokers.[185] The receiver and the shareholders sued the organization's lawyers for breach of fiduciary duty to the organization and professional negligence.[186]

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176. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96.

177. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.6 (2015); FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2016).

178. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.13 (2006); FLA. RULES OF PROF'L CONDUCT r. 4-1.16 (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYER § 96.

179. FLA. RULES OF PROF'L CONDUCT r. 4-1.16(d) (2006).

180. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 92-366 (1992).

181. *Id.*

182. 794 F. Supp. 1424 (D. Ariz. 1992).

183. *Id.* at 1432.

184. *Id.*

185. *Id.*

186. *Id.* Furthermore, the receiver plaintiff sued a second law firm for "breach of fiduciary duty, negligent misrepresentation, negligence per se, breach of contract, [and] aiding and abetting breach of fiduciary duty." *In re Am. Cont'l Corp./Lincoln Sav. & Loan*

The court opined that "[a]n attorney who represents a corporation has a duty to act in the corporation's best interest[s] when confronted by adverse interests of directors, officers, or corporate affiliates."[187] It further noted that the law firm had a duty to "urge cessation of the [constituents'] activity and withdraw from representation [when] the firm's legal services may contribute to the continuation of [a constituent's violative] conduct."[188]

When the law firm argued that the use of remedial measures would have been pointless because the constituents, who controlled the corporation and its subsidiary, would not have listened, the court disagreed, stating "[c]lient wrongdoing . . . cannot negate an attorney's fiduciary duty."[189] Thus, the court permitted the plaintiffs to proceed with their breach of fiduciary claim against the lawyers.[190]

A lawyer's silence, or his failure to counsel a constituent when he has committed a criminal or fraudulent act, may be interpreted as assisting the constituent in his criminal or fraudulent act.[191] The Restatement (Third) of Law Governing Lawyers section 96 states that "[t]he lawyer thus must not knowingly or negligently assist any constituent to breach a legal duty to the organization."[192]

Lawyers are not always required to withdraw when a client commits a wrong, but it is better to be safe than sorry.[193] Withdrawal is not only a wise move to protect the organization, but it protects the lawyer as well from "criminal, civil, or disciplinary sanctions."[194]

VIII. CONCLUSION

When in doubt, a lawyer can ensure that he fulfills his duty to proceed in the best interests of his organizational client through adoption of the three remedial measures—discovery, disclosure, and disengagement.[195] While a lawyer is not required to utilize these measures, case law shows that

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Sec. Litig., 794 F. Supp. at 1455. However, the court determined that the subsidiary was the one who was damaged, so the receiver's claims were deemed invalid. *Id.*

187. *Id.* at 1453.

188. *Id.*

189. *Id.*

190. *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. at 1453.

191. Fla. Bar v. Brown, 790 So. 2d 1081, 1086 (Fla. 2001) (per curiam).

192. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. a (AM. LAW INST. 2000).

193. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 32(3) (AM. LAW INST. 2000).

194. *Id.* at cmt. f.

195. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. f.

if he does, he is not only more likely to protect his organizational client, but he lessens the possibility of facing disciplinary action or a civil lawsuit.[196]

196. *Id.*; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 32 cmt. f.