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The Regulation of Lawyers in Compliance

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THE REGULATION OF LAWYERS IN COMPLIANCE

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Abstract: The field of compliance has exploded in interest, attention, and growth over recent years. It has emerged as a popular career path for those trained in the law, giving rise to an influx of job opportunities for new law school graduates and seasoned attorneys alike. Additionally, compliance has tightened the essential interplay between business and law. Numerous compliance officers hold J.D. degrees and many also serve simultaneously as both an organization's chief compliance officer and general counsel, thereby muddying the lines between which service constitutes the "practice of law," requiring adherence to professional rules of responsibility, or non-legal work, where such rules would typically not be applicable. This Article will analyze these important distinctions, as well as the lack of regulatory guidance for lawyers in the compliance function, by viewing the discussion largely through the lens of an often-unnoticed ethical rule—the American Bar Association's Model Rule 5.7—which requires lawyers to comply with the full range of professional conduct rules even when they are providing a non-legal "law-related service." This Article will argue that the compliance function is a near-precise fit for this rule and will propose reform to the current regulatory model to ensure that the interests of lawyers, as well as the recipients of their services, are protected to the most fruitful extent possible in today's compliance-driven era. While placing this examination in the context of current scholarly debate that challenges traditional "zealous advocate" models of attorney representation, this Article will claim that, without adequate and clear regulatory reform to establish guidelines for behavior, lawyers in compliance functions risk heightened personal liability due to potential ethical violations from their respective jurisdictions of admission.

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INTRODUCTION

The new era of heightened regulation in which we live has given rise to a compliance boom. The need for entities to navigate the complexities of regulation in their respective industries has established the field of compliance as its own distinct discipline and has thrust the role of compliance officers to the forefront, which, in turn, has garnered significant attention from the entire legal profession, including both legal scholars and practitioners.[1] Lawyers play a crucial role in the compliance function as experts in interpreting and analyzing legal mandates, rules, and statutes, thereby rendering skills that add significant value across a wide range of industries.[2]

While the position of compliance officer does not require a law degree or license, it is often the case that a lawyer holds this role.[3] According to surveys documenting the issue, the general counsel serves simultaneously

1. *See, e.g.*, Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 338 (2017) (noting that a "growing array of regulatory mandates and modes of regulatory enforcement" has contributed to compliance as a significant area of focus for legal and business activity and academic and industry-related interest); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1004 (2017) ("Compliance is king, and its subjects—regulators, prosecutors, courts, corporations, and academics—are quick to tout its power and potential for good."); Teresa Meek, *In A Risky World, Chief Compliance Officers Move To Center Stage*, FORBES (May 31, 2017), https://www.forbes.com/sites/adp/2017/05/31/in-a-risky-world-chief-compliance-officers-move-to-center-stage/ [https://perma.cc/CKL2-7NRN] (discussing how the "steady rise in regulations" has given way to Chief Compliance Officers playing crucial roles in companies and industries of all types).

2. *See* Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113 (1997) (noting that the familiarity of lawyers with legal standards will allow them to add value to the creation of the criteria and strategies used in an entity's compliance monitoring system); Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1270 (2014) (stating that possession of a law license for a compliance officer, which "signal[s] legal knowledge and experience" is a valuable component of the hiring process).

3. *See, e.g.*, Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1245 (2017) ("The optimal skill set [of a compliance officer] naturally skews personnel toward lawyers. For high-level compliance positions the trend is even more pronounced. Top compliance officers at major corporations are often not just attorneys, but many are former prosecutors and regulatory agents."); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 481 (2008) (discussing the heightened role of attorneys in compliance functions).

as chief compliance officer in forty-eight percent of companies.[4] While it has been historically more common for a joint general counsel/chief compliance officer role to exist in smaller entities, data has revealed that this duplicate role also commonly emerges in entities that are larger in size.[5] Within in-house counsel departments, an additional survey revealed that forty-one percent of in-house counsel reported that managing compliance or regulatory issues is the "greatest priority" for their legal teams over the next year.[6] In addition, numerous non-practicing lawyers (not simultaneously engaged in the general counsel function) have found employment in compliance departments, either working as compliance officers or as part of a compliance team.[7] This considerable influx of lawyers in the compliance function is illustrative of the evolution of lawyer roles over recent years, continuously shifting from what was once predominately a law firm or litigation-based practice to "quasi-legal" settings at the intersection of both business and law in which legal expertise, while desirable, is not required.[8]

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4. Jamie Saine, *Should General Counsels also be Chief Compliance Officers?*, CONVERCENT (July 13, 2015), https://www.convercent.com/blog/should-general-counsels-also-be-chief-compliance-officers [https://perma.cc/6K8F-2GVH] (citing a PwC State of Compliance survey); *see also* Kathleen M. Boozang, *The New Relators: In-House Counsel and Compliance Officers*, 6 J. HEALTH & LIFE SCI. L. 16, 36 (2012) (noting that compliance officers are often also attorneys); José A. Tabuena & Jennifer L. Smith, *The Chief Compliance Officer Versus the General Counsel: Friends or Foes?*, 8 J. HEALTH CARE COMPLIANCE 23, 23 (2006) (noting that, in many organizations, the general counsel also serves as the chief compliance officer).

5. Tabuena & Smith, *supra* note 4, at 23; *see also* Amy E. Hutchens, *Wearing Two Hats: In House Counsel and Compliance Officer*, 29 ACC DOCKET 66, 67 (2011) ("Many in-house counsel wear 'two hats' [and also serve as compliance officers].").

6. *Compliance Top Challenge for Legal Departments in 2018, Say 41 Percent Of Lawyers Surveyed*, ROBERT HALF LEGAL (Jan. 24, 2018), http://rh-us.mediaroom.com/2018-01-24-Compliance-Top-Challenge-For-Legal-Departments-In-2018-Say-41-Percent-Of-Lawyers-Surveyed [https://perma.cc/SUP8-YN8G].

7. *See, e.g.*, *Detailed Analysis of JD Advantage Jobs*, NAT'L ASS'N FOR LAW PLACEMENT (May 2013), https://www.nalp.org/jd_advantage_jobs_detail_may2013 [https://perma.cc/LF9H-E3KU] [hereinafter *JD Advantage Jobs*, NALP] (noting the prevalence of jobs for law school graduates since 2011 that do not constitute the practice of law but for which a J.D. is preferred and including compliance work as within that category—such jobs have most commonly occurred within "the business realm, which accounted for 46% of the JD Advantage jobs obtained by the Class of 2011"); Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103, 141 (2013) (noting the prevalence of law graduates finding work as compliance officers where a J.D. is not required).

8. *See, e.g.*, Remus, *supra* note 2, at 1245 (discussing the growing prevalence of lawyers in "quasi-legal" roles); Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 CONN. L. REV. 1165, 1225 (2013) (acknowledging that "much of [a lawyer's] specialized work has moved out of the traditional practice of law into the various new fields requiring legal accountability as part of a broader statutory compliance regimen."); Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law*, 82 FORDHAM L. REV. 2961, 2962 (2014) (noting that an increasing number of

Given these developments, numerous normative questions have emerged that prompt the need to define more closely how lawyers in this space should be regulated in light of their professional obligations. Scholarly and regulatory attention on this very issue has been minimal. Existing regulatory models that govern the conduct of lawyers, whether practicing law or not, have not kept pace with these recent shifts in the legal profession, thereby "remain[ing] fixed—structured around the fiction of crisp and clear boundaries between law and business."[9] It is incumbent upon the entities that regulate the professional conduct of attorneys to adequately respond to this shift.

While numerous law schools have proactively responded by creating courses, concentrations, certificate programs, or centers devoted to the compliance field,[10] the American Bar Association (ABA) has published a non-binding "deskbook" to serve as a user-friendly guide helping "compliance professionals to better understand the regulatory and enforcement landscapes in which they operate."[11] The targeted audience of this book is "the present-day compliance officer" and the content is largely a substance-rich summary of compliance-related laws and regulations across various industries, including corporate and financial, healthcare, environmental, and data security, rather than a guide to the regulation of professional conduct.[12] The book does not address the extent to which, if at all, compliance officers must adhere to the professional rules of conduct that govern lawyers but seems to imply that such persons

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lawyers are moving into such "quasi-legal jobs, where a legal license is not required but having a law degree provides an advantage.").

9. Remus, *supra* note 2, at 1245.

10. *See, e.g.*, D. Daniel Sokol, *Teaching Compliance*, 84 U. CIN. L. REV. 399, 399–400 (2016) (noting the "supply side response" of law schools to the increased hiring of lawyers in the compliance field, including the development of compliance certificates or degrees); Mikhail Reider-Gordon & Elena Helmer, *Training the Next Generation of Anti-Corruption Enforcers: International Anti-Corruption Curriculum in U.S. Law Schools*, 14 J. INT'L BUS. & L. 169, 179 (2015) (discussing the efforts of several law schools in creating compliance-based curriculum); Julie DiMauro, *U.S. Compliance Education Expands As Demand Increases – Part One: Law Schools*, REUTERS (Dec. 3, 2014), http://blogs.reuters.com/financial-regulatory-forum/2014/12/03/u-s-compliance-education-expands-as-demand-increases-part-one-law-schools/ [https://perma.cc/9283-76A8] (discussing the efforts of law schools in developing compliance curriculum in response to the uptick in jobs in this sector).

11. *ABA Compliance Officer's Deskbook*, American Bar Association, https://www.americanbar.org/products/inv/book/339179898/ [https://perma.cc/3Q32-LVR5]; Andrew S. Boutros, T. Marcus Funk & James T. O'Reilly, The ABA Compliance Officer's Deskbook (A.B.A. 2016), *New ABA Comprehensive Guide Helps Compliance Officers to Understand and Manage Risk*, A.B.A. (June 8, 2017) [hereinafter Compliance Officer's Deskbook].

12. *Id.* at iii, vi. The authors each have extensive experience as either compliance officers or prosecutors for compliance failures.

may not be operating as practicing attorneys as they conduct their work. That is especially evident in the chapter on "Preserving Legal Privilege," in which it is noted that "lawyers who serve as their company's compliance officer will expect that their communications about risk are privileged, but the nuances of that protection are not automatically granted to the corporate official whose assigned task is designated as 'compliance' rather than 'legal' officer."[13] The chapter proceeds to note that privilege "for the work of the [chief compliance officer] extends to confidential information given for the purpose of obtaining legal representation."[14] However, no further analysis is offered as to which elements of a compliance officer's work, if any, would constitute legal representation and trigger application of the rules of professional conduct.

In addition, the ABA's Model Rules of Professional Conduct (Model Rules) offer no similar guidance. Yet upon close examination of all of the existing Model Rules, Rule 5.7 stands out as the most on point in this context. This rule requires adherence to the full rules of professional conduct when a lawyer is rendering "law-related services," which is defined, in part, as those "that are not prohibited as unauthorized practice of law when provided by a nonlawyer," as opposed to "legal services."[15] The commentary to Rule 5.7 enumerates many examples of various types of "law-related services," including, non-exhaustively, financial planning, legislative lobbying, accounting, social work, providing title insurance, and patent, medical or environmental consulting.[16] However, the compliance function is not mentioned at all here, despite its fitting application to this particular rule.[17] Aside from not capturing compliance work, the current language of the rule fails to provide guidance as to navigating the very murky boundaries between legal representation and the monitoring, surveillance, and preventative measures that are typically

13. *Id*. at 124.

14. *Id.* at 126 (citing Fisher v. United States, 425 U.S. 391, 402 (1976)).

15. MODEL RULES OF PROF'L CONDUCT r. 5.7 (AM. BAR ASS'N 1983). Rule 5.7 reads as follows:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided: (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. (b) The term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

16. MODEL RULES OF PROF'L CONDUCT r. 5.7. cmt. 9 (AM. BAR ASS'N 1983).

17. *See id.*

descriptive of a compliance officer's duties.[18]

Given this absence of regulatory guidance, the legal profession currently lacks clarity as to the extent to which lawyers who are also compliance officers must adhere to the full spectrum of professional rules that govern typical attorney-client relationships. This lack of clarity, in turn, leads to the potential for confusion and a risk of personal liability through disciplinary action or sanctions from their respective jurisdictions for non-adherence to the rules. At the same time, compliance officers face added pressures from governmental regulators, given that numerous regulatory agencies have become increasingly active in imposing personal liability on compliance officers for the violations of their organizations.[19] As a result, a lawyer's overall risk of personal liability when providing compliance services is considerable.

This Article will focus on lawyers, in possession of a J.D. and admitted to a state bar, who are rendering services as compliance officers or within compliance departments and not simultaneously serving as general counsel. It will propose reform to the regulatory model that currently governs such individuals as a means of mitigating their risk of liability. While the limitations of Rule 5.7 have been previously examined in the context of lawyers engaged in government roles,[20] this Article is the first attempt to tackle this dilemma from the specific lens of the rule's applicability to the compliance function. It will proceed in four parts. Part I will examine the prevalence of lawyers in compliance and will challenge the organized bar's historical focus on traditional, litigation-based practice, thereby failing to capture the modern-day panoply of work in which a law-trained individual might engage, such as compliance. Part II will closely examine the current Rule 5.7 and provide a comparative analysis of the results of the author's state-by-state comparison of each jurisdiction's adoption or non-adoption of this rule.

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18. *See* MODEL RULES OF PROF'L CONDUCT r. 5.7 (AM. BAR ASS'N 1983); *see also* James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 3–4 (2013) (discussing how compliance officers are essential to an entity's oversight or control functions and work closely with regulators to be the "eyes and ears of the firm").

19. Brian L. Rubin & Irene A. Firippis, *Compliance Wars: SEC and FINRA Disciplinary Actions Against Chief Compliance Officers and In-House Counsel in a Galaxy Not Too Far Away,* PRAC. COMPLIANCE & RISK MGMT. SEC. INDUSTRY, (July–Dec. 2014), https://us.eversheds-sutherland.com/portalresource/Compliance-Wars_SEC-and-FINRA-Disciplinary-Actions.pdf [https://perma.cc/3Q26-68AV] (discussing the significant increase in cases brought by the SEC and FINRA against compliance officers since 2014).

20. *See* Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be "Non-Lawyers"?*, 30 GEO. J. LEGAL ETHICS 45 (2017) (presenting a robust discussion of the shortcomings of Rule 5.7 as it pertains to the governance of lawyers in policy or management roles in government positions).

The author has found that, to date, fifteen of the fifty states have not adopted Rule 5.7[21] and the remaining thirty-five states have not uniformly conformed their rule to the ABA version.[22] The author will argue that while the compliance function is not likely to be considered the "practice of law," it constitutes a "law-related service" that would mandate adherence to Rule 5.7. Part III will discuss the various personal liability concerns of lawyers in compliance roles that would stem from adherence to all of the professional rules of conduct due to Rule 5.7 and the general tensions that emerge between the legal and compliance functions in an organizational setting. Finally, Part IV will propose reform to Rule 5.7 to better address the vulnerable position of compliance officers who provide non-legal services across various industries.

I. THE COMPLIANCE BOOM

A. Influx of Lawyers in Compliance

The field of compliance was once a "a virtually unknown topic"[23] and "not traditionally the exclusive domain of lawyers,"[24] but has since emerged as one of the most vibrant sources of employment and research for the legal field as a whole. Two decades ago, compliance could be described as "a bit of a backwater," as a field that was not particularly specialized and did not necessarily attract individuals of any particular skillset—"[c]ompliance officers tended to work in cubicles and performed a sort of glorified bookkeeping task, making sure that forms were filled out and boxes checked."[25] Today, the landscape is extremely different, as the field of compliance and the role of the compliance officer now boast better salaries, expansive and collaborative departments, increased prestige, and provide insight on crucial and strategic decisions of an organization.[26] Compliance departments play a crucial role in organizations through their preventative

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21. *See* ALA. RULES OF PROF'L CONDUCT; CAL. RULES OF PROF'L CONDUCT; CONN. RULES OF PROF'L CONDUCT; HAW. RULES OF PROF'L CONDUCT; ILL. RULES OF PROF'L CONDUCT; KY. RULES OF PROF'L CONDUCT; LA. RULES OF PROF'L CONDUCT; MISS. RULES OF PROF'L CONDUCT; MONT. RULES OF PROF'L CONDUCT; NEV. RULES OF PROF'L CONDUCT; N.J. RULES OF PROF'L CONDUCT; OR. RULES OF PROF'L CONDUCT; TEX. RULES OF PROF'L CONDUCT; VA. RULES OF PROF'L CONDUCT; WYO. RULES OF PROF'L CONDUCT. All of these lack some version of Model Rule 5.7.

22. *See infra* section III.B.

23. Geoffrey P. Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 437 (2017).

24. Fanto, *supra* note 18, at 17.

25. Miller, *supra* note 23, at 437.

26. *Id*. at 438–39 ("While there is still some of the check-the-box quality to the compliance function—and there always will be—the job of compliance has increasingly moved away from a mechanical approach to a risk-based approach.").

focus. Although "compliance" is often subject to varying definitions,[27] one succinct way to describe it is as "a field that focuses on prospectively ensuring adherence to laws and regulations through the use of monitoring, policies, and other internal controls."[28]

The growth of the compliance function has come about largely as a response to the extraordinary complexity in regulation over recent decades, and has increased in attention with the U.S. Sentencing Commission's amendment of the Federal Sentencing Guidelines in 1991 to include the Organizational Sentencing Guidelines (OSG).[29] The OSG are based on a "carrots and sticks" model, with the carrot being a significantly reduced fine for organizations that adopt effective compliance programs and the stick being the placement of the organization on probation without any reduced penalty if compliance programs are not adopted.[30] To obtain the carrot of a significantly reduced fine, the OSG lists several steps for a court to consider when determining the effectiveness of a compliance program, which include: procedures for reducing the risk of criminal activity; oversight by high-level individuals; limited discretionary authority granted to any individual likely to be criminally active; communication of the program to all employees; the use of monitoring, auditing, and reporting systems; and disciplinary action for any violations of the program.[31] These steps were intentionally adopted in a general tone to allow organizations some flexibility in tailoring a compliance program specific to their needs.[32]

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27. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2086, 2092–93 (2016) (noting that the definition of compliance has multiple interpretations but common themes exist to describe the field and what constitutes "effective" compliance).

28. Eric C. Chaffee, *Creating Compliance: Exploring A Maturing Industry*, 48 U. TOL. L. REV. 429, 429 (2017) (noting also that "[n]ow is a watershed period for the compliance industry."); *see also* GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 137 (Wolters Kluwer, ed., 2017) (defining compliance as "a form of internalized norm enforcement within organizations").

29. *See, e.g.*, Robert C. Bird & Stephen K. Park, *Organic Corporate Governance*, 59 B.C. L. REV. 21, 45 (2018) (stating that the Federal Sentencing Guidelines are one of the most notable examples of federal laws that prompt companies to invest in compliance); David Hess, *Ethical Infrastructure and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 318 (2016) (discussing how the Federal Sentencing Guidelines "ushered in a new era for corporate compliance programs"); Susan L. Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 169, 172 (2015) (noting the Federal Sentencing Guidelines in 1991 first created corporate compliance and ethics programs and the compliance officer position).

30. Hess, *supra* note 29, at 327.

31. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2012) (noting the reduction of culpability in sentencing if the criminal offense occurred when the organization had in effect an "effective compliance and ethics program"); *see also* Hess, *supra* note 29, at 327–28 (explaining these seven steps).

32. Hess, *supra* note 29, at 327–28.

The focus on compliance has continued steadily since 1991 and was enhanced in the wake of the financial crisis from 2007 to 2009 and the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in 2010.[33] Even prior to Dodd-Frank, new regulatory models governing organizations and businesses were beginning to emerge that laid the groundwork for compliance racing to the forefront. The post Enron-era and the passage of the Sarbanes-Oxley Act of 2002 ("SOX") helped further facilitate a tangible move away from traditional, top-down, "command and control" government-dictated regulatory schemes to "new governance" models focused on self-regulation, self-reporting to government, preventative practices, and generally more collaboration between regulated entities and regulators.[34] New governance models reflect the collective recognition from regulators and public and private entities that the traditional style of top-down governance, which addresses problems reactively rather than preemptively and proactively, was not effective in avoiding large-scale fraud and other violations of the law.[35] This recognition prompted the need for heightened collaboration among the government, governed entities, and other non-state actors.[36] The modern-day compliance function can be said to be largely descriptive of new governance models, specifically given its emphasis on the development of policies, programs,

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33. *See* Fanto, *supra* note 18, at 14 (noting that the Dodd-Frank Act has prompted an increase in the work of compliance officers); MILLER, *supra* note 28, at 137–39 (discussing landmarks in the history of compliance).

34. *See, e.g.*, Bird & Park, *supra* note 1, at 316–17 (referring to new governance models as "Collaborative Regulation"); Cristie L. Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 456 n.54 (2010) (discussing the post-Enron concerns that U.S. GAAP rules "were too rules-based," as opposed to principles-based, which is more descriptive of "new governance"); Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 499 (discussing the more centralized governance systems in place prior to Enron); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 744 n.271 (2005) (explaining that SOX brought about various "new governance and disclosure practices").

35. *See, e.g.*, Michael B. Runnels & Andrea Giampetro-Meyer, *Cooperative NRDA & New Governance: Getting to Restoration in the Hudson River, the Gulf of Mexico, and Beyond*, 77 BROOK. L. REV. 107, 114 (2011) (describing "new governance" approaches as fostering transparency and accountability and approaching corporate decision-making as a collaborative, non-adversarial process).

36. *See, e.g.*, On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2127 (2008) (describing new governance approaches as those that promote self-regulation and government-industry cooperation and enhance problem solving); Burkard Eberlein, Kenneth W. Abbott, Julia Black, Errol Meidinger & Stepan Wood, *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 3, 10 (2014) (discussing transnational business governance and its importance in regulating business conduct through a hybrid of public and private institutions and the place of regulatory governance in this space).

and procedures aimed at detecting red flags and possible and known violations of the law, as well as maintaining focus on self-regulation and self-reporting.[37] In this way, the compliance function's focus is internal, rather than external, thereby encouraging entities to avoid violations altogether, rather than facing government investigation or litigation at a later point. Given that all entities "exist within a nexus of legal, regulatory, and social norms," compliance may broadly comprise the ways in which entities "adapt their behavior to these constraints [or] . . . the set of internal processes used by firms to adapt behavior to applicable norms."[38] Compliance officers also commonly establish ethics programs to facilitate adherence to laws and take responsibility for the day-to-day implementation and effectiveness of such programs.[39]

Despite the potential for variation in the everyday duties of compliance officers across the board, their core function is to interpret, assess, and facilitate the organization's adherence to the regulations to which it is subject, and to offer advice about such regulations and other pertinent laws and the repercussions of non-compliance, all of which are fitting characteristics of legally trained individuals.[40] Individuals of varied backgrounds and skills may be qualified to work in the compliance field but, as many scholars have noted, a lawyer brings a uniquely advantageous set of skills to the table and many organizations prefer that a lawyer hold the position of compliance officer given their special legal training.[41] Lawyers in compliance roles advise entities on conforming behavior to the complex regulatory climate and often make predictions as to how a possible adjudicator would evaluate the entity's compliance

37. *See* Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 28 (2008) ("In the compliance context, New Governance permits a dynamic and continually reevaluated internal understanding of compliance.").

38. Griffith, *supra* note 27, at 2082.

39. *Id.* at 2083 ("[T]he compliance function effectively assumes general responsibility for business conduct consistent with social norms."); Kathleen M. Boozang & Simone Handler-Hutchinson, *«Monitoring» Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 108 (2009) (noting that while "acceptance of corporate ethics and compliance programs ultimately depends upon top-down communications," compliance officers are tasked with the duty of ensuring the daily success of such programs).

40. DeStefano, *supra* note 8, at 2990 (noting that, on the other hand, some of the skills needed for compliance officers, such as project management, technology, and training, may not be traditionally taught in law school).

41. *See* Ray W. Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses*, 85 MISS. L.J. 1, 6 (2016) (noting that services once dominated by lawyers "are being delivered by non-lawyer organizations with other important skill sets"); William W. Horton, *When Two Worlds Collide: Ethics Challenges in the Compliance Officer-General Counsel Relationship*, JONES WALKER LLP (Dec. 2015), https://kipdf.com/queue/when-two-worlds-collide-ethics-challenges-in-the-compliance-officer-general-coun_5acbb1197f8b9aeb918b45a8.html [https://perma.cc/AEV2-Z4AW].

function, thereby offering judgment based on their distinct education and expertise.[42] A legal education and/or familiarity and experience with reading, interpreting, and applying rules, regulations, and statutes has spurred the exponential growth of law students and attorneys to choose compliance as a career path.[43]

The uptick in lawyers holding compliance positions coincided with an era in which traditional employment prospects for new law school graduates were at an all-time low largely due to the financial crisis,[44] thereby opening up a wave of "J.D. Advantage" or quasi-legal career options in which neither a law degree nor bar passage is required, but is desired.[45] Currently, compliance positions across various industries comprise one of the largest portions of J.D. Advantage jobs.[46] J.D. Advantage jobs reflect "the porousness of legal practice," resulting in numerous employment opportunities for legally-trained persons in

42. Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401, 1440 (2017) ("The lawyer may go beyond a yes or no answer and suggest creative ways that a client could alter behavior to increase the likelihood that the adjudicator would find the client in compliance.").

43. *See, e.g.*, Haugh, *supra* note 3, at 1245 (discussing that lawyers have the optimal skills necessary to act as compliance officers); Chaffee*, supra* note 28*,* at 435 (noting that the legal academy is well-poised to train and contribute to the maturation of the compliance industry); Fanto, *supra* note 18, at 16–17 (discussing the potential contributions of the legal academy to the compliance field); Sokol, *supra* note 10, at 399 (noting that compliance is a "JD plus" job where a legal background is an advantage to the field).

44. *See, e.g.*, Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541, 542–43 (2014) (discussing the "dark and depressing 'New Normal'" that the practice of law since the economic downturn may forever be different); Felix B. Chang, Foreword, *Rethinking Compliance*, 84 U. CIN. L. REV. 371, 371–72 (2016) (noting that the financial crisis has profoundly changed the landscape of legal employment for lawyers and has created "a concomitant surge of 'JD plus' jobs in corporate compliance," to which law schools have responded by establishing courses in the field for law students); Eric C. Chaffee, *Answering the Call to Reinvent Legal Education: The Need to Incorporate Practical Business and Transactional Skills Training into the Curricula of America's Law Schools*, 20 STAN. J.L. BUS. & FIN. 121, 136 (discussing the struggles of law school graduates to find employment in the post financial crisis era and to be paid at rates on par with what was standard prior to the crisis).

45. *See, e.g.*, Chang, *supra* note 44, at 371–72 (discussing the onset of "JD plus" jobs after the financial crisis); *JD Advantage Jobs*, NALP, *supra* note 7 (noting that the term "JD Advantage" became a "new term of art" starting with the law school graduating class of 2011); Hillary Mantis, *What is a J.D. Advantage Career?*, NAT'L JURIST (Dec. 3, 2015, 12:50 PM), http://www.nationaljurist.com/national-jurist-magazine/what-jd-advantage-career [https://perma.cc/8AVM-B5JN] (explaining that not only is this development due to difficulty in securing traditional legal jobs, but also due to "the long term desire of many recent law grads to go into alternative legal careers").

46. *JD Advantage Jobs,* NALP, *supra* note 7 (aside from compliance positions, other J.D. Advantage positions have included work as an alternative dispute resolution specialist, a government regulatory analyst, or investment banking or consulting work); *see also* Nancy Moore, *The Future of Law as a Profession*, 20 CHAP. L. REV. 255, 263 (2017) (noting the increased presence of lawyers in quasi-legal jobs like compliance officers or "law consultant" jobs).

various areas of "law and law-related services shared by lawyers *and others*." [47] These expansions in compliance are not limited to any particular industry, as rapid growth in compliance jobs has run the gamut from financial institutions to non-governmental organizations. [48] As a result, while law students have traditionally pursued either a litigation or a transactional track in their studies, they are now increasingly discovering a third option—that of a compliance officer or compliance attorney.[49]

B. The Role of Lawyers in Compliance

The popularity of compliance as a career choice for lawyers reflects the changing realities of the profession over recent decades. Traditionally, "zealous advocate" served as the sole description of a lawyer's duties, comprising such characteristics as undivided loyalty to client, disregard for "all hazards and costs to other persons" in fulfilling that duty, and a completely client-centered focus.[50] While the zealous advocate model is most apt for a "one-to-one attorney-client relationship" engaged in litigation, [51] it is not a fitting description for organizational lawyers working in modern-day compliance roles. The passage of SOX was instrumental in furthering this change. SOX implemented mandatory attorney-reporting duties due to a collective recognition that the

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47. Judith A. McMorrow, *Moving from a Brandeis Brief to a Brandeis Law Firm: Challenges and Opportunities for Holistic Legal Services in the United States*, 33 TOURO L. REV. 259, 260 (2017) (emphasis added).

48. Mikhail Reider-Gordon & Elena Helmer, *Training the Next Generation of Anti-Corruption Enforcers: International Anti-Corruption Curriculum in U.S. Law Schools*, 14 J. INT'L BUS. & L. 169, 175 (2015) (noting that, in 2013, J.P. Morgan Chase announced plans to spend an additional $1.5 billion to create 5,000 new positions in compliance area, constituting a 30% increase in risk-control staffing and that even non-governmental organizations have been active in developing compliance programs).

49. David A. Mata, *The New Career Choice: The Compliance Attorney*, NAT'L JURIST (Feb. 1, 2018, 3:33 PM), http://www.nationaljurist.com/lawyer-statesman/new-career-choice-compliance-attorney [https://perma.cc/ZW6G-KC82].

50. MILLER, *supra* note 28, at 297 (citing distinguished British Attorney, Lord Brougham, from 1821 for "what is still the best-known justification of the lawyer's role as zealous advocate." Brougham went on to state "[s]eparating the duty of a patriot from that of an advocate, [the attorney] must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion."); *see also* Kevin R. Johnson*, Lawyering for Social Change: What's A Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 217 (1999) (noting that while the "zealous advocate" role traditionally describes the role of an attorney in an adversary system, lawyers must represent their clients "within the bounds of the law").

51. Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 216–17 (2000); *see also* Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 605–06 (2016) (noting that the "zealous advocate" role is not appropriate for modern transactional attorneys).

"executives and accountants [at Enron] [did] not work alone" but were guided by the lawyers "always there looking over their shoulder."[52] As a result, Congress included in SOX a provision requiring the U.S. Securities and Exchange Commission (SEC) to establish "minimum standards of professional conduct for attorneys appearing and practicing before the [SEC]" when they represent issuer clients.[53] The SEC promulgated these "Part 205 Rules" (as they have come to be known) in 2003, which state that if attorneys become aware of evidence of material violations of the law by the issuer or an officer, director, employee, or agent thereof, they are required to report this evidence to the issuer's chief legal officer (CLO) or the CLO and chief executive officer (CEO) together.[54] If the attorney reasonably believes that the CLO and CEO have not adequately responded to the report, the attorney is then required to report the matter up-the-ladder to the board of directors.[55] Failure to report in this manner results in SEC-imposed civil penalties.[56]

Attorneys also have a permissive disclosure option in which they may opt to externally report confidential client information to the SEC if they reasonably believe doing so is necessary to prevent substantial financial injury to the organization and its investors.[57] By requiring lawyers to blow the whistle on an internal level and expanding the instances in which they may lawfully report externally, the lawyer takes on a heightened public interest role that considers the potential negative effects of client behavior on various stakeholders, including investors, employees, and the general public. These developments contrast considerably with the zealous advocate model.

After the SEC promulgated the Part 205 Rules to satisfy this congressional mandate, the ABA followed suit.[58] In 2003, the ABA

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52. 148 CONG. REC. S6524-02 (daily ed. July 10, 2002) (statement of Sen. John Edwards); David A. Westbrook, *Telling All: The Sarbanes-Oxley Act and the Ideal of Transparency*, 2004 MICH. ST. L. REV. 441, 462 (2004) (discussing Enron as "a dramatic failure of business culture" in which various individuals, including lawyers, did not properly carry out their respective roles); *see also* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1293–94 (2003) (stating that, in the wake of Enron, "Congress, the SEC, and the public at large all suspect that, when sophisticated financial chicanery occurs, lawyers are typically present 'at the scene of the crime'" (internal citations omitted)).

53. 18 U.S.C. § 7245 (2018); *see also* Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J.L. ETHICS 1027, 1039–40 (2015) (discussing the enactment of these rules for attorneys).

54. *See* 18 U.S.C. § 7245; 17 C.F.R. § 205.3(b) (2019).

55. 17 C.F.R. § 205.3(b)(3).

56. *Id.* § 205.6.

57. *Id.* § 205.3(d).

58. *Id*. § 205.3(b); William Freivogel, Chair, *ABA Model Rules and the Business Lawyer*, COMM. PROF'L RESP., http://apps.americanbar.org/buslaw/newsletter/0077/materials/ethics.pdf

amended Model Rules 1.6 (duty of confidentiality) and 1.13 (organization as client) to mirror the new SEC regulations requiring attorney reporting.[59] Current Rule 1.6 permits attorneys to disclose confidential client information without client consent in certain circumstances, including to prevent a client from committing a crime or fraud "that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[60] In addition, Rule 1.13, which governs lawyer behavior when representing an organization as client, was amended to include the same up-the-ladder, mandatory attorney reporting duties as SOX.[61] Rule 1.13 also allows an attorney to report externally without client consent after exhausting internal reporting if the lawyer reasonably believes it necessary to prevent substantial harm to the organization, thereby establishing a permissive disclosure option that is similar to the Part 205 Rules.[62] Notably, Model Rule 1.13 extends even further than the SOX attorney reporting duties by imposing no limitation on the person or entity to whom the lawyer may make the permissive disclosure, thereby allowing the lawyer to report to any third party that may suffer financial harm due to the organization's misconduct, as opposed to the Part 205 Rules that limit external disclosures only to the SEC.[63]

The ABA amendments of Rules 1.6 and 1.13 are believed to have resulted both from an effort to tame the new federal regulation of attorneys through SOX and a general desire on the part of the ABA to enhance a lawyer's facilitation of increased transparency and accountability within organizations.[64] These amendments and the Part 205 Rules help solidify a

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[https://perma.cc/P8H7-YJY9].

59. Freivogel, *supra* note 58 (summarizing the ABA's amendments of 2003 to Model Rules 1.6 and 1.13).

60. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983). These amendments expanded upon the exceptions that permit lawyers to disclose confidential information to third parties. *Am. Bar Ass'n Task Force on Corp. Resp.*, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility July 16, 2002*, 58 BUS. L. 189, 203–04 (2002) [hereinafter ABA Amendments].

61. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 1983). Prior to these amendments, Rule 1.13's up-the-ladder reporting obligations were triggered only when misconduct was related to the lawyer's representation and the overall tone of the rule tended to discourage the lawyer from taking action to respond to corporate wrongdoing. *See* ABA Amendments at 203–04.

62. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 1983).

63. *Id.* (stating simply that the "lawyer may reveal information relating to the representation"); *see also* Pacella, *supra* note 34, at 538–39 (explaining how Model Rule 1.13 extends disclosure options further than that of the Part 205 Rules under SOX).

64. *See, e.g.*, Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 731–33 (2004) (discussing these amendments as a result of the "ABA's desire to keep the SEC and the rest of the federal government at bay"); Jenny E. Cieplak & Michael K. Hibey, *The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or*

more modern perception of lawyers as "gatekeepers"—individuals who play a crucial role in the compliance function by monitoring organizations to prevent unlawful and unethical client behavior.[65] The "gatekeeper" metaphor envisions the lawyer as exercising authority to either permit or deny an organization to enter a "gate," or some business objective, depending on whether applicable standards or rules would be violated if allowed to proceed.[66] A lawyer's up-the-ladder reporting duties provide an "early warning system" for directors (especially those who are independent and not involved with daily operations) to raise issues and ensure that the entity has proper channels in place to ensure compliance with the law.[67] In general, mandatory internal reporting provides numerous benefits to organizations within any industry, including avoiding the escalation of problems into unmanageable burdens that may lead to government investigation, litigation, or financial losses; the

Complementary?, 17 GEO. J. LEGAL ETHICS 715, 728 (2004) (noting that the ABA implemented these amendments to address the public's desire for increased transparency); Peter J. Henning, *Sarbanes-Oxley Act 307 and Corporate Counsel: Who Better to Prevent Corporate Crime?*, 8 BUFF. CRIM. L. REV. 323, 341 (2004) (noting that the ABA amendments were intended to "reflect what should be the exercise of sound judgment in representing a corporation, that any misconduct by a corporation's agent or officer must be reported to senior management or the organization's highest authority").

65. *See, e.g.*, MILLER, *supra* note 28, at 293 (discussing the important role of gatekeepers in the compliance function); Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413–14 (2008) (discussing how both inside and outside counsel fulfill their gatekeeping roles); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 113–14 (2006) (discussing the duties of attorneys to act as "gatekeepers" for the organizations that they represent). Other professionals such as accountants and auditors are also commonly referred to as "gatekeepers." *See* Joseph A. Franco, *Of Complicity and Compliance: A Rules-Based Anti-Complicity Strategy Under Federal Securities Law*, 14 U. PA. J. BUS. L. 1, 37, 69 (2011) (discussing the role of auditors and accountants as gatekeepers).

66. MILLER, *supra* note 28, at 293–95 ("The gatekeeper has control over the gate, and accordingly can prevent or impede the client from achieving its objective."); *see also* Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 123–24 (2006) (noting that common definitions of gatekeeper include the following: "a reputational intermediary who provides verification or certification services to investors," and one "who is 'positioned at a critical point in the flow of events' where approval is needed before a transaction can close" (internal citations omitted)).

67. Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1112–13 (2003) (discussing that "reporting up" has a valuable gatekeeping function, including improvement in information flow and early detection of concerning matters); Beverley Earle & Gerald A. Madek, *The New World of Risk for Corporate Attorneys and Their Boards Post-Sarbanes-Oxley: An Assessment of Impact and a Prescription for Action*, 2 BERKELEY BUS. L.J. 185, 202 (2005) (discussing how the requirement of reporting up the ladder supports the "SOX mandate that securities attorneys act as internal gatekeepers"); Theodore Sonde & F. Ryan Keith, *"Up the Ladder" and Over: Regulating Securities Lawyers—Past, Present & Future*, 60 WASH. & LEE L. REV. 331, 348 (2003) (discussing the ABA's amendments as an effort to promote compliance within entities).

promotion of an ethical culture; and an increased likelihood that entities can successfully navigate the modern complex web of regulations.[68]

In addition, the ability to exercise the permissive disclosure option and report out illustrates a heightened focus on self-regulation and self-reporting to the government and/or the regulating body of the particular industry, which are all key concepts in compliance.[69] There are many examples of current regulatory policies that significantly reduce penalties for self-reporting violations of the law. For example, pursuant to the SEC's analytical framework for deciding whether to bring an enforcement action against a corporation, the Seaboard Report provides cooperation credit to entities that actively self-police and self-report violations and cooperate with the agency to rectify the problem.[70] Additionally, the DOJ's Foreign Corrupt Practices Act (FCPA) Enforcement Policy, now permanent after a pilot program instituted under the Obama Administration, significantly benefits entities that self-report, fully cooperate, and remediate any FCPA-related matters.[71]

If these actions are taken, the policy allows an entity to receive a declination from criminal charges and, if criminal charges do become warranted, self-reporting and cooperation will result in a recommendation of a fifty percent reduction off the low end of the U.S. Sentencing Guidelines.[72] The DOJ's Yates Memo of 2015 also provides consideration for cooperation under the Principles of Federal Prosecution of Business

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68. James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Financial Firms*, 2014 B.Y.U. L. REV. 1121, 1163–64 (2014) (discussing the benefits of compliance programs and internal reporting); Moberly, *supra* note 65, at 1132 (2006) (discussing how SOX's internal reporting duties are beneficial to the organization).

69. *See* Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS U. L. REV. 605, 649–51 (1995) (discussing the avoidance of liability through self-regulation through compliance programs).

70. SEC, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, EXCHANGE ACT RELEASE NO. 34-44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/5587-HCTA]; *see also* Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 167–70 (2010) (discussing cooperation policies); *SEC Spotlight, Enforcement Cooperation Program*, SEC (Sept. 20, 2016), http://www.sec.gov/spotlight/enfcoopinitiative.shtml [https://perma.cc/QN4C-K6SF].

71. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ENF'T POLICY, (2019), https://www.justice.gov/criminal-fraud/file/838416/download [https://perma.cc/YXQ9-KM3D] [hereinafter *Enf't Policy*]; *see also* Karen Woody, *"Declinations with Disgorgement" in FCPA Enforcement*, 51 U. MICH. J.L. REFORM 269, 270–71 (2018) (discussing how the FCPA's Pilot Program, with its focus on incentivizing voluntary disclosure and government cooperation, provides for eligibility for a declination from the DOJ).

72. *Enf't Policy, supra* note 71 (declinations are generally granted "absent aggravating circumstances involving the seriousness of the offense or the nature of the offender").

Organizations to entities that make a complete disclosure to the DOJ of "all relevant facts about individual misconduct."[73] As such, the Yates Memo encourages self-reporting, specifically as it pertains to identifying culpable individuals within an organization.[74] The overwhelming expansion of these governmental policies allows organizations that have effective compliance programs and skilled compliance officers on board to avoid significant penalties through a focus on deterrence, self-policing, and self-reporting, each of which are descriptive of some of the most fundamental components of the compliance function.[75] As compliance roles continue to expand, new questions arise as to the regulation of the lawyers operating in such roles.

II. THE REGULATION OF "LAW-RELATED SERVICES"

A. The Practice of Law

As a threshold matter, the inevitable question of whether lawyers operating in compliance roles are "practicing law" must be addressed. Although collective instinct may deem such work to be outside the realm of law practice, the title of lawyer, in itself, often leads constituents of an organization to believe, whether the case or not, that an attorney-client relationship has been formed.[76] As noted earlier, even the ABA's Compliance Officer's Deskbook acknowledges that a lawyer who is a compliance officer is likely to expect the substance of their work to be privileged,[77] but it is necessary to be cognizant of the fine lines between law practice and law-related services, the latter of which may not

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73. U.S. DEP'T OF JUSTICE, INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING, (2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/M69Y-CSCQ] (the Yates Memo places a heavy focus on the importance of identification of all individuals involved in the misconduct).

74. Catherine Greaves, *DOJ Stresses Individual Accountability in New "Yates Memo"*, A.B.A. (Oct. 1, 2015), https://www.americanbar.org/publications/aba_health_esource/2015-2016/october/yatesmemo.html [http://perma.cc/86Y5-MHZ2].

75. *See, e.g.*, Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 700 (2017) (defining compliance as a system of policies or processes aimed to deter violations of the law, regulations, or applicable norms); Sarah L. Stafford, *Outsourcing Enforcement: Principles to Guide Self-Policing Regimes,* 32 CARDOZO L. REV. 2293, 2297 (2011) (discussing the importance of voluntary self-policing as part of the compliance function).

76. *See* Michele DeStefano, *Creating A Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 137 (2014) (quoting general counsel who oversee compliance roles stating that constituents of an organization view lawyers who are not in a role in which they are practicing law as lawyers, nonetheless, to be relied on for legal advice regardless of title).

77. COMPLIANCE OFFICER'S DESKBOOK, *supra* note 11, at 124.

necessarily invoke the privilege or other coveted characteristics of an attorney-client relationship.

The question of attorney-client privilege applicability is a crucial consideration for compliance work given its influence upon the individuals comprising the organization. If such persons know from the onset that the privilege applies, they are likely to share information with the lawyer much more freely. When the general counsel serves simultaneously as the compliance officer, it is often quite difficult for individuals to know whether or not the privilege applies.[78] Attorney-client privilege applies to communications between an attorney and client when made for the purpose of obtaining an opinion of law, legal services, or assistance in a legal proceeding, and when made without the presence of strangers.[79] The privilege applies only to situations in which the lawyer is providing "legal advice or services" and "will not protect disclosure of non-legal communications where the attorney acts as a business or economic advisor."[80] As courts have made clear, neither the attorney-client privilege nor work-product protections apply to documents or communications produced as part of an internal investigation within an entity's compliance department when that investigation was not conducted for the purpose of receiving or providing legal advice, prior to litigation emerging, or when a non-lawyer carrying out the investigation was not acting as the lawyer's direct agent.[81]

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78. *See, e.g.*, Thomas O'Connor, *When You Come to A Fork in the Road, Take It: Unifying the Split in New York's Analysis of In-House Attorney-Client Privilege*, 25 J.L. & POL'Y 437, 457 (2016) (noting the difficulty for the corporate client to determine whether communications at issue are legal in nature and subject to the attorney-client privilege when an attorney is simultaneously serving as a compliance officer).

79. *See* Peterson v. Bernardi, 262 F.R.D. 424, 428 (D.N.J. 2009); Edwards v. Whitaker, 868 F. Supp. 226, 228 (M.D. Tenn. 1994) (citing Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 630 (W.D.N.Y.1993)).

80. *Whitaker*, 868 F. Supp. at 228 (citing *Hydraflow*, 145 F.R.D. at 631); *see also* United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) ("[E]ven though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation." (quoting Charles A. Wright et al., 8 Fed. Prac. & Procedure § 2024, at 346)); U.S. *ex rel*. Gale v. Omnicare, Inc., No. 1:10–CV–00127, 2013 WL 5525697, at *1 (N.D. Ohio Oct. 4, 2013) (finding that business communications made in business meetings when an attorney is present are not protected from disclosure).

81. *See, e.g.*, Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 495–96 (S.D.N.Y. 2013) ("Privilege does not apply to an internal corporate investigation . . . made by management itself." (internal citations omitted)); Arizona *ex rel*. Goddard v. Frito-Lay, Inc., 273 F.R.D. 545, 557 (D. Ariz. 2011) (determining that attorney-client privilege did not apply to the results of an investigation conducted by a compliance officer); *Omnicare*, 2013 WL 5525697, at *2 (holding that the attorney-client privilege did not apply to documents drafted by a compliance officer just because general counsel and other attorneys may have also received these documents). *But see In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 758 (D.C. Cir. 2014) (holding privilege applied to communications between company employees and non-attorney investigators acting at the direction of counsel when

In at least one instance, a court denied application of the attorney-client privilege to communications made by constituents of an organization to a non-lawyer chief compliance officer conducting routine compliance work, even though the general counsel directly supervised the compliance department.[82] Despite the attorney's supervisory role over the compliance department, the court found that the privilege was still not applicable because the compliance officer was not preparing for a lawsuit or responding to legal claims or litigation at the time.[83] Therefore, the privilege is not likely to apply to most interactions with compliance officers who, in the course of their typical job duties, are not rendering legal advice or opinions or defending the company in a legal proceeding, all of which are actions that have traditionally described the "practice of law."[84] Rather, the compliance officer is monitoring and managing an organization's behavior to avoid that these very actions ever become necessary.

Many scholars have acknowledged the significant difficulty of defining "the practice of law" in any concrete manner,[85] especially as it pertains to rendering legal advice versus non-legal business or strategic advice[86]— a discrepancy that is especially relevant in the field of compliance. The Model Rules provide no definition of the "practice of law" and defer the matter completely to the individual states.[87] Comment 2 to Model Rule 5.5, which prohibits the unauthorized practice of law by non-lawyers, notes that the "definition of the practice of law is established by law and varies from one jurisdiction to another. *Whatever the definition*, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[88] As is visible through this commentary, the ABA appears most concerned about the risk that a

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the investigators were deemed "agents" of the attorney).

82. *Whitaker*, 868 F. Supp. at 228.

83. *Id*.

84. *See infra* notes 89–91.

85. *See, e.g*., DeStefano, *supra* note 8, at 2961–62 (noting, especially in the context of determining whether unauthorized practice of law statutes apply, the inability of the legal profession to define the practice of law); Brandon M. Meyers*, Addressing the Boundaries of the Legal Profession's Monopoly Through A Model Definition of the Practice of Law,* 40 J. LEGAL PROF. 321, 325 (2016) (noting the absence of a clear definition of the practice of law); Deborah L. Rhode & Lucy B. Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2605 (2014) (noting the widespread lack of definition of the practice of law).

86. DeStefano, *supra* note 8, at 2961–62 (noting that this distinction is "indeterminate").

87. MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 1983); *see also In re* Pinkins, 213 B.R. 818, 820 (E.D. Mich. Oct. 14, 1977) ("The formidable task of constructing a definition of the practice of law has largely been left to the judiciary." (internal citations omitted)).

88. MODEL RULES OF PROF'L CONDUCT r. 5.5. cmt. 2 (AM. BAR ASS'N 1983) (emphasis added).

non-attorney will perform responsibilities that could constitute the "practice of law," rather than providing guidance as to how a clear definition is established. This lack of clarity is pertinent to compliance officers who are also lawyers, given the gray area in determining whether they are providing services that are legal in nature.

Definitions of the practice of law across the fifty states are "consistently vague," fact-specific, and extremely difficult to summarize into one description.[89] Many judicial interpretations have expressed the inability to set forth a precise description of law practice, thereby making clear that questions on the topic must be decided on a case-by-case basis depending on the specific facts of the matter.[90] For example, an Arkansas court stated that "[r]esearch of authorities by able counsel and by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law."[91] A court in Florida held that:

> Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case.[92]

As these quotes reveal, state courts have tended to shy away from establishing a definition that could be widely applicable, thus deferring the question to some future determination where individual facts will be

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89. Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553, 563 (2015); *see also, e.g.*, Evan G. Zuckerman, *Justicecorps: Helping Pro Se Litigants Bridge A Divide*, 49 COLUM. J.L. & SOC. PROBS. 551, 584 (2016) (discussing the variations among states in defining law practice); Victor Li, *Talk to Me Issues Papers Seeking Feedback on How Legal Services Are Regulated Prompt Lots of Comments but Little Consensus*, 102 A.B.A. J. 65, 66 (Sept. 2016) (discussing the extreme difficulty in defining what constitutes the practice of law).

90. *See* Anya E.R. Prince & Arlene M. Davis, *Navigating Professional Norms in an Inter-Professional Environment: The 'Practice' of Healthcare Ethics Committees*, 15 CONN. PUB. INT. L.J. 115, 139 (2016) (noting that states have "experienced difficulty" in creating rules to guide what is meant by the practice of law); Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1389 (2015) (discussing the lack of clarity as to how states define the practice of law).

91. Ark. Bar Ass'n v. Block, 323 S.W.2d 912, 914 (1959) (concluding subsequently that each case presenting this issue must be decided based on its own facts).

92. State *ex rel*. Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962); *see also* State *ex rel*. Johnson v. Childe, 23 N.W.2d 720, 723 (Neb. 1946) ("An all inclusive definition of what constitutes the practice of law is too difficult for simple statement. We shall not attempt it here. . . .").

analyzed. The existing state definitions are "not much more helpful than the standard for defining obscenity: we know it when we see it."[93]

The ABA has compiled a comparison of the fifty states' definitions of the "practice of law," which, upon examination, reveal that some common themes may be drawn from the various definitions—all such themes center around a litigation-focused approach in which client representation occurs in a tribunal-like or adversarial setting.[94] Many state definitions focus heavily on adjudicative elements, defining law practice, most prominently, to include actions like appearing as an advocate; drawing papers or pleadings to enforce rights before a court or other entity as part of proceedings; preparing or drafting documents to enforce legal rights; or providing redress for a lack of rights or wrong committed.[95] All of these actions imply that "law practice" constitutes a reactive response to a problem, rather than a preventative measure to avoid problems before they occur.

While some states have also acknowledged that the practice of law may be described more generally as providing advice or counsel on various subjects, none have included the monitoring, surveillance, and preventative measures that are typically descriptive of a compliance officer's duties within their definitions.[96] Rather, the "practice of law" tends to center on after-the-fact representation in which clients are in need of some type of advocacy because they have been sued or their rights have been violated in some way. While "practice of law" definitions fail to provide one consistent description, most states do converge on the requirement that the person providing the services is one specifically trained or knowledgeable in the law; operates in a representative capacity to enforce or defend another's rights with skilled, legal knowledge;[97] or

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93. Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 88–89 (2015).

94. A.B.A., State Definitions of the Practice of Law, https://www.americanbar.org/content/dam/aba/administrative/professionalresponsibility/model-def_migrated/model_def_statutes.authcheckdam.pdf [https://perma.cc/7QZA-HLWP] [hereinafter A.B.A., State Definitions]; see also Bruce A. Green, The Litigator's Monopoly, 40 A.B.A. Litig. 10 (Summer 2014) (discussing that there are ambiguities as to what professional services are "legal services" versus the "practice of law" for purposes of unauthorized practice of law statutes and noting that, despite the lack of clarity, "it has long been assumed that if any one service constitutes the practice of law and is therefore off-limits to non-lawyers, it is litigation.").

95. A.B.A., *State Definitions*, supra note 94 (citing the various state adaptations of the definition of the practice of law); *see also* Moxley, *supra* note 89, at 563 (noting that a comparative analysis of the various state definitions have summarized the following duties as most comprehensive in outlining what comprises the practice of law: directing and managing the enforcement of legal rights or legal claims, giving or offering legal advice as to such enforcement, rendering opinions, and drafting documents "by which such rights are created, modified, surrendered or secured . . . .").

96. A.B.A., *State Definitions*, supra note 94.

97. *See, e.g.*, ALASKA STAT. § 08.08.230 (R. 63) (2019); Denver Bar Ass'n v. Public Utilities

possesses the "professional judgment of a lawyer."[98] The ABA has also attempted to set forth that "functionally the practice of law 'relates to the rendition of services for others that call for the professional judgment of a lawyer.'"[99]

In light of the uncertainty of defining the practice of law and the general consensus among states that, at a minimum, possession of specialized, legal knowledge or judgment is required, it is a reasonable conclusion that the work of a compliance officer or a person engaged in the compliance function does not fit squarely into the "practice of law" for purposes of triggering adherence to all of the ABA's Model Rules of Professional Responsibility. This is the case because compliance officers are not necessarily trained in law. As previously noted, such individuals need not possess a J.D. or a law license. While possession of a J.D. may be an advantage, it is not a requirement for the job.[100] Further, the definitions of law practice among the states have in common a focus on litigation-related activities, whether the drafting of pleadings, advocacy, or representation in an adjudicative setting.[101] Such activities are not on par with the work of a compliance officer, which is focused on organizational monitoring for red flags to ensure, well in advance of actual violations,

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Comm'n, 391 P.2d 467, 471 (Colo. 1964) ("We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law [in Colorado]."); Fink v. Peden, 17 N.E.2d 95, 96 (Ind. 1938) (noting that, in Indiana, the "practice of law" "is to carry on the business of an attorney at law . . . to exercise the calling or profession of the law."); KY. REV. STAT. § SCR 3.020 (2020); LA. REV. STAT. § 37: 212 (2012); *In re* Welch, 185 A.2d 458, 459 (Vt. 1962) ("In general, one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply the possession and use of legal knowledge and skill.").

98. *See, e.g.*, N.H. SUP. CT. r. 35 (defining law practice as that which requires the "professional judgment of a lawyer," which is defined as the "educated ability to relate the general body and philosophy of law to a specific legal problem of a client"); IOWA CODE PROF'L RESP. EC 3-5; State *ex rel*. Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962) (noting that those engaged in law practice " possess legal skill and a knowledge of the law greater than that possessed by the average citizen"); R. J. Edwards, Inc. v. Hert, 504 P.2d 407, 416 (Okla. 1972) (defining the practice of law in Kansas as "the rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent"); *In re* Discipio, 645 N.E.2d 906, 910 (Ill. 1994) ("The focus of the inquiry must be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent."); State v. Rogers, 705 A.2d 397, 400 (N.J. App. Div. 1998) ("The practice of law is not 'limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill, and ability are required.'" (internal citations omitted)).

99. A.B.A. Comm. on Ethics and Prof'l Responsibility, Informal Op. 1311 (Mar. 11, 1975) (internal citations omitted).

100. *See supra* section I.A.

101. *See supra* notes 95–99.

that an entity is conforming its behavior to the expectations of the appropriate governing regulatory agency.

As discussed, in many cases, a compliance officer, in conjunction with the organization, would opt to self-report the non-conformities to the government for cooperation credit or to work in tandem with the agency to establish a compliance remediation plan.[102] Each of these activities, especially the self-reporting, diverge from the traditional role of attorneys that still largely comprise the various state definitions of law practice. For these reasons, compliance work that does not overlap with the general counsel function is not likely to fit squarely within services that constitute the "practice of law." The next logical inquiry, then, is whether a better fit for compliance constitutes "law-related services," which, if deemed applicable, would trigger full adherence to the professional rules of conduct pursuant to ABA Model Rule 5.7.[103]

B. Rule 5.7

One study, which consisted of interviews with seventy compliance officers and general counsels of S&P 500 corporations across different industries, revealed that most of the individuals within those entities perceived compliance officers, whether trained in the law or not, as being involved with interpreting the law in some way or offering advice that may be legally related.[104] As various interviewees expressed, "you often face . . . compliance officers giving legal advice—*and it's hard for them not to do it sometimes*, given the nature and scope of their jobs . . . . " and "internal clients, and even lawyers working within the legal department itself, *sometimes believe that they can receive (or are receiving) legal advice* from the compliance officer." [105] The compliance officers interviewed who hold no law degree or law license also expressed that their job largely consists of reading and interpreting the law or regulations that are on point to guide their monitoring of the entity, which involves researching and interpreting legal precedent for guidance.[106] As such, it is often not clear where legal work ends and compliance duties begin.

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102. *See supra* section I.B.

103. *See* MODEL RULES OF PROF'L CONDUCT r. 5.7 (AM. BAR ASS'N 1983).

104. DeStefano, *supra* note 8, at 2977; *see also* James Fanto, *Dashboard Compliance: Benefit, Threat, or Both?*, 11 BROOK. J. CORP. FIN. & COM. L 1, 7 (2016) (noting that "compliance officers are specialists in legal obligations" and also contribute greatly to the ethical climate and culture of the institution).

105. DeStefano, *supra* note 8, at 2977 (emphasis added) (quoting various interviewees).

106. *Id*. at 2978.

As explained in the previous section, while it is not a precise fit to define compliance work as the "practice of law," at a minimum, a lawyer in a compliance role is very likely to render services that would be "law-related" given the broad definition of how such services are defined.[107] Accordingly, ABA's Model Rule 5.7, "Responsibilities Regarding Law-related Services," would be triggered, which prompts adherence to the full range of ethical rules even when the services provided are non-legal. Rule 5.7 rule reads in full as follows:

> a) A lawyer shall be subject to the Rules of Professional Conduct *with respect to the provision of law-related services*, as defined in paragraph (b), if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.[108]

The definition of "law-related services" is very much on point to describe the compliance function. Commentary to the rule elaborates that "law-related services" would exist in a "broad range of economic and other interests of clients," with enumerated examples including "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."[109] Given the expansiveness of this commentary and the definition itself, it is reasonable to argue that compliance work is, at a minimum, descriptive of the services listed above. A compliance officer's work largely consists of interpreting applicable law, regulations, and statutes, and monitoring the organization for conformity with these mandates through compliance programs, advice, internal reporting systems, and the encouragement of ethical

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107. *Id*. at 2979 (noting that the following law-related services may be included in the corporate compliance context: public relations, banking, financial, or accounting services).

108. MODEL RULES OF PROF'L CONDUCT r. 5.7. (AM. BAR ASS'N 1983) (emphasis added).

109. MODEL RULES OF PROF'L CONDUCT r. 5.7. cmt. 9 (AM. BAR ASS'N 1983).

practices—all constituting services that are very likely to "reasonably be performed in conjunction with and in substance are related to" legal services.[110] Compliance services are substantively related to legal services not only because an entity's legal and compliance functions must be in sync to ensure appropriate remediation of any violations,[111] but also because it is ultimately the law itself that dictates whether an organization has complied with the regulations incumbent upon it and whether its compliance program is effective. Simply put, one must know the laws and regulations in substance to ensure compliance with them.

In addition, it is significant that the definition of law-related services includes a requirement that the services being offered "are not prohibited as unauthorized practice of law when provided by a non-lawyer."[112] Therefore, the services must actually comprise those that may lawfully be carried out by non-legal laypersons without any argument that such persons are committing an unauthorized practice of law.[113] As discussed, there is absolutely no requirement that a compliance officer be an attorney—a law degree or law license, while desirable in the current era, have never been prerequisites to employment qualification. For these reasons, it is reasonable to conclude that the compliance function fits squarely within the realm of what would constitute law-related services, thereby prompting adherence to Rule 5.7.

Subsection (1) of the rule triggers the application of all of the professional rules of conduct when a lawyer provides law-related services that are so intertwined with the legal services being rendered that the two are indistinguishable from each other, which often occurs when the lawyer is providing both types of services with respect to the same matter.[114] As this part of the rule guards against, when the two types of services are indistinguishable in this way, it is reasonable for the recipient to mistakenly believe that all of the various protections of the attorney-client relationship are being afforded, including a duty of confidentiality, prohibitions against conflicts of interest, and, if applicable, the existence of attorney-client privilege.[115]

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110. *See supra* section I.A.

111. *See infra* note 181.

112. MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 1983).

113. Unauthorized practice of law statutes, which have been adopted in some form by all of the states, bar prohibit non-lawyers from providing legal services and practicing law. *See generally* David G. Ebner, *Crossing the Border: Issues in the Multistate Practice of Law,* ROCKY MT. MINERAL L. SPEC. INST. (1988); DeStefano, *supra* note 8, at 2961 (discussing unauthorized practice of law statutes).

114. *See* MODEL RULES OF PROF'L CONDUCT r. 5.7 cmt. 8 (AM. BAR ASS'N 1983).

115. *See id.* at cmt. 1; PHILA. BAR ASS'N, Ethics Op. 2003-16 (2004) (discussing the situations that Rule 5.7 is intended to cover).

This type of scenario is most likely to play out when a lawyer wears the dual hat of compliance officer and general counsel and is thus providing both legal and law-related services at the same time. As examined earlier in this section, it may prove to be impossible to distinguish between legal and law-related services in this context, and result in significant confusion for organizational clients to know whether an attorney-client relationship exists in all settings.[116] Therefore, it is reasonable, per Rule 5.7, to expect a joint general counsel/compliance officer to follow the full spectrum of attorney professional conduct rules for both types of services.

In circumstances where the legal and law-related services are distinct from each other, however, subsection (2) is applicable. The crux of this subsection is to trigger adherence to the full set of professional conduct rules in all other circumstances not captured by subsection (1).[117] As such, the coverage of this rule is much broader than it initially appears on its face to apply to the services rendered by "entities" that are controlled by lawyers.[118] This situation is most likely to occur when the chief compliance officer of an organization is not simultaneously the general counsel, or operates within a separate department from that of legal counsel.

Rule 5.7 was developed in the early 1990s in response to efforts by law firms to relax restrictions on lawyers sharing fees with non-lawyers and to regulate lawyers engaging in ancillary businesses or creating multidisciplinary practice arrangements with other professionals like accountants, engineers, social workers, or medical experts.[119] While Rule 5.7's original aim was to ensure that lawyers engaged in ancillary businesses or business ventures with non-lawyers would still be held to ethical rules for their non-legal services if the client failed to understand that there was no attorney-client relationship for those services,[120] the modern interpretation of this rule is much broader and extends to lawyers

116. MODEL RULES OF PROF'L CONDUCT r. 5.7(a)(2) (AM. BAR ASS'N 1983).

117. Id.; *see also infra* note 118 and accompanying text.

118. MODEL RULES OF PROF'L CONDUCT r. 5.7(a)(2) cmt. 4. (AM. BAR ASS'N 1983); Spitzer, *supra* note 20, at 6, 50.

119. *See* Roberta S. Karmel, *Will Law Firms Go Public?*, 35 U. PA. J. INT'L L. 487, 498 (2013) (noting that New York adopted Rule 5.7 in light of the recognition that law firms often provide non-legal services that may be difficult to distinguish from legal services); Spitzer, *supra* note 20, at 50–52 (discussing the history of Rule 5.7).

120. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING, 51:02, 51–54 (4th ed., 2015); Spitzer, *supra* note 20, at 50 (discussing the history of the ABA as it pertains to the development of this rule).

in any setting who provide law-related services that laypersons may also perform.[121]

Application of the rule in this manner was solidified by the ABA's House of Delegates Ethics 2000 Commission, which amended some Model Rules and broadened Rule 5.7's scope specifically to apply to all circumstances not covered by subsection (1), which captures all instances in which a lawyer provides law-related services that are distinct from legal services.[122] The Commission explained that the change in interpretation was needed to "eliminate[] an unintended gap in the coverage of the Model Rule" and "precludes an overly restrictive reading of paragraph (a)(1) to the effect that the provision of law-related services could never be distinct from the provision of legal services if directly provided by a lawyer or law firm."[123] This extensive reach of Rule 5.7, however, is reined in by an exception providing an "out" articulated in subsection (2), which allows lawyers to avoid being subject to the full span of professional conduct rules if they take "reasonable measures" to inform the recipient of the law-related services that such services are not legal in nature and that the protective benefits of an attorney-client relationship will not be triggered.[124] This provision has been described as a "consumer and public protection regulation . . . meant to protect non-legally trained individuals from being taken advantage of by lawyers."[125]

Most state jurisdictions have adopted Rule 5.7 as it is currently written.[126] The following fifteen states have not adopted Rule 5.7 in any form: Alabama, California, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Jersey, Oregon, Texas, Virginia, and Wyoming.[127] The following states have adopted the same language that is set forth in the ABA's Model Rule 5.7: Arizona,

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121. Spitzer, *supra* note 20, at 62 (discussing the applicability of the rule to all lawyers providing "law-like activities" that may also be provided by non-lawyers).

122. *Ethics 2000 Commission*, MODEL RULE 5.7, REPORTER'S EXPLANATION OF CHANGES, AM. BAR ASS'N., https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule57rem/ [https://perma.cc/4TXV-8WRE]; *see also* Spitzer, *supra* note 20, at 62–63 (discussing the broad application of Rule 5.7).

123. *Ethics 2000 Commission*, *supra* note 122.

124. *See* MODEL RULES OF PROF'L CONDUCT r. 5.7(a)(2) (AM. BAR ASS'N 1983).

125. Spitzer, *supra* note 20, at 55.

126. *See infra* notes 127–128.

127. *See* ALA. RULES OF PROF'L CONDUCT; CAL. RULES OF PROF'L CONDUCT; CONN. RULES OF PROF'L CONDUCT; HAW. RULES OF PROF'L CONDUCT; ILL. RULES OF PROF'L CONDUCT; KY. RULES OF PROF'L CONDUCT; LA. RULES OF PROF'L CONDUCT; MONT. RULES OF PROF'L CONDUCT; NEV. RULES OF PROF'L CONDUCT; N.J. RULES OF PROF'L CONDUCT; OR. RULES OF PROF'L CONDUCT; and TEX. RULES OF PROF'L CONDUCT (each lacking some version of Model Rule 5.7).

Arkansas, Colorado, Delaware, Georgia,[128] Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Washington, D.C.[129]

New York, Pennsylvania, and Ohio, however, have each made some noteworthy variations to their versions of the rule. New York's Rule 5.7 uses the term "nonlegal services" rather than "law-related services," which is defined as "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer."[130] In contrast, the ABA version of the rule contains a reasonability requirement to determine the meaning of "law-related services," defining such services as those "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services."[131] New York's adaptation thereby renders the universe of services subject to this rule broader than those covered by the Model Rules given that it encompasses nearly all services in which any non-lawyer may also engage. Subsection (2) of the New York rule also differs from Model Rule 5.7 in two important respects, and reads as follows:

> A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could

128. The language of Georgia's Rule 5.7 is the same as that of the ABA version except that it adds the following sentence at the end of the rule to limit the maximum penalty for lawyers who fail to comply with the rule: "The maximum penalty for a violation of this Rule is a public reprimand." *See* GA. RULES OF PROF'L CONDUCT r. 5.7.

129. *See* ARIZ. RULES OF PROF'L CONDUCT r. 5.7; ARK. RULES OF PROF'L CONDUCT r. 5.7; COLO. RULES OF PROF'L CONDUCT r. 5.7; DEL. RULES OF PROF'L CONDUCT r. 5.7; GA. RULES OF PROF'L CONDUCT r. 5.7; HAW. RULES OF PROF'L CONDUCT r. 5.7; IDAHO RULES OF PROF'L CONDUCT r. 5.7; IND. RULES OF PROF'L CONDUCT r. 5.7; IOWA RULES OF PROF'L CONDUCT r. 5.7; KAN. RULES OF PROF'L CONDUCT r. 5.7; ME. RULES OF PROF'L CONDUCT r. 5.7; MD. RULES OF PROF'L CONDUCT r. 5.7; MASS. RULES OF PROF'L CONDUCT r. 5.7; MICH. RULES OF PROF'L CONDUCT r. 5.7; MINN. RULES OF PROF'L CONDUCT r. 5.7; MO. RULES OF PROF'L CONDUCT r. 5.7; NEB. RULES OF PROF'L CONDUCT r. 5.7; N.H. RULES OF PROF'L CONDUCT r. 5.7; N.M. RULES OF PROF'L CONDUCT r. 5.7; N.C. RULES OF PROF'L CONDUCT r. 5.7; N.D. RULES OF PROF'L CONDUCT r. 5.7; OKLA. RULES OF PROF'L CONDUCT r. 5.7; R.I. RULES OF PROF'L CONDUCT r. 5.7; S.C. RULES OF PROF'L CONDUCT r. 5.7; S.D. RULES OF PROF'L CONDUCT r. 5.7; TENN. RULES OF PROF'L CONDUCT r. 5.7; UTAH RULES OF PROF'L CONDUCT r. 5.7; VT. RULES OF PROF'L CONDUCT r. 5.7; WASH. RULES OF PROF'L CONDUCT r. 5.7; W. VA. RULES OF PROF'L CONDUCT r. 5.7; WIS. RULES OF PROF'L CONDUCT r. 5.7; D.C. RULES OF PROF'L CONDUCT r. 5.7.

130. N.Y. RULES OF PROF'L CONDUCT r. 5.7(c).

131. MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 1983).

> reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.[132]

The first difference is that New York's version prioritizes client interpretation, rather than a lawyer's directive, to determine whether the protections of the attorney-client relationship will be triggered. This determination is based on the client's "reasonabl[e] belie[f]" as to whether such a relationship was formed,[133] rather than any action taken by the lawyer to inform the client otherwise. Like use of the term "nonlegal services,"[134] such language has the effect of broadening the reach of the rule to require lawyers to follow all of the professional rules in the course of their compliance work.

Second, the above language makes clear that the available "out" (although harder to achieve through the New York rule since it is based on the reasonable belief of the recipient of the services) is not limited to the context of services provided by "entities," but also captures individual lawyers. The advantage of such language over the current form of ABA's Model Rule 5.7 is that it is clearly stated in the rule and allows an individual lawyer who is providing non-legal services that are distinct from legal services to have a mechanism for avoiding the full application of the professional rules. Although the reach of ABA's Model Rule 5.7 is intended to have the same result after the clarifications of the Ethics 2000 Commission discussed earlier,[135] the fact that current subsection (2) fails to explicitly name individual lawyers creates the potential for confusion as to whether a lawyer falling in this category may avoid the full application of the rules by using "reasonable measures" to inform the recipient that the services are not legal. One scholar has expressed that the drafting of subsection (2), in referring only to "entities," was an oversight and should be treated as such.[136]

Further, the "out" available in the New York rule is expanded upon through an additional subsection stating the following:

> [I]t will be presumed that the person receiving non-legal services believes the services to be the subject of a client-lawyer relationship *unless* the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the non-legal services. . . . [137]

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132. N.Y. RULES OF PROF'L CONDUCT r. 5.7(a)(2).

133. *Id.*

134. *Id.*

135. *See supra* notes 122–123.

136. Spitzer, *supra* note 20, at 63.

137. N.Y. RULES OF PROF'L CONDUCT r. 5.7(a)(4) (emphasis added).

While, at first glance, the presumption described here may create concerns of expanded liability for lawyers because it would automatically create an attorney-client relationship if no action is taken by the lawyer, it provides the benefit of making absolutely clear (unlike Model Rule 5.7, which uses the term "reasonable measures") exactly what a New York lawyer must do to avoid application of the presumption. In this way, New York lawyers providing non-legal services are called upon to take clearly articulated steps from the onset, in the form of a writing, to avoid any confusion as to the nature of the services being provided.

Pennsylvania's Rule 5.7, similar to that of New York, also uses the term "nonlegal services" rather than "law-related services," but defines it in the same manner as Model Rule 5.7.[138] Its equivalent of subsection (2) is also similar to that of New York in that it captures both lawyers who own or control ancillary businesses and those who do not in having an "out" from full application of the ethical rules.[139] In this case, adherence to the ethical rules is triggered "if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship."[140] Thus, Pennsylvania's rule is more of a middle road between that of Model Rule 5.7, which is focused on a lawyer taking "reasonable measures," and New York's Rule 5.7, which is client-focused. The Pennsylvania rule then proceeds to excuse lawyers from full adherence to the ethical rules if they have made "reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services."[141] Such "efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient."[142] Therefore, this rule provides for a similar disclosure requirement as that of New York, but lacks the requirement that it be in writing.

In response to an inquiry from a general counsel of a corporation who was being asked to make a non-legal business decision for the company, a Philadelphia Bar Association Advisory Opinion advised that its Rule 5.7 applies in this exact situation and that the lawyer "has a duty" to the client to (a) clearly explain when and how attorney-client privilege would apply;

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138. PA. RULES OF PROF'L CONDUCT r. 5.7(e). "Non-legal services" in Pennsylvania are defined as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." *Id.*

139. *Id*. r. 5.7(b), (c).

140. *Id*. r. 5.7(c).

141. *Id*. r. 5.7(d).

142. *Id*.

(b) clearly explain that certain communications in this context may not be privileged; and (c) articulate which non-legal services are so distinct from legal services that the protections of the rules of professional conduct may not apply.[143] This letter emphasized the sheer importance of informing the client of these facts in advance, since any work done by the in-house counsel, whether non-legal or legal, "will have the imprimatur of being done by an attorney, and thus could be subject by others who scrutinize her conduct to the expectation that the highest ethical standards apply to all of her company functions."[144]

Finally, Ohio's version of Rule 5.7 requires an additional mandate for a lawyer "who controls or owns an interest in a business that provides a law-related service," barring lawyers from "requir[ing] any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business."[145] In such instances, lawyers must disclose their interest in the business to any such customers and inform them that they are free to "obtain legal services elsewhere. . . . "[146] In this way, the rule ensures (a) that a lawyer operating an ancillary business will not induce already-existing customers receiving non-legal services from the business to continue to work with the lawyer if legal services are later needed; and (b) vice-versa—that an existing client of a lawyer receiving legal services need not utilize the lawyer's ancillary business if any non-legal services are desired.

In summary, New York, Pennsylvania, and Ohio have each included on the face of the rule itself some form of disclosure obligation involving affirmative steps that the lawyer must take to ensure, from the onset, that it is absolutely clear that the law-related or non-legal services being provided do not carry with them all of the protections of a typical attorney-client relationship. In turn, the lawyer is able to avoid the full application of the professional rules to their non-legal services. In the context of the compliance function, this type of clarity is especially crucial given that full application of the professional rules would result in exceedingly complex and sometimes impossible expectations on the part of the non-practicing compliance lawyer given that such work does not fit squarely into the types of rules that were created to govern the "practice of law." As a result, lawyers in such positions become subject to considerable personal liability. These concerns will be addressed next.

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143. PHILA. BAR ASS'N, Advisory Op. 2008-8 (Oct. 2008).

144. *Id*.

145. OHIO RULES OF PROF'L CONDUCT r. 5.7(b), (c).

146. *Id*. r. 5.7(b).

III. LIABILITY CONCERNS FOR LAWYERS IN COMPLIANCE

A. Imprecise Fit of Professional Conduct Rules

When compliance officers who are also lawyers become subject to the full span of professional conduct rules, they also become susceptible to heightened personal liability and potential disciplinary action by their respective jurisdictions for risk of violating one of the many ethical rules that are not a perfect fit for the non-legal, compliance work that they provide. There are several examples of professional conduct rules that would create unique difficulties to ensure that the rule is properly followed by compliance officers who, although may be admitted to the bar and answerable to their respective jurisdiction of admission, are neither serving in a general counsel role nor practicing law.

For example, Model Rule 1.1 requires a lawyer to represent a client competently, defined as "requir[ing] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[147] To ensure adherence to this rule, lawyers who are functioning as compliance officers described above must possess the requisite knowledge and skill pertaining to the applicable regulatory scheme that governs the industry in which their organization is operating, which may prove to be a very difficult task because of the extensive breadth and depth of the regulations in question, both at the state and federal level.[148] In addition, lawyers would need to constantly monitor their shortcomings as they pertain to competency issues and, if necessary, "refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."[149] This requirement may be problematic in the types of organizational settings in which compliance officers or compliance departments exist, as opposed to a law firm or legal

147. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983). In determining whether competency exists, the commentary to the rule lists various factors to be considered, including:

> The relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. *Id.* cmt. 1.

148. *See* William W. Horton, *When Two Worlds Collide: Ethics Challenges in the Compliance Officer-General Counsel Relationship*, JONES WALKER LLP (Dec. 2015), https://kipdf.com/queue/when-two-worlds-collide-ethics-challenges-in-the-compliance-officer-general-coun_5acbb1197f8b9aeb918b45a8.html [https://perma.cc/AEV2-Z4AW] (discussing how ensuring competency creates potential concerns for joint lawyers/compliance officers working in the healthcare compliance arena).

149. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 1983).

department where others with varying specializations may be readily available for reference.[150]

In addition, the rules pertaining to the disclosure of confidential information in Model Rule 1.6 and to conflicts of interest in Model Rules 1.7 to 1.11 are of particular concern to a joint lawyer/compliance officer.[151] Pursuant to Rule 1.6, lawyers must maintain client confidences, which the ABA deems a "fundamental principle" that "contributes to the trust that is the hallmark of the client-lawyer relationship."[152] Various exceptions allow lawyers to reveal confidential information when they reasonably believe necessary to prevent severe instances such as death, bodily harm, crimes and frauds, and other permitted circumstances.[153] Lawyers held to this rule in the compliance context must be particularly cognizant of its limitations, especially given their duties to report the organization's compliance violations to the board of directors or the applicable regulator. If this rule were to apply to their compliance work, they would need to be careful to argue that an external report fits one of the exceptions to the rule permitting disclosure, which is not likely to be the case when the report is being made preemptively to a regulator to timely address an early-stage red flag.[154]

Further, Model Rules 1.7 through 1.9 each bar a lawyer from representing clients if doing so would involve a conflict of interest, whether posing a conflict with current or future clients (Rules 1.7 and 1.9, respectively), or where a lawyer acquires an interest that is adverse to the client (Rule 1.8).[155] Rule 1.8 is likely to emerge as a greater concern for compliance officers in the context of compensation issues. When a compliance officer's compensation structure is based on the business line's financial performance, this could create a conflict of interest and

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150. *See* Horton, *supra* note 148 (noting that certain compliance-related skills, specifically in the healthcare sector, may involve technical billing and coding, medical necessity, or cost report issues, which tend to be out of the purview of the lawyer/compliance officer).

151. Comment 10 to Model Rule 5.7 highlights these rules as being particularly important when a lawyer rendering law-related services is obliged to adhere to the full set of ethical rules. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 1983).

152. *Id*. r. 1.6 cmt. 2.

153. *Id*. r. 1.6(b).

154. John B. McNeece, IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677, 678 (2012); *see also* DeStefano, *supra* note 8, at 124 (discussing how the "rules and standards regulating lawyers" differentiate them from compliance officers with respect to self-reporting); *Preserving Confidentiality*, 12 ACCA DOCKET, no. 1, Winter 1994, at 24, 44 (noting that a compliance officer's failure to report may result in a complicit individual being subject to prosecution, whereas a lawyer has an obligation to maintain confidentiality in such situations).

155. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.8, 1.9, 1.10, and 1.11 (AM. BAR ASS'N 1983).

undermine the independence of the compliance function.[156] Although an October 2008 letter issued by the Board of Governors of the Federal Reserve advised that compensation and incentive programs for compliance staff should not be based on financial business performance to avoid these types of conflicts, a recent survey of compliance staff compensation by the National Regulatory Services revealed that sixty percent of the respondents do participate in some type of incentive compensation program.[157] Such concerns are especially prevalent in the financial services industry, in which incentive compensation through annual bonuses may have the effect of doubling or tripling one's base income.[158]

In addition to the potential conflict stemming from compensation-based issues, a compliance officer's direct reporting line may also pose a conflict of interest concern. It is commonly argued that the board of directors should have oversight over compliance officers with respect to hiring, compensation, and termination, and that compliance officers should report directly to the board rather than to officers or general counsel.[159] Yet in many cases, the executive officers have control over compliance officers and receive their reports.[160] This situation could lead to a conflict of interest given that there are times when the compliance officer's position might contrast with the wishes or desired direction of management, thereby resulting in intense pressures for the compliance officer to succumb to the pressures of management to avoid threats to job security.[161] In fact, various instances of compliance officers opting to

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156. *See* Vishal Melwani, *Refining Compliance Within Large Banking Organizations in a Post SR 08-8 World*, 9 BROOK. J. CORP. FIN. & COM. L. 615, 622 (2015) (discussing this potential conflict and acknowledging the inherent contradiction it poses: "how can compliance staff be compensated if not for the performance of the business line that contributes to the firm's bottom line?"); Aruna Viswanatha & Brett Wolf, *Wall Street's Hot Hire: Anti-Money Laundering Compliance Officers*, REUTERS FIN. REG. FORUM (Oct. 14, 2013), http://blogs.reuters.com/financial-regulatory-forum/2013/10/14/wall-streets-hot-hire-anti-money-laundering-compliance-officers/ [https://perma.cc/ZZ2S-WFPP] (discussing the rapid increase in compliance jobs and increased compensation).

157. *See* Melwani, *supra* note 156, at 622–23 (noting that the data presented through this survey, although differing depending on the compensation structure, revealed that on average incentive compensation is typically 20% to 30% of base compensation but can even reach 100% of base compensation).

158. *See id*. (noting that the data presented through this survey, although differing depending on the compensation structure, revealed that on average incentive compensation is typically 20% to 30% of base compensation but can even reach 100% of base compensation).

159. *See, e.g.*, Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 694 (2009).

160. *Id.* at 693.

161. *Id.* at 693–94.

forego an investigation due to pressure from management have been reported.[162]

B. Inherent Tension Between Law Practice & Compliance Work

Given that the requirements of Rule 5.7 differ based on whether law-related services are being provided in circumstances that are distinct from the lawyer's provision of legal services, one way to minimize potential liability is to clearly separate the legal and compliance departments within an organization. There has been extensive scholarly debate as to whether an organization's legal and compliance functions should be departmentalized, or operate as separate units, from each other.[163] Various corporate scandals occurring over the last two decades, and spanning multiple industries, have prompted regulators to favor the separation of the two functions.[164] In particular, the SEC and the Department of Health and Human Services have each required corporations that have engaged in wrongdoing to both establish stand-alone compliance departments, and appoint a chief compliance officer who reports directly to the board of directors, rather than to the general counsel.[165] Regulators commonly believe that a compliance department that is separate from the legal function will allow more autonomy and independence to the former to discover, report, and manage instances of non-compliance because general counsel would not have a chance to filter or safeguard the information before it reaches the board of directors.[166] This regulatory preference towards separation of the two functions is also telling of the inherent differences between a compliance officer and an attorney, especially pertaining to the relationship of these individuals with the organization itself and with regulators; in essence, the compliance officer represents the regulator, rather than the organization that it monitors.[167]

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162. *Id.* (also noting claims of compliance officers losing their jobs after deciding to resist orders from management).

163. *See, e.g.,* DeStefano, *supra* note 8, at 124 (explaining the arguments for and against departmentalization); Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 500 (2012) (discussing the "robust debate" as to whether compliance professionals should operate separately from legal counsel).

164. DeStefano, *supra* note 8, at 73–74 (noting that the trend of separating the two functions).

165. *Id.* at 74–75.

166. *Id.* at 124; *see also* Langevoort, *supra* note 163, at 500 (discussing how this influences "professional competition" between lawyers and compliance officers). In addition, separation may also allow the compliance industry as a whole to gain increased status in the corporate arena given that it is not controlled by the legal function. *See id.*

167. *See* Fanto, *supra* note 104, at 5 (discussing the role of the compliance officer as guardians of regulatory and other obligations who design policies and procedures to ensure that the organization meets these external requirements).

In society and in professional culture, lawyers tend to be perceived as trusted, revered confidants and advisors offering a level of trust to clients that would be unparalleled in other settings.[168] This level of trust, inherent in the various duties of loyalty and confidentiality that every attorney is called to uphold, is likely to be in tension with that of the fundamental role of a compliance officer, as compliance officers are commonly perceived as either regulators themselves or as agents of regulators that police entities to ensure rules are being followed.[169] In contrast, the general counsel has a much more protective role over the organization and is likely to have a more adversarial relationship with the regulator in defending the entity against litigation or shielding it from liability.[170] Various scholars and practitioners have also noted the tendency to perceive lawyers as possessing a certain "cast of mind" or exercising more "strategy" than compliance officers so that the wishes of the client may be followed, even if that may mean finding loopholes in the law.[171] Studies have revealed that lawyers, specifically when in charge of compliance, are more likely than compliance officers "to lead their organizations into a game-playing posture."[172] As one scholar put it, in some cases, lawyers, particularly in-house counsel, may become subject to a sort of "ethical numbing," thereby leading the lawyer to adopt "the same occupational morality as the managers with whom they work,

168. *See, e.g.*, Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1116 (2000) (noting that "basic principles of loyalty, competence and confidentiality" are "defining principles for the practice of law [and] among the core values of the legal profession"); State *ex rel*. S.G., 814 A.2d 612, 617 (N.J. 2003); Bohatch v. Butler & Binion, 977 SW.2d 543 (Tex. 1998) (each noting the almost sacred bond between attorney and client); Seth Rosner, *The Consigliere*, 9 GEO. J. LEGAL ETHICS 191, 193 (1995) (describing a lawyer as "consigliere, or counselor in the broadest professional sense," the "old-fashioned . . . trusted advisor"); Edward J. Greenfield, former Justice of the Supreme Court of New York, Letter to the Forum, *Attorney Professionalism Forum*, 76 N.Y. ST. B. A. J., Jan. 2004, at 48 (2005) (noting that the lawyer's position is one "of trust as counsel, confidant, champion and fiduciary" (quoting Sanders v. Rosen, 605 N.Y.S.2d 805, 808 (Sup. Ct. 1993)).

169. MILLER, *supra* note 28, at 130 (comparing a compliance officer to "a beat cop walking the corridors of the company's organization chart to ensure that rules and regulations are being followed."); *see also* DeStefano, *supra* note 8, at 122–23 (describing that proponents of departmentalization have argued that doing so results in more independence and autonomy of the compliance officer); McNeece, IV, *supra* note 154, at 677–78 (noting the inherent tensions in external reporting that exist when the general counsel also serves as the compliance officer, the latter of which has duties to report compliance obligations).

170. MILLER, *supra* note 28, at 127–28 (noting that, despite these differences, the general counsel will usually still have input in a company's response to the detection of a legal violation).

171. DeStefano, *supra* note 8, at 135–36.

172. *See* Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 239–40 (2009).

because they are subject to the same social exigencies, power struggles, personal uncertainties and demands of expediency that characterize the corporate bureaucratic organization."[173] In-house counsel are often faced with strong pressures to follow the wishes of management—their refusal to do so may compromise not only their standing within the organization, but also their job security.[174] As such, they are susceptible to retaliation in much the same way as employees are for insubordination, and there have been numerous instances of retaliation cases occurring against counsel for refusing to follow the wishes of management.[175]

While such perceptions cannot and should not be used to generalize all attorneys, they do raise concerns that are more likely to be associated with the tensions that exist when an entity's general counsel is simultaneously wearing the hat of chief compliance officer, as opposed to a non-lawyer acting solely in a compliance role. Senator Chuck Grassley, while leading a committee to investigate a large-scale fraud within Tenet Healthcare Corporation, one of the largest hospital operators in the country, publicly "blasted" the corporation's joint general counsel and chief compliance officer in 2003 for the inherent conflict of interest that allegedly rendered her unable to prevent the scandal.[176] He expressed that:

> [A]s general counsel, [she] zealously defended [the corporation] against claims of ethical and legal non-compliance . . . while as chief compliance officer, she supposedly ensured compliance by [the corporation's] officers, directors, and employees. . . . [I]t doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.[177]

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173. Mark A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867, 879–80 (2004); *see also* Greg Radinsky, *The Compliance Officer Conundrum: Assessing Privilege Issues in a Health Care Setting*, 5 DEPAUL J. HEALTH CARE L. 1, 3 (2002) ("[T]he dual roles [of general counsel/CO] will make it difficult for the corporate counsel to maintain objectivity when providing advice about the deficiencies of the compliance program he/she oversees.").

174. Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 246–47 (2016).

175. *See, e.g.*, Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1083–86 (2008) (discussing numerous cases of attorneys who were retaliated against for reporting misconduct, either internally or externally or resisting management); Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1005–06 (2005) (discussing the prevalence of retaliation against in-house counsel).

176. Charles E. Grassley, *Grassley Investigates Tenet Healthcare's Use of Federal Tax Dollars*, CHUCK GRASSLEY, U.S. SEN. FOR IOWA (Sept. 7, 2003), https://www.grassley.senate.gov/news/news-releases/grassley-investigates-tenet-healthcares-use-federal-tax-dollars [https://perma.cc/LSU7-ASW9].

177. Martin, *supra* note 29, at 170 (internal citations omitted); *see also* Hutchens, *supra* note 5, at 67 (noting that when counsel also wears the hat of compliance officer, it "can become a nightmare. . . .").

In contrast to the general counsel's role, the compliance function, in its most fundamental form, is centered around "neutral fact finding," the detection and prevention of misconduct, and assurance that the organization operates to facilitate the best interests of all stakeholders, all of which involve not just the constituents of an organization but also internal and external parties.[178] In this way, it has been argued that the compliance function is often more focused on the question of whether entities "should" take some action, as opposed to the legal department historically being sometimes more focused on whether entities "*can* do something."[179] Additionally, the compliance function also involves characteristics that extend beyond legal capabilities into expertise in management, training, human resource issues, auditing, communications, and internal controls.[180] Despite these inherent differences between the compliance and legal functions, it is widely acknowledged that the two are nevertheless jointly responsible for an entity's overall adherence to the law and regulatory landscape and that thus, even if they are housed in separate units, they must be in communication with each other and have a good working relationship.[181] A healthy partnership between the legal and compliance functions helps to ensure a culture of integrity that is centered on honesty, fairness, and other crucial values that facilitate effective governance.[182]

Despite the need for a collaborative partnership in this manner, lawyers within the compliance function should also be mindful of the risk of liability by regulatory agencies that may seek to hold them personally responsible for the compliance failures of their respective organizations. Recently, the SEC has expressed an interest in imposing liability against in-house counsel and lawyers who carry out gatekeeping roles.[183] One such threat involves requiring lawyers to "take ownership of violations"

178. DeStefano, *supra* note 8, at 148 (emphasis omitted) (citing interviews with chief compliance officers, including individuals who formerly practiced law, as to the important distinctions between the legal and compliance functions); *see also* Tabuena & Smith, *supra* note 5, at 25–26.

179. DeStefano, *supra* note 8, at 148–49 (emphasis added).

180. Tabuena & Smith, *supra* note 5, at 26; *see also* Roy Snell, *Having an Effective Compliance Program Is Not About Being Perfect Seasoned Compliance Leader Discusses Program Effectiveness Evaluations*, 17 J. HEALTH CARE COMPLIANCE 37, 66 (2015) (discussing the various skills and traits of effective compliance officers).

181. *See, e.g.*, Bird & Park, *supra* note 174, at 203–05 (discussing the contributions of the Chief Legal Officer to the corporate compliance function); Martin, *supra* note 29, at 184 (noting that practitioners have expressed the importance of coordinating legal and compliance functions); David B. Wilkins, *Team of Rivals—Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2131–32 (2010) (discussing the interplay between the legal and compliance functions).

182. Bird & Park, *supra* note 174, at 236–38.

183. *See* Eric Hammesfahr, *SEC's Stein Suggests Attorneys Sign Disclosures*, CQ ROLL CALL, 2014 WL 2119345 (2014) (discussing SEC attempts to impose liability).

by including statements and a signature attesting to the accuracy of clients' disclosure statements in SEC filings, a requirement that has previously been designated only to chief financial officers under SOX.[184] Stating that "[n]othing focuses the mind like signing your own name," SEC staff have expressed the agency's desire to hold attorneys in compliance roles just as liable as other gatekeepers like accountants and auditors, without hiding behind the attorney-client privilege, given their involvement in "getting corporations to follow the law in completing disclosure documents."[185] One SEC staff member in particular has expressed concern that the attorney-client privilege may have the effect of shielding lawyers in compliance roles from responsibility for their company's violations and that they should arguably face the same kind of scrutiny as other gatekeepers, given their role in providing advice on corporate transactions and reviewing disclosures.[186]

Traditionally, the organized bar has heavily resisted government efforts to impose responsibility upon lawyers to ensure their clients' compliance with the law.[187] In 1975, the ABA expressed that this type of imposition would "evoke serious and far-reaching disruption in the role of the lawyer as counselor, which would be detrimental to the public, clients, and the legal profession."[188] This line of thinking is based on the more traditional "moral independence" or "non-accountability" theory of lawyering, which takes the view that lawyers are "independent" from their clients and thus cannot be morally responsible for the wrongs that their clients commit.[189] This theory, however, is no longer adequate to reflect the

184. *Id.* (noting the desire of the SEC to impose liability in this manner); *see* 18 U.S.C. § 1350(b) (2018) (requiring principal executives and financial officers of public companies to certify the accuracy of their company's financial statements).

185. Hammesfahr, *supra* note 183.

186. *Id*. ("When lawyers provide bad advice or effectively assist in a fraud, sometimes their involvement is used as a shield against liability for both themselves and for others." (citing Commissioner Kara M. Stein)). Stein also asked the question "Are we treating lawyers differently from other gatekeepers, such as accountants?" *Id.*; *see also* Frank C. Razzano, *Is the SEC Targeting Lawyers?*, 36 SEC. REG. L.J. 1, 1 (noting the uptick in the SEC targeting lawyers for violations of gatekeeping duties); Dylan L. Ruffi, *Attorney-Client Privilege in Corporate Administration: A New Approach*, 9 BROOK. J. CORP. FIN. & COM. L. 640, 640 (2015) (discussing the "burgeoning concern" in the modern corporate world that lawyers who provide dual legal and non-legal roles will "use their dual roles as shields against discovery—invoking attorney-client privilege to immunize otherwise unprotected communications.").

187. Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 558–59 (1994).

188. *Id.* (citing ABA REPORT TO THE HOUSE OF DELEGATES, SECTION ON CORPORATION, BANKING, AND BUSINESS LAW (1975)).

189. *See* Michal McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1, 8 (2013) (describing the moral independence theory as "[a] deep-seated yet controversial precept of our legal system"); *see also*

compliance and gatekeeping roles that many attorneys play in modern society, which embody an important public interest role that strays from traditional definitions of the practice of law centered on litigation, advocacy, and representation in an adversarial setting. As Richard Painter has discussed, a model more appropriate to modern day attorney-client interactions may be described as a "moral *interdependence* theory" in which it is acknowledged that "[o]ften, lawyers and clients accomplish objectives together, not separately."[190]

Lawyers representing clients in transactional, regulatory, and compliance contexts have different responsibilities than those representing clients in criminal or tort contexts. The latter requires the attorney to represent a client who may have committed a crime or tort and seeks the help of a lawyer to represent them through the adversarial process—in this instance, the attorney is clearly not liable for the client's crime or tort. In contrast, lawyers representing clients in transactional, regulatory, and compliance contexts are often advising clients on legal and ethical actions to be taken, are more intimately engaged with day-to-day corporate behavior, and play a substantial role in what information the client ultimately decides to self-report or disclose in a public filing.[191] "When lawyers monitor disclosure of information to regulators and investors . . . lawyers assume some responsibility for the flow of accurate information. A litigator's responsibility for the integrity of the adversary system is not the issue; a corporate lawyer's responsibility for the integrity of the financial markets is."[192]

Thus, even if lawyers have attempted to establish independence from clients by objecting to wrongful conduct, that conduct may be said to be "imposed by the client upon a compliance or transactional framework designed by the lawyer and so contaminates the framework such that the lawyer has an obligation to repudiate it in its entirety."[193] This risk is particularly relevant to a compliance officer, who is directly involved in establishing frameworks, mechanisms, policies, and procedures to ensure adherence of the organization to the rules and regulations that govern its behavior. For these reasons, it is crucial that the ethical rules governing the behavior of lawyers, especially as they pertain to those functioning as compliance officers who are not practicing law, provide with absolute clarity the extent to which they are obligated, if at all, to provide the

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Painter, *supra* note 187, at 511–16 (discussing the limitations of this theory).

190. Painter, *supra* note 187, at 511 (emphasis added).

191. *See id.* at 508.

192. *Id.* at 570.

193. *Id.*

organizational client with all of the coveted characteristics that are typical of the attorney-client relationship.

IV. PROPOSALS FOR REFORM

To better regulate the professional behavior of lawyers engaged in compliance roles, Rule 5.7 is in need of reform. There is sufficient evidence that state bars and courts actively enforce Rule 5.7. Various courts have disciplined or excluded from representation a number of lawyers for violations of the rule.[194] In addition, numerous state bars have issued ethics opinions, both generally and in response to inquiries, that highlight the existence of Rule 5.7 in their jurisdictions and clarify that enforcement of the rule will be upheld in situations in which admitted attorneys provide law-related services in conjunction with their legal services.[195] Some of the most recent ethics opinions in this context have found that adherence to all of the rules of professional conduct would be necessary when the following non-legal services are being provided: accounting services that substantially overlapped with legal services; instances in which a licensed attorney was acting as a real estate agent under a broker's supervision; the management by lawyers of a for-profit adoption agency; the provision of mediation services; when former judges engage in law-related businesses; an investment match-making service in which lawyers introduced potential investors to clients in search of capital for start-up businesses; and the provision of lien search services through a law firm's own employees.[196]

This insight from bar associations and courts indicates that enforcement of Rule 5.7 likely also applies against compliance officers who are admitted attorneys, given that their work can be described as a law-related

194. Sneed v. Bd. of Prof'l Responsibility, 301 S.W.3d 603, 610 (Tenn. 2010); *In re* Peper, 763 S.E.2d 205, 209 (S.C. 2014); *In re* Disciplinary Action Fraley, 709 N.W.2d 624, 625 (Minn. 2006); *In re* Rost, 211 P.3d 145, 156 (Kan. 2009); *In re* Guste, 118 So. 3d 1023 (La. 2012) (imposing disciplinary actions on an attorney for violations of Rule 5.7); *In re* Disciplinary Action Against McCray, 755 N.W.2d 835 (N.D. 2008) (imposing disciplinary actions on an attorney for violations of Rule 5.7); *see also* Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 390 (2005) (noting that various courts have disciplined lawyers providing "law-related services" for violating Rule 5.7).

195. A search on Westlaw on the existence of state bar ethics opinions covering Rule 5.7 yielded sixty-six results. *See, e.g.*, N.Y. BAR. ASS'N. COMM. PROF'L. ETHICS, N.Y. Ethics Op. 1135 (2017) (clarifying that Rule 5.7 will be enforced by the jurisdiction); UTAH BAR ETHICS ADVISORY OP. COMM., Utah Ethics Op. 17-07 (2017) (same); N.C. BAR, N.C. Ethics Op. 10 (2015) (same); N.Y. BAR. ASS'N. COMM. PROF'L. ETHICS, N.Y. Ethics Op. 1026 (2014) (same); OHIO BD. COMM'RS. ON GRIEVANCE & DISCIPLINE, Ohio Advisory Op. 2013-3 (2013) (same); N.Y. BAR. ASS'N. COMM. PROF'L. ETHICS, N.Y. Ethics Op. 958 (2013) (same); N.Y. BAR. ASS'N. COMM. PROF'L. ETHICS, N.Y. Ethics Op. 896 (2011) (same).

196. *See supra* state bar ethics opinions accompanying note 195, respectively.

service subject to the rule. In 2009, the Supreme Court of Kansas disbarred a retired attorney on inactive status who continued to "practice law" by providing legal advice to clients, appearing in court with clients, and splitting fees with another attorney on client matters.[197] While these actions alone constituted the unauthorized practice of law, the court also found that the attorney had violated Rule 5.7 by operating a consulting business in which he rendered business advice and accounting services to his clients, which were deemed to be law-related services warranting reasonable measures to inform clients that a lawyer-client relationship had not been established for those services.[198] In failing to provide such disclosures, the lawyer had violated the rule; "[t]he principal culprit is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship."[199]

The Supreme Court of Louisiana suspended an attorney for charging a client an excessive fee in violation of the state's rules of professional conduct.[200] In that case, the attorney had represented a nursing home resident in both the preparation of a power of attorney and a criminal proceeding arising from a hit and run accident.[201] When these legal services ended, the attorney continued to assist the client with duties like taking him to the bank and running other personal errands with him, for which she charged him her hourly fee as an attorney.[202] The attorney testified that "during her six-month relationship with [the client], he frequently told her that he 'wanted an attorney' on a full-time basis and that because of her legal training, he trusted her to handle his affairs."[203] The court concluded that the client "came to rely upon [the respondent] because of her position as a lawyer and that this confidence did not dissipate simply because she had concluded a court case."[204] The court went on to explain that this kind of "blur[ring of] the line[s]" between legal and non-legal services made it impossible to "draw any line of demarcation" between the two, and so treated all of her fees as legal fees.[205] However, because the court still recognized that the attorney had

197. *In re* Rost, 211 P.3d at 146–55.

198. *Id*. at 156–58.

199. *Id.* at 156.

200. *In re* Guste, 118 So. 3d 1023, 1032 (La. 2012).

201. *Id.* at 1025.

202. *Id.*

203. *Id.* at 1031.

204. *Id.*

205. *Id.* at 1031–33.

charged her client for time as a lawyer while she was providing non-legal services, her fee was determined to be excessive and she was suspended from practice for two years.[206]

In one case interpreting New York's Rule 5.7 (known as Disciplinary Rule 1-106 at the time), an attorney was disqualified when he was found to have a conflict of interest in representing a plaintiff who was suing a school that allegedly discriminated against her.[207] The attorney had previously provided non-legal auditing services for the school that was being sued, during which time he obtained confidential information about the school.[208] A dispute existed in that case as to whether the precise nature of the work that the attorney had provided to the school was legal in nature. Without resolving that exact question, the court upheld the presumption that an attorney-client relationship had been formed since it was not demonstrated that the client reasonably believed otherwise.[209] There was no evidence that the lawyer had exercised his disclosure option to inform the school in advance that legal services were not being rendered.[210]

Each of these cases offers a fitting example of the perils of non-disclosure and exemplifies that, in situations where the non-legal work may be reasonably interpreted to have legal components, there is a strong likelihood that the client will believe that an attorney-client relationship is in place. This likelihood is strongest in organizations comprising both lawyers and non-lawyers who are engaged in a common goal. For example,

> [w]hile a non-lawyer would immediately understand that a law graduate who owns and operates a craft brewery is not providing "law-related services," the distinction might not be so clear if an attorney is part-owner of a lobbying firm that includes both lawyer and non-lawyer lobbyists, a patent firm with both attorneys and non-lawyer patent agents, or a tax consulting service employing lawyers, accountants, and tax advisors who are neither.[211]

In much the same way, constituents of an organization—whether they be directors, officers, managers or employees—are likely to be susceptible to confusion if their compliance officer is either wearing the

206. *Id.*

207. Ehrich v. Binghamton City Sch. Dist., 210 F.R.D. 17, 18–19 (N.D.N.Y. Oct. 2002).

208. *Id.* at 19.

209. *Id.* at 23.

210. *Id.*

211. Spitzer, *supra* note 20, at 55.

dual hat of general counsel or, even if not in that role, is simply a lawyer by training.[212] There is evidence that this risk is especially significant in the compliance context. Some general counsels overseeing compliance have noted a frequent perception that:

> There is NO such thing as a non-practicing lawyer—purely practical—if you are a lawyer, you are a lawyer. It doesn't matter if you are licensed to practice law or not. People look at you as a lawyer and rely on you as it and believe you dispense legal advice despite [your] title.[213]

As this statement supports, lawyers do tend to embody a certain "degree of *gravitas*" within organizational settings, generally prompting individuals within an organization to respond more quickly and comprehensively to their requests or inquiries for information.[214]

While the potential for confusion as to whether an attorney-client relationship exists is high in a compliance context, it is not isolated to it—in actuality, it commonly occurs whenever various law-related services are being provided, whether involving trust officers interacting with bank customers, real estate attorneys providing title insurance, or any of the other scenarios contemplated by Rule 5.7 that are deemed to be law-related services.[215] For these reasons, Rule 5.7 should be amended to incorporate the preventative disclosure obligation that is currently contained in the versions of Rule 5.7 adopted by New York, Ohio, and Pennsylvania.

While some may perhaps view a disclosure obligation of this nature as an additional burden for attorneys, the benefits far outweigh the relatively small costs of taking these preemptive steps because they would offer a mechanism for the attorney to avoid being bound to the full spectrum of ethical rules while conducting compliance-only services. In addition, recipients of law-related services would be clearly informed from the beginning as to the exact nature of their relationship with the lawyer. Subsection (2) of Rule 5.7 contains an "out" for lawyers providing law-related services to avoid being held to all of the other rules if they "take *reasonable measures* to assure that a person obtaining the law-related

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212. Remus, *supra* note 2, at 1280 (noting that "confusion [pertaining to whether a lawyer-client relationship has been formed] frequently surrounds" interactions between an attorney not practicing law within an organization and the individuals within the entity).

213. DeStefano, *supra* note 8, at 137 (quoting various interviewees holding joint general counsel/compliance positions).

214. MILLER, *supra* note 28, at 193.

215. *See*, *e.g.*, Andrew M. Goldner, *Minding Someone Else's Businesses: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 GEO. J. LEGAL ETHICS 767, 772 (1998) (same); Remus, *supra* note 2, at 1280 (discussing the types of law-related services currently contemplated by the rule).

services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist."[216] As noted, subsection (2) also refers to "entities" controlled by lawyers and fails to explicitly include individual lawyers who may be employees of an organization as being able to avail themselves of this option.[217] Although, as discussed, this subsection is intended to capture all other circumstances not covered by subsection (1),[218] the potential for confusion remains as to whether a lawyer who does not "control" an entity may utilize the "reasonable measures" out given the lack of explicit mention in the rule. Clarity to this language would ensure that compliance officers, who are employees of the organizations that they monitor,[219] would not be excluded from the rule's protective disclosure option.

An additional problem with Rule 5.7 is that subsection (2)'s use of the term "reasonable measures" is fraught with great potential for confusion due to its lack of specificity. Neither Rule 5.7 nor the commentary thereto explains what constitutes a reasonable measure that would sufficiently ensure that the lawyer has successfully avoided application of all of the rules.[220] Comment 7 to the rule explains that "[t]he burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding."[221] It then proceeds to note that what satisfies the threshold of "reasonable measures" will differ depending on the "sophisticat[ion] [of the] user of law-related services"; "[f]or instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit."[222]

In the context of compliance services, judging the sophistication of the recipient of the law-related services is likely to be quite a challenge given that such persons would consist of various identifiable constituents, whether employees of any level, members of the management team, the board of directors, or other lawyers working in the compliance

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216. MODEL RULES OF PROF'L CONDUCT r. 5.7(a)(2) (AM. BAR ASS'N 1983) (emphasis added).

217. *Id*.

218. *See supra* notes 114–123, 134–135 and accompanying text.

219. Boozang & Handler-Hutchinson, *supra* note 39, at 108 ("[C]ompliance officers are employees of the company they monitor and audit.").

220. *See* MODEL RULES OF PROF'L CONDUCT 5.7 (AM. BAR ASS'N 1983) (lacking such explanations).

221. *Id.* cmt. 7.

222. *Id.*

department—each of whom obviously possesses a differing level of comprehension as to the extent to which legal services are distinct from law-related services. [223] Therefore, it is important that a lawyer's preventative disclosure be communicated in a consistent manner to any and all persons who may be receiving the services.

Model Rule 1.13, discussed in Part I of this article, which governs the behavior of attorneys when they are representing organizations as clients, also offers helpful guidance in shaping a disclosure requirement for incorporation in Rule 5.7. Model Rule 1.13 contains a reporting obligation that requires a lawyer who represents an organization to explain to the various constituents of the organization the boundaries of the attorney-client relationship.[224] Subsection (f) of Model Rule 1.13 reads as follows: "[i]n 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."[225] In practice, these requirements are arguably comparable to *Upjohn* warnings, which require in-house counsel to warn employees interviewed during internal investigations in advance that the interview is subject to the attorney-client privilege only between the company and the lawyer, given that the lawyer represents the company only, and that the company may opt to waive the privilege and disclose the employees' communications with the lawyer to third parties.[226] In this way, employees are then alerted to exercise caution, if they so choose, in their communications to the lawyer.

In a similar way, the constituents of an organization regularly interacting with lawyer/compliance officers, including the organization's directors, officers, employees, members, shareholders or other constituents (as the language of Model Rule 1.13 captures), should be made aware of the precise boundaries of the work being rendered and which of those services would trigger the protections of the attorney-client relationship. As examined earlier, Model Rule 1.13 requires lawyers representing organizations to report violations of the law likely "to result in substantial injury to the organization" to its "highest authority" (the board of directors or board of trustees); if the board fails to address the

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223. *See* L.T. Lafferty, *The Habits of Highly Effective Compliance Officers from Effectiveness to Greatness in Your Program Activities*, 12 J. HEALTH CARE COMPLIANCE 11, 15 (2010) (discussing the various types of individuals within an entity with whom the compliance officer has daily contact and interactions).

224. MODEL RULES OF PROF'L CONDUCT r. 1.13(f) (AM. BAR ASS'N 1983).

225. *Id*.

226. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

concern or allows it to proceed, lawyers who "reasonably believe necessary to prevent substantial injury to the organization" may opt to make an external report of the violation without obtaining client consent and without violating the duty of confidentiality.[227]

The unique considerations that emerge when a lawyer is representing an organization are also relevant to the lawyer serving as a compliance officer for an entity—in both cases, the recipient of the lawyer's services is not an individual person, but rather an organization comprised of various individuals. In such instances, it becomes possible that one category of constituents may have interests that are adverse to that of the organization, such as, for example, in the case of officers or other executives committing wrongdoing that ultimately harms the organization. [228] Therefore, a reporting requirement, when provided through advance written notice, could significantly reduce the potential for confusion regarding a compliance lawyer's duties. In light of these considerations, the language of Rule 5.7 should be amended to adopt the bolded language below or a similar variation thereof. Paragraph (b) of the rule should remain unchanged.[229]

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b),[230] if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) in other circumstances **by the lawyer or** by an entity controlled by the lawyer individually or with others if the lawyer fails **to inform the person receiving the services, or, in the case of an organization, its duly authorized constituents, in writing that the services are not legal services and that the protections of a client-lawyer relationship do not exist with respect to the law-related services**.

This proposed language incorporates both the heightened disclosure obligations of Rule 5.7 adopted by New York, Pennsylvania, and Ohio[231]

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227. MODEL RULES OF PROF'L CONDUCT r. 1.13(b), (c) (AM. BAR ASS'N 1983).

228. *See supra* notes 172–175.

229. Paragraph (b) of Model Rule 5.7 currently reads as follows: "[t]he term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer." MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 1983).

230. *See id.*

231. See N.Y. RULES OF PROF'L CONDUCT r. 5.7 (a)(4), which establishes a presumption that the recipient of the non-legal services "believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that

and the pertinent organizational-related concerns that are highlighted in Model Rule 1.13.[232] These amendments would clearly inform the recipient of the services in a writing (which would document the communication for later reference) that the coveted characteristics of an attorney-client relationship, like confidentiality and conflict of interest concerns, would not come into play.

In addition, a minor change to Comment 9 of Model Rule 5.7 is warranted. This Comment currently enumerates that the various law-related services that the ABA has noted serve "a broad range of economic and other interests of clients" and trigger adherence to Rule 5.7.[233] As previously stated, these include "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."[234] To properly reflect the popularity of compliance as an employment option for lawyers, the position of "compliance officer" or "compliance services" should also be added to this list. By doing so, any and all confusion may be eliminated as to whether compliance constitutes a law-related service. These changes to Model Rule 5.7 provide the type of guidance that is warranted to regulate lawyers in modern-day non-legal or law-related fields and would serve as a model for state adoption to help the increasing number of lawyers engaged in the compliance function ensure that they are properly following the rules that govern their professional duties.

CONCLUSION

The field of compliance has developed by leaps and bounds in recent decades, thereby giving rise to numerous employment opportunities that lawyers have increasingly filled. As a "J.D. Advantage" job, lawyers make valuable contributions to the compliance function by applying their skills and expertise in the interpretation and analysis of regulations, rules, and statutes across various industries.[235] Despite the notable increase in law graduates and experienced attorneys working as compliance officers or within compliance departments, the regulation of lawyers in this space has failed to keep pace with these realities. The inefficiencies of the

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the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the non-legal services." *See also* OHIO RULES OF PROF'L CONDUCT r. 5.7 (b)–(c); PA. RULES OF PROF'L CONDUCT r. 5.7(d).

232. *See* MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 1983).

233. MODEL RULES OF PROF'L CONDUCT r. 5.7 cmt. 9 (AM. BAR ASS'N 1983).

234. *Id.*

235. *See supra* section I.A.

existing regulatory model that governs lawyers when acting in a non-legal role, such as compliance, give rise to the potential for heightened liability because lawyers must ensure that they are following and fulfilling their ethical duties, even in duties that do not constitute law practice.[236]

The ABA's Model Rule 5.7, which requires lawyers to follow the full panoply of ethical rules when they are providing non-legal, "law-related services" is on point for the compliance function, which encompasses the exact circumstances in which this rule would be triggered.[237] This Article closely examines this rule and highlights adoptions of the rule that have more successfully articulated the specific responsibilities of lawyers engaged in law-related services. It concludes by proposing reform to Rule 5.7 focused on heightened disclosure obligations that would help navigate the murky boundaries between the legal and compliance functions and ensure that the recipient of the lawyer's services is fully aware of the extent to which the protections of the attorney-client relationship may or may not apply. Such amendments would better protect the unique vulnerabilities that have emerged for lawyers in compliance as they facilitate and promote the public interest goal that is so fundamental to the compliance function.

236. *See supra* Part III.

237. *See supra* section II.A.