THE LAWYER AS ENLIGHTENED CITIZEN: TOWARDS A NEW REGULATORY MODEL IN ENVIRONMENTAL LAW

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INTRODUCTION

[T]o say nothing, to do nothing, to know nothing . . . is to be great part of your title; which is within a very little of nothing.

-William Shakespeare[1]

Over the past two decades, the role of the attorney and the practice of law have undergone a perceptible shift, resulting in a distinct erosion of the precept that lawyers are protected by virtue of the attorney-client relationship. The idea of the "attorney as scrivener," insulated from client misconduct, is under critical review and increasing scrutiny even though it is consistent with concepts of advocacy and in accordance with existing professional standards. This erosion has been especially prominent in the securities and banking arenas. The shifting standard of the Securities and Exchange Commission (SEC) and the Office of Thrift Supervision (OTS) reflects an emerging belief that lawyers serve as "gatekeepers,"[2] with duties not only to ensure a client's compliance with applicable laws, but conceivably to disclose any failure to comply.[3] The evolution of this regulatory ethical paradigm holds significant implications for society in general and the legal profession in particular. It posits as an absurdity the long held Anglo-Saxon dictate that an attorney's duty and loyalty is only to his or her client, magnifying the concept of attorney as "citizen" and "officer of the court" to proportions unrecognizable in common law.

To date, this new regulatory model has principally impacted the securities and banking industries; however, its reasoning extends to regulated industries such as those covered by environmental laws and regulations. Facially, an extension of attorney obligations beyond the traditional client-based model seems appropriate in the environmental arena given the

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1. WILLIAM SHAKESPEARE, ALL'S WELL THAT ENDS WELL, Act II, Scene IV.

2. *See generally* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (discussing gatekeeper models and strategies). Professor Kraakman terms as gatekeepers third parties who occupy a position where they can prevent misconduct through the withholding of support. *See id.* at 54. "It is roughly equivalent to the duty to withhold 'substantial assistance' from wrongdoers, as this is construed in determining the scope of aiding and abetting misconduct." *Id.*

3. The imposition of a duty to disclose can also been referred to as "whistleblowing." *See, e.g., id.* at 58 (discussing whistleblowing as a strategy for third party enforcement).

significant public health and welfare implications associated with environmental degradation.[4] The magnitude of harm caused by pollution, together with the inherently self-policing nature of the environmental regulatory scheme, arguably supports adoption of nontraditional avenues of oversight. Requiring attorneys who represent regulated entities to shoulder some of that responsibility is not untoward. However, although perhaps tolerable—even if distasteful—where only civil liability is involved, the implications of criminal liability—increasingly prominent in environmental enforcement efforts—suggest that regulatory and judicial efforts to expand professional responsibility in the environmental arena beyond that already imposed by the professional rules of conduct require close scrutiny and precise contours. The touchstone is whether on balance public health and welfare interests outweigh the traditional role of counsel and, if so, whether the imposition of criminal liability is an appropriate method of policing that role. More importantly, as a society we must ask and answer the seminal question of duty.

This article argues that the heightened standard of "gatekeeper," which has already shaped enforcement actions under the securities and banking laws, provides a bridge to extend liability to attorney conduct in the environmental regulatory arena. Part I of this article examines statutory and case law where regulatory agencies have expanded their focus to include legal professionals within the scope of parties subject to enforcement actions based on agency dictate of a duty beyond the obligations owed to the client. Part II posits that the regulatory model seeking to impose gatekeeping obligations upon attorneys is applicable to the environmental arena. Additionally, it argues that the duty upon which such responsibilities can be premised is easily culled from the expansion of environmental statutes to include criminal sanctions for violations of environmental disclosure requirements. The article asserts that the reach of the criminal provisions extends farther than their civil counterparts to encompass conduct by environmental attorneys taken in their professional capacity, and establishes a vehicle through which environmental attorneys can also be subject to enforcement action should the Environmental

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4. *See* David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 OR. L. REV. 57, 80 (Spring 1995).

> There are many settings in which the general public bears the cost of what in hindsight may appear to be imprudent behavior by regulated entities. The argument in favor of imposing a special obligation upon thrift lawyers suggests that regulatory lawyers also should be required to practice the 'whole law' when advising clients with respect to, among other things, food and drug law, occupational safety law, and environmental law.

Id. But see Ted Schneyer, *Fuzzy Models of the Corporate Lawyer as Environmental Compliance Counselor*, 74 OR. L. REV. 99, 119 (1995) (arguing that, unlike in the banking industry, federal regulators lack sufficient motivation in the environmental arena to proceed against environmental lawyers).

Protection Agency (EPA) adopt a gatekeeper standard as governing their conduct. Part III addresses the implications of regulatory oversight of the attorney-client relationship, and the conflict between the demands of the regulatory ethical model and existing standards of professional conduct. This article then considers the environmental lawyer as gatekeeper and concludes in Part IV that while the imposition of gatekeeper functions on environmental attorneys may be warranted, any such obligations should be clearly defined and tailored to take into account the complexities of the environmental regulatory scheme. Further, any efforts to impose affirmative disclosure obligations as part of a regulatory ethical paradigm in environmental law should be discouraged.

I. THE MEANING OF 'ADVICE': THE ATTORNEY AS AN ENFORCEMENT TARGET IN THE FINANCIAL ARENA

A. Liability Under the Securities Laws After National Student Marketing

Congress enacted the Securities Act of 1933[5] (1933 Act) and the Securities Exchange Act of 1934[6] (1934 Act) to ensure that issuers of public securities[7] provide accurate and necessary information to investors.[8] This regulatory scheme was designed "to combat the victimization of public investors from widespread fraud and manipulation following the late 1920s,

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5. 15 U.S.C. §§ 77a-77aa (1997).

6. *Id.* §§ 78a-78kk.

7. The securities markets are public markets, with their performance affecting the general economy and well-being. *See* Report of Special Study of Securities Markets, SEC, H.R. DOC. NO. 95, 88th Cong., 1st Sess. (1969).

> The securities markets' vast resources for marshaling the capital of individuals and institutional investors all over the world give corporate enterprise access to large sources of funds that would not otherwise be available. At the same time, by providing liquidity to investments, the markets make possible the accumulation of aggregates of capital with the assurance that they can be converted to cash or readily valued when they may be needed . . . .

Id.

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> American enterprise can raise the financial capital it needs to start new businesses or expand existing businesses by selling common stock, preferred stock, or bonds or obtaining loans in a ready-and-waiting capital market which channels millions of dollars from savers to investors every year. If these investment funds were not available to the business community, the American economy would stagnate, unemployment would rise and gross national product (GNP) per capita would fall . . . . To maintain and augment its capital markets, the U.S. government has taken various legal steps to ensure that the markets are fair and honest places where small savers and big investors alike can put their funds.

JACK CLARK FRANCIS, INVESTMENTS ANALYSIS AND MANAGEMENT 72 (3d ed. 1980).

. . . mark[ing] a shift from the doctrine of caveat emptor toward principles of consumer protection."[9] Through the anti-fraud provisions, the securities laws prohibit the sale or purchase of any security through fraud or the use of materially false or misleading statements.[10] Among other provisions designed to deter and punish fraud, the statutes also impose disclosure requirements.[11]

Prior to 1972, SEC enforcement action under the securities laws focused on corporate misconduct, rarely pursuing enforcement action against attorneys.[12] The SEC historically took the position, consistent with views expressed by the American Bar Association (ABA) and the ethical codes, that the securities lawyer owed a duty primarily to his client; the lawyer's public duty was limited to avoiding personal participation in securities fraud.[13]

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9. Scott M. Murray, *Central Bank of Denver v. First Interstate Bank of Denver: The Supreme Court Chops a Bough From the Judicial Oak: There is no Implied Private Remedy to Sue for Aiding and Abetting Under Section 10(b) and SEC Rule 10b-5*, 30 N. ENG. L. REV. 475, 480 (1996). Justice Goldberg in *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 186 (1963), similarly described the role of the securities laws as "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *See also* Larry D. Soderquist, *Approaching the Securities Laws*, 956 PRAC. L. INST. CORP. L. & PRAC. 9 (Sept. 1996) [hereinafter 956 PLI/Corp. 9] (explaining the correct approach to understanding securities law).

10. *See, e.g.*, 17 C.F.R. § 240.10b-5 (1999).

11. *See id.*

12. *See* Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645, 671 (1993); Lewis D. Lowenfels, *Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standard of Care Priorities and Duties*, 74 COLUM. L. REV. 412, 413-16 (1974). Rather, the SEC principally sought to control an attorney's behavior through administrative disciplinary proceedings, pursuant to which the SEC can suspend or disbar a securities attorney from practice before the Commission where the lawyer has engaged in conduct that is "lacking in character or integrity or has engaged in unethical or improper professional conduct; or . . . has willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws . . . or the rules and regulations thereunder." 17 C.F.R. § 201.102(e)(ii) and (iii) (1999). In *In re* Carter and Johnson, 1981 WL 36552, *1, the Commission, reviewing an administrative law judge finding that the attorneys engaged in unethical and improper professional conduct by willfully aiding and abetting a violation of the securities laws, indicated that although a lawyer's traditional role is as an advisor to his or her client, not the public, Rule 2(e) permitted the Commissioner to discipline attorneys practicing before it who violated "ethical or professional standards . . . or performs his professional function without regard to the consequences . . . ." *Id.* at *5. Although concluding that there was insufficient evidence of willfulness to support the aiding and abetting charge, the Commission noted that once made aware of a client's failure to comply with the securities laws, the attorney must take "prompt steps to end the client's non-compliance." *Id.* Similarly, in Rule 2(e) proceedings involving Charles Keating, Jr, the Commission stated that a law firm "has a duty to make sure that disclosure documents filed with the Commission include all material facts about a client of which it has knowledge as a result of its legal representation of that client." Sean T. Geary, *Outside Professionals Representing Financial Institutions: An Overview of the Legal Bases for and Effects of Increased Regulatory Action*, 12 ANN. REV. BANKING L. 515, 544 (1993).

13. *See* Lowenfels, *supra* note 12, at 414-15. The SEC distinguished the lawyer's duty from that of the accountant based on the traditional role of the lawyer as representing the interests and rights of the client compared with the statutory certification requirements imposed on accountants. *See id.* (quoting American Finance Company, 40 S.E.C. 1043, 1044 (1962)). "The requirement of the Act of certification by a independent accountant, on the other hand, is intended to secure for the benefit of public investors the

Lawyers were viewed in their traditional capacity as advisors, rather than primary participants in client misconduct. "The traditional limitation on the liability of opining attorneys under common law and the federal securities statutes was inexorably linked to the historic view that a lawyer owed 'unremitting loyalty' to the interests of his client."[14] Consequently, while the client might have liability to the public, the attorney's liability stopped at the client.[15] Absent evidence that the attorney's involvement extended beyond this traditional advisory role to become active participation in a scheme to defraud investors, lawyers were unlikely to be pursued under the anti-fraud provisions of the securities laws.[16] Further, under this commonly accepted view of the attorney's role, mere negligence would not support a finding of liability; proof of scienter was a prerequisite to relief.[17] In those cases where sanctions were sought against attorneys functioning in their professional capacity, courts were reluctant to impose liability.[18] And, as attorneys were not directly regulated under the statutes, the SEC civil remedies were limited primarily to injunctive proceedings or to the institution of disciplinary proceedings under Rule 2(e).[19] The complacency of the securities bar was

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detached objectivity of a disinterested person." *Id.* at 416. Commissioner Sommer subsequently rejected this distinction in a speech entitled "*The Emerging Responsibility of the Securities Lawyer.*" [1973-1974 Transfer Binder] FED. SEC. L. REP. ¶79,631, ¶83,689. Accountants are generally believed to play an important and critical role in the financial arena. *See, e.g.*, Ann Maxey, *SEC Enforcement Actions Against Securities Lawyers: New Remedies v. Old Policies*, 22 DEL. J. CORP. L. 537, 557 (1997). The duties owed by accountants and the regulatory policing of these duties, both under the securities and banking laws, are not addressed in this article.

14. Joseph L. Johnson III, *Opinions Under the Federal Securities Laws*, 27 B.C.L. REV. 325, 346 (1986).

15. *See* Lowenfels, *supra* note 12, at 415.

16. *See, e.g.*, United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964) (attorney with knowledge of and active participation in scheme to defraud held criminally liable for securities fraud). *See also* Day, *supra* note 12, at 671; Lowenfels, *supra* note 12, at 413-14. Attorneys advise the clients in a number of disclosure and drafting issues throughout the registration process. The SEC's interest in regulating attorney conduct is related to these latter, non-statutory activities, and seeks to monitor it though disciplinary proceedings and administration and enforcement actions. *See* Maxey, *supra* note 13, at 557.

> This does not mean the SEC lacks an interest in regulating lawyers' professional conduct. Its predominant interest, however, is, not in monitoring the lawyers' statutory functions, but regulating the lawyers' role of advising clients, including making sure the clients act on such advice–in other words, having the lawyer serve as gatekeeper to the market.

Id. at 558. Private actions have sought damages against attorneys. *See, e.g.*, Blakely v. Lisac, 357 F. Supp. 255, 266 (D. Ore. 1972).

17. As discussed in note 26, *infra*, primary liability, or "active participant" liability requires a mental state embracing the intent to deceive. Although some courts have held that recklessness will satisfy this standard, mere negligence will not usually support a finding of primary liability. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

18. *See* Lowenfels, *supra* note 12, at 414; *see also* Nicewarner v. Bleavins, 244 F. Supp. 261, 266 (D. Colo. 1965) (evidence insufficient to establish defendant did more than serve as an attorney).

19. *See* 17 C.F.R. § 201.102(e)(1); *see also* Maxey, *supra* note 13, at 548. The SEC's interests

short-lived, however. The SEC[20] stunned the legal community in 1972 with the filing of *SEC v. National Student Marketing Corp.*[21] Alleging a violation of Section 10 and Rule 10b-5 of the 1934 Act, the SEC named the law firms and several partners of White & Case and Lord, Bissell & Brook and asserted, among other things, that the law firms had an obligation of allegiance to the Commission greater than the obligation to their own clients.[22] The SEC initiated the action for, *inter alia*, the following reasons: (1) because the lawyers allowed a merger between National Student Marketing Corporation (NSMC) and Interstate National Insurance Company (Interstate), two publicly held companies; and (2) because both firms issued an opinion letter[23] despite knowledge received just before closing that certain financial statements, disclosed in shareholder proxies soliciting approval of the merger, were erroneous.[24] The opinion letters, however, failed to disclose the need for

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in attorney conduct related to their role in advising clients and ensuring clients complied with statutory requirements. *See* Maxey, *supra* note 13, at 550. Rule 2(e) was subsequently succeeded by Rule 102(e). Before the SEC's 1995 revision of its Rules of Practice, the rule was denominated as Rule 2(e). The revision re-denominated the provision as Rule 102(e) without any substantive changes. Whether appearing in the text or in cited authority, the terms "Rule 2(e)" and "Rule 102(e)" are synonymous.

20. The SEC was created by the Securities and Exchange Act of 1934, and is composed of five members appointed by the President with the approval of the Senate. No more than three members may be from the same political party, and the SEC functions as a bipartisan, quasi-judicial agency. *See* THOMAS LEE HAZAN, THE LAW OF SECURITIES REGULATION 11 (2d ed. 1990).

21. *See* Complaint, (CCH)[1971-1972 Transfer Binder] Fed. Sec. Law. Rptr. ¶93,360 (D.C.D.C. 1972). *See also* SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978); Stuart C. Goldberg, *Ethical Dilemma: Attorney Client Privilege v. National Student Marketing Doctrine*, 1 SEC. REG. L. J. XX, 297 (1973) ("Securities Bar was shaken to is very foundation . . . ."); Maxey, *supra* note 13, at 551 (*National Student Marketing* was viewed as a "substantial departure from traditional standards" by the bar, which was concerned that the SEC "was attempting to regulate the professional responsibility of lawyers").

22. *See* Goldberg, *supra* note 21, at 297-98.

23. An opinion letter was also issued by counsel for individuals who had purchased a wholly-owned subsidiary of NSMC, stating that NSMC could backdate the purchase from November 29, 1969 to August 31, 1969, so that the sale of the subsidiary and NSMC's gain could be included in the nine month financials that were subsequently sent to shareholders for approval of the NSMC-Interstate merger. *See* Complaint, *supra* note 21, ¶¶91,913-18; *see also* SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978); SEC v. National Student Mktg. Corp., 402 F. Supp. 641 (1975). The SEC complaint against Everest Management Corp. also named two attorneys among the defendants. *See* SEC v. Everest Management Corp., No. 71-4932 (S.D.N.Y., filed Nov. 11, 1971). Although the conduct of one fell within the "active participant" standard, the second attorney was charged based solely on his conduct as counsel. Lowenfels, *supra* note 12, at 419-20 (citing SEC v. Everest Management Corp., No. 71-4932 (S.D.N.Y., filed Nov. 11, 1971)).

24. *See generally* SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978). NSMC and Interstate agreed to a merger, pursuant to which certain unaudited interim financial statements and other related documents were submitted with proxy statements to shareholders for approval of the merger. *See National Student Mktg. Corp.*, 457 F. Supp. at 687. The terms of the merger agreement required Lord, Bissell & Brook, counsel for Interstate, and White & Case, counsel for NSMC, to render legal opinions that the actions taken in connection with the merger were valid and that no violation of the laws had occurred. *See id.* at 690. In addition, each company was to receive a "comfort letter" from the independent public

adjustments as indicated by the accountants, and shareholders were not resolicited in light of these disclosures.[25]

The SEC charges against White & Case and Lord, Bissell & Brook were premised upon violation of the anti-fraud provisions, principally through non-disclosure.[26] The complaint, seeking injunctive sanctions,[27] contended that the

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accountants for the other stating that the unaudited financials for the respective companies were prepared in accordance with all generally accepted accounting principles and that no adjustments were needed. *See id.* During closing, however, the accountants for NSMC informed counsel and their clients that the comfort letter would disclose that NSMC's unaudited financials should have reported a loss, instead of the profits claimed, and that this profit figure had not been arrived at in accordance with generally accepted accounting principles for the nine month period covered by the financial statements. *See id.* at 691. On the day of closing, Marion Jay Epley III, a partner at White & Case, had conversations with the accounting firm Peat Marwick regarding why they had not yet received the comfort letter and was told of the need for adjustments in the unaudited financials. *See id.* Epley then drafted an unsigned comfort letter based on the conversations with Peat Marwick, but failed to include additional information the accountants required, including a paragraph indicating that, contrary to the profit shown in the financials, NSMC had suffered a net loss. *See id.* at 691-92. Epley also did not include a paragraph wherein the accountants had urged shareholder resolicitation. *See id.* The closing proceeded based on the unsigned comfort letter. *See id.* at 694. Peat Marwick subsequently forwarded a signed copy which was identical to the unsigned copy except that it included the additional paragraphs. *See id.* at 695.

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> "The consensus of the directors was that there was no need to delay the closing . . . . Any delay for the purpose of resoliciting the shareholders was considered impractical because it would require the use of year-end figures instead of the stale nine-month interim financials. Such a requirement would make it impossible to resolicit shareholder approval before the merger upset date of November 28, 1969, and would cause either the complete abandonment of the merger or its renegotiation on terms possibly far less favorable to Interstate."

National Student Mktg. Corp., 457 F. Supp. at 694.

26. The SEC charges did not distinguish between primary, or principal violations of the securities laws, and secondary liability for aiding and abetting as it related to the attorney defendants. The charges against the attorney defendants in *National Student Marketing*, with one exception, were viewed as alleging secondary liability. *See National Student Mktg. Corp.*, 457 F. Supp. at 700-01. Generally, under 10(b) and 10b-5, primary liability occurs when there exists: "(1) a scheme or artifice to defraud; (2) an affirmative misrepresentation or omission of a fact requisite necessary to make other statements not misleading; or (3) a course of business which operates as a fraud or deceit . . . 'in connection with' the purchase or sale of securities. . . ." *In re* American Continental Corp./Lincoln Sav. and Loan Sec. Litig., 794 F. Supp. 1424, 1433 (D. Ariz. 1992). The Supreme Court has held that an *attorney* may be primarily liable under 10(b) and 10b-5 where, in connection with purchase or sale of a security, an attorney actively participates in misrepresentation or omission of a material fact, the plaintiff relies upon the misrepresentation or omission in buying or selling, and the attorney possesses the requisite "scienter," or "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). Proof of scienter, defined by the Supreme Court as "a mental state embracing intent to deceive," is also a prerequisite. *Id.* Although the issue of whether recklessness would be sufficient to satisfy the civil primary liability standard was not specifically considered in *Hochfelder*, circuit courts considering the issue have held that proof of recklessness will suffice to subject an attorney to primary liability. *See, e.g.*, Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990) (holding that minimum culpable conduct is met by recklessness); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495 (7th Cir. 1986) (holding that recklessness meets standard of unlawful intent); Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38 (2d Cir. 1978) (holding that recklessness satisfies scienter); Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) (assuming without deciding that reckless conduct will satisfy scienter under 10(b)); Hirsch v. du Pont, 553 F.2d 750

firms "failed to refuse to issue their opinions . . . and failed to insist that the financial statements be revised and shareholders be resolicited, and fail[ed] . . . to cease representing their respective clients and, under the circumstances, [to] notify the plaintiff Commission concerning the misleading nature of the . . . financial statements."[28]

In *National Student Marketing,* however, the SEC also asserted, among other things, that attorneys owe an obligation of allegiance to the SEC, and by extension, the marketplace, that is greater than the obligation owed to their clients.[29] In essence the SEC sought to impose upon lawyers the responsibility to disclose any false and misleading representations made by the client to the Agency.[30] SEC Commissioner Sommer stated:

(2d Cir. 1977) (holding that recklessness satisfies scienter). Secondary liability, on the other hand, arises under 10(b) for "aiding and abetting" a violation of the securities laws by a primary violator and requires proof of: (1) an independent primary wrong; (2) the aider and abettor's knowledge of the wrong; and (3) that the aider and abettor's assistance was a substantial factor in causing the harm. *See In re American Continental Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. at 1434. As far back as 1976, the Supreme Court questioned the propriety of "aiding and abetting" liability in private actions, noting the complete absence of aiding and abetting language in 10(b) and 10b-5. *See* Melissa Harrison, *The Assault on the Liability of Outside Professionals: Are Lawyers and Accountants Off the Hook?* 65 U. CIN. L. REV. 473, 498 (1997). It was not until 1994, however, in *Central Bank of Denver v. First Interstate Bank of Denver*, that the Supreme Court held that aiding and abetting liability in private actions may not be imposed under 10(b) or 10b-5. *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 200 (1994); *see also* Donald C. Langevoort, *Words From On High About Rule 10b-5: Chiarella's History, Central Bank's Future*, 20 DEL. J. CORP. L. 865, 885 (1995). Thus, as the law exists today, only the SEC may bring civil actions based on aiding and abetting, and may do so only where the defendant acts knowingly. *See* Harrison, *supra* at 503. The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77z-l, 78u-4 to u-5 (Supp. 1996)), expressly gave this right to the SEC, but, despite requests by the SEC commissioner and several commentators, the Act did not provide for private causes of action based on aiding and abetting. *See* Harrison, *supra* at 522. Since enactment of the reform act, no amendments have been passed giving private citizens an aider and abettor cause of action.

27. Section 20(b) of the 1933 Act and § 21(d) of the 1934 Act provide for injunctive relief. *See* Johnson, *supra* note 14, at 330. The SEC can bring a civil injunctive action pursuant to either section against persons engaged or about to engage in violations of the securities statutes, rules, or regulations. *See id.* at 330-31. Typically, SEC injunctive actions against attorneys have involved violations of § 10(b) and Rule 10b-5 and § 17(a). *See id.* at 331. Under all three authorities, attorneys can be subject to both primary and secondary liability. *See id.* at 332. Similar showings will support primary and secondary liability under § 17(a) in connection with the sale, rather than purchase of security. *See id.* at 334. In *National Student Marketing*, the court held that Lord, Bissell & Brook, acting as general counsel for Interstate, met the requisite scienter for aiding and abetting a securities violation through their knowledge that there were inaccuracies in NSMC's financial statement and subsequent failure to object to the closing. *See National Student Mktg. Corp.*, 457 F. Supp. at 711.

28. SEC v. National Student Mktg. Corp., [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360, 91,913 (D.D.C. Feb. 3, 1972).

29. *See* SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 700-01 (D.D.C. 1978).

30. Complaint, *supra* note 21, at ¶91,913-11. *See also* Lowenfels, *supra* note 12, at 425-27 (citing statements of various SEC Commissioners regarding the SEC's position on the obligations owed by a securities attorney).

> I would suggest that in securities matters (other than those where advocacy is clearly proper) the attorney will have to function in a manner more akin to that of the auditor than to that of the advocate. This means several things. It means he will have to exercise a measure of independence that is perhaps uncomfortable if he is also the close counselor of management in other matters, often including business decisions. It means he will have to be acutely cognizant of his responsibility to the public who engage in securities transactions that would never have come about were it not for his professional presence. It means he will have to adopt the healthy skepticism toward the representations of management which a good auditor must adopt.[31]

Thus the SEC put the lawyer's duty of candor, owed to the agency and to the public, in conflict with the duty of loyalty owed to the client.

Although subsequently settled against White & Case without issuance of an injunction[32] and without the payment of money damages,[33] *National Student Marketing* was significant for the amount of attention generated within the legal profession on the scope of attorneys' potential liability under the securities laws and the conflict created between attorneys' obligations to the client, the investing public, and the Agency.[34] By the time the court issued the final decision in *National Student Marketing*, only Lord, Bissell & Brook and its partners remained as attorney defendants.[35] As to Lord, Bissell & Brook, the court found that once the lawyer defendants, obviously expert securities lawyers, learned of the misleading information, the responsibility to their clients required them to take steps to ensure that the information would be disclosed to shareholders.[36] Therefore, their continued silence, knowing that the information was false, provided substantial assistance to the client. In essence, the attorneys aided and abetted the primary violation of the client.[37] The court did not reach the issue of the attorneys' duty to disclose to

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31. A.A. Sommer, *The Emerging Responsibilities of the Securities Lawyer*, an address to the Banking, Corporation and Business Law Section, N.Y. State Bar Ass'n, Jan. 24, 1974, [1973-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶76,631.

32. A Settlement Order was agreed to between the SEC and White & Case. *See National Student Mktg. Corp.*, 457 F. Supp. at 687 n.2.

33. *See id. But see* 15 U.S.C. §§ 77(k) (civil liabilities) and 77(t) (injunctions).

34. *See, e.g.*, LARRY D. SODERQUIST, SECURITIES REGULATION 572 (2d ed. 1988); Remarks of Harris Weinstein Delivered at the Pennsylvania Association of Commercial Bankers, Harrisburg, PA on Mar. 23, 1992, *in Emerging Standards of Liability*, 637 PRAC. L. INST. COM. L. & PRAC. 389, 391 (Oct-Nov. 1992) [hereinafter 637 PLI/Comm. 389].

35. *See National Student Mktg. Corp.*, 457 F. Supp. at 687.

36. *See id.* at 714-15.

37. *See id.*

the public or to the SEC.[38] However, the *National Student Marketing* court underscored that if the attorneys owed a fiduciary obligation to disclose to their clients, then their failure to interfere in the closing through inaction or silence could constitute substantial assistance[39] in violation of the securities laws.[40]

National Student Marketing also signaled the SEC's emerging view of the attorney as "professional gatekeeper," if not "whistleblower." Under such a view, attorneys would have affirmative obligations to disclose, explicitly to shareholders and implicitly to the investing public, or risk enforcement action for violation of the securities laws.[41] The SEC seemed to focus closely on attorneys who provided opinions concerning the legality of public offerings, to be filed with the SEC along with registration statements, believing they especially owed a duty to protect the investing public.[42] From this duty flowed the obligation to investigate client representations and to disclose.[43] The SEC further sought to broaden the scope of activities pursuant to which attorneys would be subject to civil enforcement actions, an effort initially embraced by the courts.[44] Lawyers found themselves facing SEC injunctive

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38. *See id.* at 713. In private damage actions against law firms, the courts consistently have held that there is no duty to disclose to non-clients unless a fiduciary or other relationship exists between the parties. *See, e.g.*, Schatz v. Rosenberg, 943 F.2d 485, 490 (4th Cir. 1991); Abell v. Potomac Ins. Co., 858 F.2d 1104, 1126 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 496 (7th Cir. 1986).

39. Whether an attorney's activity constitutes substantial assistance is a question of fact, and courts had been reluctant to impose liability unless the assistance involved some sort of 'knowing" participation. Acts referred to as "ministerial" could not constitute substantial assistance. *See* Harrision, *supra* note 26, at 503.

40. *See National Student Mktg. Corp.*, 457 F. Supp. at 713.

41. Most actions against attorneys charged secondary violations. Under Rule 10b-5, a lawyer can only be held liable for aiding and abetting where the government proves the existence of an independent primary violation by his client. *See Abell*, 858 F. Supp. at 1126; *In re American Continental Corp./Lincoln Sav.and Loan Sec. Litig.*, 794 F. Supp. at 1434. *But see generally* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (holding there is no implied private action for aiding and abetting against secondary parties).

42.

> "Because of the importance of legal opinions in the securities area and the need for the investing public to be able to rely on these opinions, the Commission and the courts began requiring opining securities attorneys to take a more objective and independent role in rendering legal opinions."

Johnson, *supra* note 14, at 327. *See also* Marshall L. Small, *An Attorney's Responsibility Under Federal and State Securities Law: Private Counselor or Public Servant*, 61 CAL. L. REV. 1189 (1973) (discussing the obligations of attorneys under various provisions of the 1933 and 1934 Acts, and arguing that there has to be a balance as to when liability for those actions should attach). Small advocates, among other things, that although attorneys have a due diligence obligation which must be satisfied before rendering an opinion, they should at the same time be entitled to rely on certain representations made by the client or client's agent. *See id.* at 1194-1201.

43. *See* Johnson, *supra* note 14, at 328.

44. *See id.*

actions based on conduct ranging from rendering incorrect legal opinions[45] to the preparation of client documents for submission to shareholders, the investing public, and the SEC.[46] In each case, these actions fell within the lawyer's professional role as advocate or advisor.[47] Early decisions such as *SEC v. Spectrum Ltd.*, followed by *SEC v. Universal Major Industries Corp.*, firmly established that active participation in wrongdoing was not required and indicated the courts' willingness to premise aiding and abetting liability on mere negligence.[48] As long as the evidence supported a finding that the lawyer knew or through the exercise of reasonable care should have known of the errors in information, courts supported the SEC's position that liability could be imposed.[49] Implicitly, the courts premised liability upon a failure to correct or otherwise disclose, which in turn assumed the existence of a duty to do so. Both the Agency and the courts placed attorneys on notice that because of their significant influence in the securities arena, "[t]he public trust demands more of its legal advisors than 'customary' activities which prove to be careless."[50] In addition, the SEC began to aggressively pursue attorneys under the auspices of Rule 2(e), using its authority to discipline professional

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45. *See* SEC v. Century Investment Transfer Corp., [1971-1972 Transfer Binder] Fed. Sec. L..Rpt. (CCH) ¶93,232 (S.D.N.Y. 1971); SEC v. Management Dynamics, Inc., 515 F.2d at 804.

46. *See, e.g., Management Dynamics Inc.*, 515 F.2d at 809; SEC v. Spectrum Ltd., 489 F.2d 535 (2d Cir. 1973). *See also* SEC v. Frank, 388 F.2d 486, 489 (2d Cir. 1968) (decided prior to *National Student Marketing*, but noting that an attorney who has information which would put him on notice of the falsity of representations could not "escape liability for fraud by closing his eyes").

47. For a description of the range of work undertaken by securities lawyers, see generally Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in Securities Transactions*, 32 BUS. LAW. 1879, 1884-86 (July, 1977).

48. Johnson, *supra* note 14, at 328 (referring to Spectrum Ltd., 489 F.2d 535, 541-42 (2d Cir. 1973) and SEC v. Universal Major Industries Corp., 546 F.2d 1044, 1047 (2d Cir. 1976)). *See, e.g.*, SEC v. Rega, No. 73 Civ. 2944, 1975 WL 4508 (S.D.N.Y. July 3, 1975). The Supreme Court in *Ernst & Ernst v. Hochfelder* failed to consider the use of a negligence standard for aider and abettor liability under § 10(b) where damages were sought. *See Ernst & Ernst*, 425 U.S. at 193-94 n.12. However, the Court declined to decide whether scienter was required in injunctive relief actions. *See id.*

49. *See Spectrum Ltd.*, 489 F.2d at 541; *Universal Major Indus.*, 546 F.2d at 1046-47. In *Spectrum*, the Second Circuit rejected the district court's reformulation of the scienter requirement in establishing liability as an aider and abettor, finding it a "sharp and unjustified departure from the negligence standard which we have repeatedly held to be sufficient in the context of enforcement proceedings . . . ." *Spectrum Ltd.*, 489 F.2d at 541. *But see* SEC v. Goetek, [1978 Trans. Binder] Fed. Sec. L. Rep. ¶96,520 (CCH) (N.D.Cal.) (stating that an attorney would not be liable for "mistake of law and judgment on his part short of an intentional or negligent violation").

50. *Spectrum Ltd.*, 489 F.2d at 542. Commissioner Sommer commented that "[i]n opining that a registration statement complies as to 'form' with the requirements of the Securities Act of 1933, often counsel may be saying more about the contents of the statement than he realizes and if his opinion goes to the question of the legality of the offering as distinguished from the securities, certainly clear questions concerning the adequacy of disclosure are raised." Sommer, *supra* note 31.

misconduct as a tool for shaping the professional obligations of the securities bar.[51]

It was not until the Supreme Court decision in *Aaron v. SEC*, that courts began to retreat from negligence as a basis for liability.[52] SEC requests for injunctive relief against attorneys based on negligence were increasingly rejected, with the presence or absence of scienter now viewed as a substantial factor to be considered in the grant or denial of an injunction.[53] "For an opining attorney to be subject to liability under the securities laws . . . the Commission or a private party must show that the lawyer knowingly or recklessly issued an erroneous legal opinion which substantially assisted the perpetration of a securities fraud."[54] Similar reluctance to impose unfettered liability for actions taken in a professional capacity as advisors or advocates is reflected in decisions on attorney prospectus liability.[55] Subsequent cases

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51. *See, e.g., In re* Keating, Muething & Klekamp, 47 S.E.C. 95, 112 (1979) (Karmel, SEC Commissioner, dissenting); *In re* Ferguson, Sec. Act Release No. 33-5523, 5 S.E.C. Docket 37 (Aug. 21, 1974); In re Feld, Exchange Release Act No. 11, 775, 8 S.E.C. Docket 291(Oct. 30, 1975).

52. *See generally* Aaron v. SEC, 446 U.S. 680 (1981). In *Aaron*, the Court held that the defendant must act with scienter to support an injunction under § 10b of the 1934 Act or §17(a)(1) of the 1933 Act. *See id.*, 446 U.S. at 680. And, although a showing of negligence would support injunctive relief under section 17(a)(2) or (a)(3), the presence or absence of scienter would be an important factor and bear heavily on whether relief should be granted. *See id.* The Tenth Circuit in *SEC v. Haswell*, 654 F.2d 698, 700 (10th Cir. 1981) subsequently held that the absence of scienter, although not required under section 17(a)(2) or (a)(3) should still be an important consideration in deciding whether to award injunctive relief.

53. *See Aaron*, 446 U.S. at 680-81.

54. Johnson, *supra* note 14, at 328-29. Recklessness was defined as a "highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977). *See also* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws–Aiding and Abetting Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313, 327-28 (1989) (noting that "[a]lthough the scope of recklessness for rule 10b-5 liability is not fully resolved, recklessness now is accepted almost universally as constituting scienter for primary rule 10b-5 violations. It also generally is accepted as constituting knowledge for aiding and abetting.").

55. The SEC had been dogged in its efforts to impose attorney prospectus liability. *See, e.g.*, Schatz v. Rosenberg, 943 F.2d 485, 490-91 (4th Cir. 1991); SEC v. Frank, 388 F.2d 486, 493 (2d Cir. 1968) (reversing district court grant of temporary injunction entered against an attorney who allegedly provided false information in prospectus on the basis that the affidavits were conflicting, and the district judge provided no findings to support the allegations); Molecular Technology Corp. v. Valentine, 925 F.2d 910, 911(6th Cir. 1991) (reversing jury verdict of fraud and negligent misrepresentation against attorney and law firm); Seidel v. Public Serv. Co. of N.H., 616 F. Supp. 1342, 1362 (D.C.N.H. 1985); *In re* Flight Transp. Corp. Sec. Litig., 593 F. Supp. 612 (D. Minn. 1984); Renovitch v. Stewardship Concepts, Inc., 654 F. Supp 353 (N.D. Ill. 1987). Following the U.S. Supreme Court's 1994 decision in *Central Bank of Denver v. First Interstate Bank of Denver*, attorney liability under Section 10 and Rule 10b-5 for knowingly drafting a materially false or misleading prospectus became uncertain. "[I]f drafting a prospectus is no more than secondary conduct, [under *Central Bank*] the attorney, as a matter of law, has no liability . . . . Under this interpretation of 'primary' and 'secondary' liability, the act of drafting a fraudulent prospectus

also suggested that courts, if not the SEC, had moved away from a conception of the securities lawyer as "whistleblowers."[56] The pendulum within the courts, at least, thus began to swing back towards requiring some form of active misconduct.[57]

With the decision in *In re Carter and Johnson*, the SEC seemed in accord with the courts, moving towards a requirement of some form of active misconduct beyond negligence, and away from the idea that an attorney has a public duty to blow the whistle on client misconduct.[58] The SEC stated:

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is itself a primary violation of Section 10(b)." Ben D. Orlanski, *Whose Representations Are These Anyway? Attorney Prospectus Liability After Central Bank*, 42 UCLA L. REV. 885, 889 (1995). Accordingly, *Central Bank* effectively insulated the lawyer from liability for his or her role in prospectus preparation and other actions, as long as that role was viewed as "advocacy," or secondary conduct. The consequence of the retreat by the courts was a shift in strategy by the SEC and private plaintiffs to name attorneys as primary participants to avoid the dictates of *Central Bank*. *See* Orlansky, *supra*, at 890-91. "The gist of the plaintiffs' and the Commission's strategy in light of Central Bank is summarized by former SEC Chairman David S. Ruder: '[I]f [the Supreme Court] want[s] primary participants, we'll give them primary participants.'" Orlanski, *supra*, at 890-91 (alteration in original) (citation omitted). *But see* Manning G. Warren III, *The Primary Liability of Securities Lawyers*, 50 SMU L. REV. 383, 386 (1996) ("[T]he requisite shift from secondary to primary liability should not prove particularly difficult. Most fraudulent securities transactions involving lawyer misconduct arise in factual circumstances that supply the supplemental elements necessary for a primary violation.").

56. The courts have construed the aiding and abetting provision narrowly, particularly where the aiding and abetting charge is premised on a failure to disclose. *See, e.g.*, Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986).

> The professionals usually prevail because plaintiffs in securities fraud cases are unable to establish the requisite level of scienter, particularly where the allegation is one of failure to disclose information of which the lawyer was aware. In such cases, the federal courts look to state law to determine the existence of a disclosure duty . . . .

George H. Brown, *Financial Institution Lawyers As Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 674 (1994) [herinafter Brown, *Financial Institution Lawyers*]. In *Schatz v. Rosenberg*, the court commented that although some of the documents prepared by the attorney had been misleading, "this fact alone does not meet the 'substantial assistance' threshold [of aiding and abetting]. Otherwise there would be a per se rule holding attorneys liable in every securities fraud case, because in virtually every transaction, attorneys draft the closing documents." Schatz v. Rosenberg, 943 F.2d 485, (4th Cir. 1991); *See also Barker*, 797 F.2d at 497.

57. *See Aaron*, 446 U.S. at 680; SEC v. Haswell, 654 F.2d 698 (10th Cir.1981).

58. *See generally In re Carter and Johnson*, 1981 WL 36552 (involving an appeal from an administrative finding in a Rule 2(e) disciplinary proceeding). In *Carter and Johnson*, the SEC adopted a requirement of scienter in Rule 2(e) proceedings based on allegations that the attorney aided and abetted a securities violation. In determining whether the "awareness or intent" element was met, the Commission stated:

> It is axiomatic that a lawyer will not be liable as an aider and abettor merely because his advice, followed by the client, is ultimately wrong. . . . If a securities lawyer is to bring his best independent judgment to bear on a disclosure problem he must have the freedom to make innocent—or even in certain cases, careless—mistakes without fear of legal liability. . . .

Id. at *5. Although the SEC adopted a scienter standard in *Carter and Johnson* for Rule 2(e) proceedings, in administrative cease and desist actions under the Remedies Act of 1990, the SEC considers negligence sufficient to establish a violation. *See* Maxey, *supra* note 13, at 570-71 (discussing cease and desist consent

> [A] lawyer engages in "unethical or improper professional conduct" under the following circumstances: When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.[59]

The Commission went on to note that prompt action could include notification to the board of directors of the consequences of non-disclosure, and whatever other steps were necessary to "avoid the inference that he has been co-opted willingly or unwillingly into the scheme of nondisclosure."[60] Should management disregard his advice, the lawyer was to consider disclosure to shareholders and, if necessary, withdrawal.[61] Although the SEC maintained that Rule 2(e) was not designed to impose on attorneys' duties on the public or otherwise change the nature of the attorney-client relationship, it stated the following:

> Nevertheless[,] if a lawyer . . . becomes a *conscious participant* in violations of the securities laws, or performs his professional function without regard to the consequences, it will not do to say that because the lawyer's duty is to his client alone, this Commission must stand helplessly by . . . .[62]

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orders applying a negligence standard as standard for culpable conduct and failing to distinguish between conduct violating the statute and conduct that caused a violation). Citing cases where, for example, the attorney was deemed to have caused a violation of the securities laws for the negligent failure to discover the client's misrepresentations, Professor Maxey argued that "sanctioning a lawyer for negligence in the drafting of misleading documents could result in the lawyer guaranteeing the accuracy of his client's representations." *Id.* at 575.

59. *In re Carter and Johnson*, 1981 WL 36552, at *30.

60. *Id.* at *30.

61. *Id.* at *30-31.

62. *Id.* at *30. Interestingly, in *In re Fields*, an administrative disciplinary action under Rule 2(e) filed after the SEC complaint in *National Student Marketing*, the SEC stated the following reason in a footnote. It responded to an argument that the lawyer's right to practice was within sole authority of the courts of New York, as follows:

> That argument assumes, among other things, that the standards of character and integrity that the New York courts consider adequate for their purposes ought to be and are necessarily controlling here. This fallacious position overlooks the peculiarly strategic and especially central place of the private practicing lawyer in the investment process . . . ."

Lowenfels, *supra* note 12, at 423 (citing SEC Securities Act of 1933 Release No. 5404 (June 18, 1973), at 5)).

Certainly, one issue has been not only when, but *if* silence or inaction ever meets the requirements of "substantial assistance." In overturning the administrative law judge's (ALJ) finding of liability in *In re Carter and Johnson*, the SEC concluded that lawyer inaction, even after discovery of client misconduct, was insufficient to satisfy the necessary intent to aid and abet in a securities violation required under Rule 2(e).[63] Thus, it became increasingly clear that attorneys could no longer comfortably take refuge behind the shield of "advocacy." Morever, the issues seem embedded in abstract notions of the duty owed by the lawyer to the other parties to the transaction. Yet, the prevailing view rejects the imposition of liability for aiding and abetting arising out of an attorney's silence or inaction absent a duty to disclose.[64] Even so, the SEC has continued to maintain that a securities lawyer's overriding responsibility is to assure that his client's disclosures meet the information needs of the market as demanded by the securities laws.[65] This policy is expressed not only in enforcement proceedings but in administrative proceedings as well.[66] The issue as to the

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63. *See In re Carter and Johnson*, 1981 WL 36552, at *30.

64. *See* Chiarella v. United States, 445 U.S. 222, 228 (1980) (absent a duty to disclose, silence in the face of client misconduct does not violate the securities laws); *Schatz*, 943 F.2d at 490 (lawyer will not be liable for misrepresentation arising out of failure to disclose absent some fiduciary or confidential relationship); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) ("Neither lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose."); Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914 (1989).

65. *See* Ridgway M. Hall, Jr., *Recent Developments in Professional Liability Affecting Corporate Environmental Lawyers*, 36 BUS. LAW. 461, 478 (January, 1981). Concomitantly, the SEC has suggested that an attorney's professional obligations require that he counsel accurate disclosure, even if that counsel is not accepted, and at some point take affirmative steps to the point of resignation or withdrawal from representation to avoid any inference of participation in the client's failure to disclose. *See generally In re Carter and Johnson*, 1981 WL 36552.

66. *See* Lowenfels, *supra* note 12, at 418-24. *See generally* Maxey, *supra* note 13. Thus in an administrative proceeding brought against an attorney under section 15(c)(4), the attorney was alleged to have "caused" the alleged securities violation by the client through his advice construing the disclosure requirements of the applicable tender offer rules. *See In re Kern*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,342, at 89, 581-82. The administrative law judge (ALJ), although discontinuing the proceedings on the grounds that section 15(c)(4) did not authorize orders of general future compliance, *see id.* ¶ 89,595, concluded that the attorney, who was also an outside director, had accepted full discretionary authority for decisions on disclosures. *See id.* ¶ 89,592. In so doing, the attorney stepped out of the "usual relationship of lawyer and client" and became indistinguishable from corporate officials and thereby an agent causing the corporation to act. *See* Maxey, *supra* note 13. Although the SEC affirmed the discontinuance on the grounds stated by the ALJ, "[a]s in In re Carter, the SEC announced by implication a substantive standard of conduct by failing to withdraw the ALJ's findings, while at the same time protecting its decisions from review by not imposing a sanction." *Id.* at 554-55. The passage of the Securities Law Enforcement Remedies Act of 1990 and the Private Securities Litigation Reform Act of 1995 provided the SEC with the ability to bring administrative proceedings against persons outside the regulated entity. *See id.* at 555-56.

extent of an attorney's obligations within the rubric of the securities laws remains a matter of significant debate within the SEC.[67]

B. FIRREA and the Imposition of Lawyer Liability

One commentator's concern in early 1981 that the SEC's position on disclosure requirements "will spread to other agencies of the federal government, and perhaps fundamentally change the role of lawyers practicing in regulatory fields,"[68] proved prescient as the regulatory net widened to include attorneys as culpable parties. Most prominent among these efforts were the actions stemming from the federal savings and loan crisis.[69] Thrift institutions,[70] hampered by limits on borrowing and investment activities, were experiencing financial difficulties by the 1970s.[71] Congressional efforts to ameliorate the problem included not only the removal of prior limits on thrift activities, but also deregulation of the thrift industry in an effort to attract private investors.[72] Conservative thrift institutions were suddenly taking on substantial market risk. Relaxed governmental oversight, together with the partial deregulation of financial markets, resulted in unsafe and unsound banking practices, with thrift institutions "spending other people's money and [engaging in] . . . fraud or cavalier investment."[73] Further, those activities were leveraged through guarantees of thrift deposits by the Federal Savings

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67. Interview with Laura Unger, SEC Commissioner, in Washington, DC (Oct. 16, 1999).

68. Hall, *supra* note 65, at 479.

69. Estimates of the losses sustained from the rampant fraud and mismanagement of thrifts and savings and loans, as the government has been forced to close or take over hundreds of banks, were at $250 billion in 1991, as OTS and RTS began to pursue lawyers as well as other professionals. *See* David F. Partlett and Eric A. Szweda, *An Embattled Profession: The Role of Lawyers in the Regulatory State*, 14 U. OF NEW SOUTH WALES L.J. 3, 32 (1991).

70. Thrift institutions include savings associations, building and loans, savings banks, and savings and loans, and are distinguishable from commercial banks. *See generally* Brown, *Financial Institution Lawyers*, *supra* note 56, at 689.

71. *See id.* at 691 n.239.

72.

> Real estate developers and entrepreneurs sought to acquire S&Ls in order to take advantage of the new economic realities. The ability to raise capital insured by the federal government and invest it in high-risk projects, with limited down-side risk to the highly leveraged S&L owners, was an irresistible lure. The new speculators invested heavily in commercial real estate ventures and in junk bonds that were proliferating due to the [leveraged buyout]/takeover craze of the 1980s.

Id. at 691.

73. Partlett and Szweda, *supra* note 69, at 32. Changes in the economic environment and increased competitive pressures may have caused thrift management to ignore existing banking regulatory statutes. *See* Brown, *Financial Institution Lawyers*, *supra* note 56, at 691.

and Loan Insurance Corporation (FSLIC).[74] The bubble ultimately burst and any illusion of solvency disappeared as thrifts began to fail one after another.[75]

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989[76] (FIRREA) amended the federal banking statute, significantly expanding the civil enforcement powers of federal banking regulators.[77] FIRREA established the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC) to salvage what was left of failed savings and loans and to commence civil and/or criminal actions against those persons who had fraudulently or negligently operated them.[78] FIRREA vested the OTS with principal supervisory authority to act as the primary federal regulator of savings and loans. Thus, the OTS succeeded the FSLIC and the Federal Home Loan Bank Board (FHLBB) as the new bank regulatory agency and became responsible for the supervision and oversight of all thrift institutions.[79] The OTS' primary role is to promote the safety and soundness of the thrift industry and to insure compliance with applicable regulations.[80] The RTC stepped into the shoes of failed thrifts, assuming all the thrifts' rights to sue those persons deemed to have contributed to the thrifts' demise, including officers, directors, employees, or stockholders.[81]

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74. The FSLIC insured depositor accounts at all federally insured savings and loans through the FSLIC fund. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Public Law 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.), abolished the FSLIC, merging its functions in regulating savings and loans into the Federal Deposit Insurance Corp. (FDIC). *See* 12 U.S.C. § 401(a)(1). The FDIC is a federal agency created pursuant to the Federal Deposit Insurance Act, 12 U.S.C. § 1811, which prior to 1989 only regulated banks. All of the assets and liabilities of FSLIC were transferred to the FSLIC Resolution Fund to be managed by the FDIC. *See id.* § 215.

75. Of over 2,878 thrifts operating in 1989, 806 were closed by 1993. *See* Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1024 n.15 (1993). "The Savings and Loan (S & L) crisis has already cost U.S. taxpayers at least $70 billion, and some estimates anticipated that taxpayers would pay up to $500 billion before all the problems were resolved." Brown, *Financial Institution Lawyers*, *supra* note 56, at 638 n.1.

76. Financial Institution Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at scattered sections of 12 U.S.C.).

77. FIRREA greatly expanded authority to impose civil monetary penalties, *see* 12 U.S.C. § 1818(i)(2), issue cease and desist orders, *see id.* § 1818(b)(1), and commence informal actions, *see id.* § 1818(a)(2), as well as seek injunctive relief, *see id.* § 1818(a)(8)(A).

78. *See* FIRREA, 12 U.S.C. § 1818 (1994).

79. *See* Day, *supra* note 12, at 654. 12 U.S.C. § 1818(b)(1) (1994) authorized the issuance of cease and desist orders to insured depository institutions upon reasonable cause where the institution "is about to engage in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or is about to violate, a law, rule, or regulation . . . ."

80. *See* Nancy Armoury Combs, *Understanding Kaye Scholer: The Autonomous Citizen, The Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663, 710 (1994).

81. Thus the RTC "qua receiver succeeds to whatever malpractice or contract claims the defunct institution may have had as a result of defective legal services rendered to the institution before its demise." Jackson, *supra* note 75, at 1026.

> While pre-FIRREA law gave federal regulators some power over the banking industry, their authority did not extend to attorneys. Thrift regulators seeking to

FIRREA also expanded the power of regulatory banking agencies in their pursuit of parties responsible for thrift failures.[82] FIRREA substantially upped the ante, both by lowering the threshold required before bank regulatory agencies could issue a cease-and-desist order or a "suspension, removal and prohibition" order, and by increasing the civil and criminal penalties which could be imposed for violation of a regulatory order.[83] Yet FIRREA's most far-reaching impact was its express inclusion of thrift attorneys, previously beyond the scope of pre-FIRREA banking laws, within the definition of "institution-affiliated parties" and therefore subject to the OTS' enforcement powers.[84] "Institution-affiliated parties" were defined in FIRREA as encompassing not only officers, directors, employees, or stockholders, but also independent contractors including, attorneys, or accountants.[85] With the

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> pursue attorneys were largely limited to those common law remedies available to the thrift itself: malpractice, breach of fiduciary duty, aiding and abetting, breach of contract, and unjust enrichment.

Day, *supra* note 12, at 652-53. By 1993, the RTC had settled 246 cases against attorneys, and collected over $663 million. *See Developments in Banking Law: 1992*, 12 ANN. REV. BANKING L. 1 (1993).

82. Pre-FIRREA bank regulatory action required a showing of "substantial harm" or "serious prejudice" to depositors, a high threshold which more often than not resulted in thrift failure before the Agency could intervene. *See* Day, *supra* note 12, at 653. Penalties were equally limited and singularly ineffective. *See id.* at 652-53. The benefits inuring to thrift managers created irresistible incentives to engage in unsafe, unsound and fraudulent activities *See id.* at 654.

83. Section 907 of FIRREA replaces the prior penalty structure for violation of a cease-and-desist order with a three-tiered approach. Under the first tier, the maximum penalty is up to $5,000 per day. The second tier permits penalties of up to $25,000 per day and the third tier up to $1,000,000 per day. *See* 12 U.S.C. § 1818(i) (1994). Criminal penalties were similarly increased for violation of a "suspension, removal and prohibition" order to $1,000,000 and a potential prison term of five years. *Id.* § 1818(j) (1994). In addition, FIRREA permits bank regulators to freeze assets. *See id.* § 1818(b)(6)(F).

84. 12 U.S.C. § 1818 empowers the issuance of cease and desist orders, not only against insured depository institutions, but against institution-affiliated parties as well. *Id.* § 1818(e)(1). FIRREA imposes civil penalties of $5,000 per day for regulatory violations, $25,000 per day for conduct causing material losses or personal gain, and $1,000,000 for knowing conduct causing substantial losses to a depository institution, *see id.* § 1818(i)(2), as well as prohibits an institution affiliated party from future participation in the affairs of a depository institution, *see id.* § 1818(e).

85. Section 1813(u) provides that the "institution-affiliated party" means:

> (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in
>
> (A) any violation of any law or regulation;
>
> (B) any breach of fiduciary duty; or
>
> (C) any unsafe or unsound practice,
>
> which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

Id. § 1813(u). Although traditional OTS investigative efforts focused on a particular institution and its affiliated parties, in *In re* Ernst & Young, OTS Resol. No. AP-91-23 (1991), the OTS asserted that the accounting firm constituted a "potential" institution-affiliated party by virtue of its rendition of auditing services to a number of thrifts. *See* Michael S. Helfer, *Enforcement Actions Against Banks and Thrifts, in The Impact of FDICIA One Year Later*, 123 PRAC. L. INST. 79 (1992) (citing Director of OTS v. Ernst & Young, Misc. No. 91-401 (RCL) (DDC 1992)).

addition of the "institution-affiliated party" provisions, FIRREA banking regulations prohibited lawyers from making false or misleading statements of material fact to federal regulators,[86] from engaging in unethical or improper professional conduct,[87] or from willfully aiding and abetting any violation of federal banking laws or regulations.[88]

Pre-FIRREA, actions against attorneys for their role in thrift failures were virtually non-existent and were limited to whatever common law remedies the thrift institution itself possessed.[89] Armed with Congressional authority, however, FIRREA afforded the OTS another weapon in its arsenal by permitting the OTS to aggressively pursue attorneys both under the common law and for regulatory violations.[90] Administrative enforcement actions against the Denver law firm of Sherman & Howard in 1991, followed by an action against the Mississippi law firm of Ingram, Matthews & Stroud,

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86. *See* 12 C.F.R. § 563.180(b) (1993). This provision provides, among other things:

> No savings association or director, officer, agent, employee, affiliated person, or other person participating in the conduct of the affairs of such association nor any person filing or seeking approval of any application shall knowingly: (1) Make any written or oral statement to the Office or to an agent, representative or employee of the Office that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the Office; or (2) Make any such statement or omission to a person or organization auditing a savings association or otherwise preparing or reviewing its financial statements concerning the accounts, assets, management condition, ownership, safety, or soundness, or other affairs of the association.

Id.

87. 12 C.F.R. § 513.4(a)(3) and (4) (1993) sets forth practice standards permitting the OTS "to censure any person practicing before it . . . if such person is found . . . [t]o have engaged in any dilatory, obstructionist, egregious, contemptuous, contumacious or other unethical or improper professional conduct before the Office" or to have "willfully violated, or willfully aided and abetted the violation of, any provision of the laws administered by the Office or the rules and regulations promulgated thereunder."

88. *See id.*; *see also* Brown, *Financial Institution Lawyers*, *supra* note 56, at 686 (stating that as an institution-affiliated party, a lawyer cannot knowingly or recklessly assist the client in transactions that violate, or assist in a breach of fiduciary duty, or counsel an unsafe and unsound banking practice).

89. "Attorney liability under earlier bank and thrift legislation was at best doubtful–attorneys were never expressly included and agency regulators chose not to apply statutory provisions to lawyers." Jackson, *supra* note 75, at 656. *See also* Raymund G. Kawasaki, Note, *Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989*, 42 HASTINGS L. J. 249, 252 (1990). Like the SEC, however, the OTS had regulations similar to the SEC's Rule 2(e) pursuant to which the OTS could restrict or suspend an attorney's right to practice before it. *See* Geary, *supra* note 12, at 544 n.165. The OTS could, and did, bring actions against attorneys under theories such as malpractice and for breach of fiduciary duties. *See, e.g.*, FDIC v. Mmahat, 907 F.2d 546, 549 (5th Cir. 1990); F.D.I.C v. Clark, 768 F.Supp. 1402, 1405 (D. Colo. 1989); In *FDIC v. Mmahat*, the outside general counsel and his firm were found to have breached their fiduciary duty by improperly advising the institution, causing it to violate certain banking regulations, and the jury awarded $35 million in damages. *See* Mmahat, 907 F.2d at 549. In *FDIC v. Clark*, a jury held two lawyers and their firm liable for negligence in failing to investigate an alleged fraud and conspiracy by bank insiders. *See* Clark, 768 F. Supp. at 1405.

90. *See* Kawasaki, *supra* note 89, at 250.

were among the early cases pursued by the OTS.[91] The Sherman & Howard settlement included provisions whereby the firm agreed to advise thrift officers and directors "to address safety and soundness issues concerning the institution's operators, as well as to seek advice from the OTS when needed to assure compliance with federal laws."[92] However, like the action against White & Case twenty years earlier, the flexing of the banking regulatory muscle reverberated throughout the legal community with the service and filing of a Notice of Charges and the issuance of a cease-and-desist order against the prominent New York law firm of Kaye, Scholer, Fierman, Hayes & Handler. The charges arose out of its representation of Lincoln Savings and Loan Association and Charles Keating.[93]

The OTS alleged, among other things, that Lincoln sold uninsured junk bonds to elderly depositors,[94] and engaged in illegal and sham transactions as a way of transferring cash to its parent corporation.[95] Further, Kaye, Scholer allegedly represented to the OTS that Lincoln was in compliance with banking laws while concealing its infractions.[96] Chief among the charges were that Kaye, Scholer (i) knowingly disregarded material facts in advising Lincoln, (ii) failed to disclose to the FHLBB material facts, (iii) violated its fiduciary duties to Lincoln, and (iv) made false and misleading representations through omissions of material facts, all in violation of the federal banking statute and its implementing regulations.[97] Kaye, Scholer settled with the OTS six days

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91. *See* Susan Saab Fortney, *OTS vs The Bar: Must Attorneys Advise Directors That The Directors Owe A Duty To The Depository Fund?*, 12 ANN. REV. BANKING L. 373, 377 (1993).

92. *Id.* (citing *OTS Settles With Silverado Law Firm, Reaches Separate Agreement on C & D Order*, 57 BANKING REP. (BNA) 1204 (June 24, 1991)). The inclusion of the provision to seek advice from the OTS implicitly requires the firm to check with the Agency whenever any doubt exists as to the applicability or interpretation of banking regulations to the client's proposed action.

93. Kaye, Scholer, a New York-based law firm with offices in Los Angeles and Washington, D.C., became counsel for Lincoln Savings and Loan Association following its acquisition by its then client American Continental Corporation, owned by Charles Keating. Although the Federal Home Loan Bank Board (FHLBB) twice issued a negative report of examination, stating in one that Lincoln's aggressive risk practices "severely strained capital" and placed "the continued viability of the association in jeopardy," on each occasion Kaye, Scholer responded with a lengthy, detailed rebuttal together with thousands of pages of exhibits, "portraying Lincoln as a soundly managed, solvent institution." James O. Johnston Jr. and Daniel Scott Schecter, Introduction: *Kaye, Scholer and the OTS–Did Anyone Go Too Far?* 66 S. CAL. L. REV. 977, 980 (1993). When finally seized by the FDIC in 1989, the thrift was insolvent by over $2.6 billion. *See id.*

94. *See In re American Continental Corp./Lincoln Sav. and Loan Litig.*, 794 F. Supp at 1432.

95. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 909 (D.D.C. 1990).

96. *See* Johnson & Schecter, *supra* note 93, at 981-82.

97. *See id.* There was disagreement by observers as to whether the charges were novel. Professor Gillers, for example, believed that OTS' charge that the representation of a regulated client placed an obligation upon the law firm to reveal information to the bank board "put the bank board functionally as a client of Kaye Scholer." *Kaye Scholer Settlement Leaves Open Issues About Lawyers' Disclosure Duties*, 24 SEC. REG. & L. REP. (BNA) 759 (May 22, 1992). Keith Fisher, Chairman of the ABA Task Force on the Liability of Counsel Representing Depository Institutions, believed that no novel theories of ethical

later.[98] The settlement reached between the law firm and the agency required payment of restitution damages in the amount of $41,000,000 and placed limitations upon the firm's future banking practices.[99] One such limitation underscored the disclosure obligation sought to be imposed on attorneys in regulatory filings. Paragraph 12 of the Settlement Order provided, among other things, that Kaye, Scholer would not prepare or assist in preparation of any statement to a federal banking agency that knowingly "includes any untrue statement or omits to state a material fact necessary to make the statements made . . . not misleading."[100] Kaye, Scholer further agreed that it would not "knowingly rely" upon false or misleading information or fail to disclose material facts related to any disclosure to a federal banking agency.[101]

Federal banking regulators continued to pursue law firms premised on an explicit or implicit duty, if not to disclose, to at a minimum investigate. In *FDIC v. O'Melveny and Myers*, the FDIC, as the receiver for the failed savings and loan American Diversified Savings Bank (ADSB), sued O'Melveny & Myers for its role in the preparation of two private placement memoranda wherein ADSB's assets had been fraudulently overvalued by ADSB officers.[102] In response to O'Melveny & Myers' argument that it had no duty to uncover the fraud, the Ninth Circuit held that at a minimum the

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conduct were raised because banking lawyers were "rarely involved in the examination process in the way Kaye, Scholer was alleged to have acted . . . ." *Id.* Harris Weinstein, OTS Chief Counsel, similarly stated that the notice of charges did not signal the imposition of any new obligations on attorneys. Rather, they were based on well established principles including that

> lawyers cannot issue legal opinions based on factual assumptions they know to be incorrect; that lawyers must to report unlawful client activity up the corporate chain of command; . . . and that lawyers cannot knowingly further a client's unlawful activity . . . . [D]epositary institutions and their representatives must comply with regulations that require disclosure to regulators . . . [and] that lawyers step into the client's shoes and become subject to the institution's disclosure and record keeping obligations when lawyers become providers of facts.

OTS Chief Defends Enforcement Action Asset Order Against Kaye Scholer Firm, 24 SEC.REG. & L. (BNA) REP. 495-96 (April 10, 1992). *See generally* Brown, *Financial Institution Lawyers*, *supra* note 56, (discussing facts underlying the Lincoln debacle and the resulting OTS action).

98. *See* Johnston & Schecter, *supra* note 93, at 983. The enforcement action against Kaye, Scholer included a temporary cease and desist order, required 25% of the earnings of each member of the firm be placed in escrow, and limited the firm's permissible expenditures of funds to servicing existing debt, payment of ordinary and reasonable operating expenses, and capital expenditures. *See* Michael S. Helfer & Richard Sigel, *Enforcement Actions Against Banks and Thrifts: The Impact of the FDICIA: One Year Later*, 645 PRAC. L. INST. 63, 84 (1992).

99. *See generally* Peter C. Kostant, *When Zeal Boils Over: Disclosure of Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings After Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487 (1993) (discussing terms of settlement and impact).

100. *See id.* at 515 n.182; *In re* Fishbein, OTS AP No. 92-24 (Mar. 10 1992).

101. *In re* Fishbein, OTS AP No. 92-24 (Mar. 10 1992) at ¶13.

102. FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992), *overruled by*, 512 U.S. 79 (1994).

firm had a duty to make a "reasonable independent investigation" and was not justified in assuming facts were as represented to it by ADSB officers.[103] The court stated:

> Part and parcel of effectively protecting a client, and thus discharging the attorney's duty of care, is to protect the client from the liability which may flow from promulgating a false or misleading offering to investors. An important duty of securities counsel is to make a "reasonable, independent investigation to detect and correct false or misleading materials." This is what is meant by a due diligence investigation . . . . In its high specialty field, O'Melveny . . . owed a duty of due care not only to the investors but to its client.[104]

Faced with OTS' cease and desist authority, combined with OTS' power to freeze assets,[105] most firms quickly settled enforcement actions.[106] A year following the Kaye, Scholer settlement, Jones, Day, Reavis & Pogue, also associated with Lincoln Savings, settled similar charges for $51 million.[107] And Paul, Weiss, Rifkind, Wharton & Garrison, a Los Angeles based law firm, agreed to pay the government $45 million to settle charges arising out of a thrift representation, entering into a consent decree structured along the lines of the Kaye, Scholer settlement.[108] Although the enforcement provisions themselves did not directly create such an obligation, the OTS used the inclusion of professionals within the definition of "institution-affiliated party" as a springboard from which to implicitly cobble a duty transcending the traditional attorney-client relationship.[109] OTS Chief Counsel, Harris

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103. *Id.* at 749.

104. *Id.* (internal citations omitted).

105. *See* 12 U.S.C. §§ 1818(b)(6) and (c)(1).

106. A number of apparently uncontested cease-and-desist orders were entered into between the OTS and professionals (accounting and law firms) without the filing of an administrative enforcement action. *See, e.g.*, Geary, *supra* note 12, at 540-42 (discussing negotiated settlements that include terms such as requiring consultation with the OTS over questionable transactions and seeking advice directly from OTS to insure compliance with banking laws); *see also* Keith R. Fisher, *Nibbling on the Chancellor's Toesies: A "Roguish" Concurrence With Professor Baxter*, L534 ALI-ABA 397 (Dec. 10, 1993), *reprinted from* 56:1 LAW AND CONTEMPORARY PROB. 45 n.5 (1993) (listing OTS enforcement actions initiated against law firms and individuals, including Ingram Matthews & Stroud, Sherman & Howard, Silver, Freedman & Taff, and Kirkpatrick & Lockhart).

107. *See Jones Day Settles OTS Enforcement Claims on Lincoln S&L, Will Pay RTC $51 Million*, 60 BANKING REP. (BNA) 582 (Apr. 6, 1993); Rita Henley Jensen, *Jones Day: Behind the Settlement: What Can Law Firms Learn From the Jones Day/RTC Pact?*, NAT'L L.J., July 5, 1993, at 1. Jones, Day allegedly assisted Lincoln's parent company in misleading regulators. *See id.*

108. *See* Richard B. Schmitt, *Paul Weiss Agrees to Pay U.S. $45 Million*, WALL ST. J., Sept. 29, 1993, at B8; *Developments in Banking Law: 1992*, *supra* note 81, at 16.

109. *See also* Geary, *supra* note 12, at 515 (arguing that the OTS has attempted to create a vague

Weinstein, initially expressed that lawyers owed a fiduciary duty to the Agency, as well as their client, although he seemed to retreat from that view shortly thereafter.[110] In subsequent remarks at the University of Michigan Law School, Weinstein commented that banking lawyers should practice the "whole law" and that "loophole lawyering" is to be avoided.[111] Despite the protests of banking lawyers, the OTS adopted the position that attorneys who continued to represent thrifts engaged in shaky transactions, in contravention of the thrift's duty to its depositors, were required to counsel the officers and directors against such conduct and to ultimately withdraw if their advice went unheeded.[112] The failure to withdraw in the face of the thrift's continued violation of its fiduciary duties, would subject the attorney to potential liability as a "participant."[113] As with its sister agency, banking regulators looked to attorneys to provide oversight of client conduct, accordingly mandating a shift in their role to one of gatekeeper.[114]

"superduty" that lacks any legal basis).

110. *See* Fisher, *supra* note 106 (citing remarks at July 1990 attorney's clinic).

111. Weinstein explained:

> What do I mean by practicing the "whole law"? I mean that all pertinent legal principles must be brought to bear on a problem. The whole law is the prescribed antidote to misguided "loophole lawyering." It is the reliance on an implied exception to a statute or regulation that mistakenly disregards the significance of principles of general applicability . . . . Whether a lawyer believes he or she has found a legal loophole in a regulation or statute, or is counseling a client in a gray area without clear legal guidelines, the lawyer must advise banking fiduciaries that their conduct must be consistent with their fiduciary duties . . . .

Remarks of Harris Weinstein, Delivered at the University of Michigan Law School on Mar. 24, 1992, in 637 PLI/Comm. 389, 405; Fisher, *supra* note 106, at 407.

112. Banking lawyers took umbrage with the OTS position, asserting that it failed to recognize that, as perhaps even more so than in other business arenas, the banking attorney is not necessarily privy to an institution's overall strategy, goals, or even of every piece of a complex transaction. *See* Steve France, *Savings and Loan Lawyers*, 77 A.B.A. J. 52, 56 (May, 1991). Nor is the attorney in a position, or expected, to make business judgments. Accordingly the attorney is not involved in the process pursuant to which risks are quantified and decisions are made; agency demands based on such erroneous assumptions are simply unworkable. *See id.* Underlying these arguments was the premise that "given the lack of consensus on the extent to which directors owe fiduciary duties to depositors, what is counsel's role in advising institutional directors?" Fortney, *supra* note 91, at 388.

113. *See* France, *supra* note 112, at 56.

114. *See, e.g.*, Brown, *Financial Institution Lawyers*, *supra* note 56, (discussing the applicability of the gatekeeper role in banking); Jackson, *supra* note 75 (discussing gatekeeper model).

II. THE IMPLICATIONS OF KAYE, SCHOLER AND NATIONAL STUDENT MARKETING—THE TRANSLATION OF PUBLIC DUTY TO THE ENVIRONMENTAL ARENA

A. Kaye, Scholer and National Student Marketing–A Matter of Public Interest?

That federal agencies in areas involving the public trust, such as the financial industry, would seek to hold attorneys responsible for their role in regulatory violations is not surprising. The securities laws were born out of the stock market crash, designed to help ensure market stability through the dissemination of accurate and truthful disclosure.[115] The economic devastation of the Depression years inalterably marked the ensuing decades, warranting close scrutiny of corporate conduct and market representations. Similarly, the federal banking laws enacted after the Great Depression were designed to assure the public of the safety of deposits as well as to avoid bank runs similar to those that contributed to the failure of banks and thrift institutions during that period.[116] Accordingly, the regulatory scheme enacted by Congress included a system of federal deposit insurance and regulatory oversight so that the federal banking agencies could intervene prior to a thrift institution's failure.[117] It may very well be that the existence of deposit insurance contributed to a decrease in incentives by thrift managers to exercise greater care in investment and other decisions.[118] But at the same time, "[t]he reduction in market discipline created by deposit insurance produces corresponding pressure on the regulators to provide other mechanisms for protecting the insured institutions from the harm their managers and owners can inflict upon them."[119] As the relaxed governmental oversight and partial deregulation created the opportunity for the avarice that followed, Judge Sporkin questioned the *Kaye, Scholer* affair:

> Where were these professionals . . . when these clearly improper transactions were being consummated? . . . Where . . . were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal) why at least

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115. *See* Lowenfels, *supra* note 12, at 412.

116. *See* Day, *supra* note 12, at 651.

117. *See id.*

118. *See* Lawrence G. Baxter, *Reforming Legal Ethics in a Regulated Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181, 194 (1994).

119. *See id.*

> one professional would not have blown the whistle to stop the overreaching that took place in this case.[120]

Thus the protection of the market for the benefit of the public good presumably justifies, in the eyes of the Agency, the heightened scrutiny sought by the SEC and the OTS. In the thrift arena, the duty was statutory. FIRREA specifically included attorneys within the scope of the statute's reach.[121] The SEC's path, albeit more tortured, nonetheless ultimately recast the duty as one owed to the marketplace as well as to the client. The high premium placed on truthful and accurate information exchange warranted imposition of an obligation to protect the investing public and the economy.[122] In both instances the public interest, as measured by the potential impact, is substantial. And in both, regulators have sought to ensure that lawyers, to the extent their role includes representing regulated entities in areas affecting the public trust, not be permitted to facilitate a violation of that trust.

National Student Marketing and the Kaye, Scholer settlement arguably provide a bridge across which a public duty may be measured and extended to legal professionals representing regulated industries under the environmental laws.[123] What seems apparent is that regulatory concern as to the role played by professionals is triggered where substantial public risk is involved, and that concern becomes paramount where the agency relies heavily on self-reporting for compliance. Hence, any inquiry into the application of a regulatory ethical paradigm to the practice of environmental law must necessarily begin with an analysis of whether significant public welfare considerations support regulatory, and by extension, public interest in the conduct of environmental attorneys. The focus then shifts to the role played by environmental attorneys and the framework within which a heightened duty can be structured.

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120. Johnson & Schecter, *supra* note 93, at 981.

121. Professor Geary argues that the FIRREA enforcement provisions do not create a "superduty" on the part of lawyers to police their clients, but that OTS has tried to use them in cases such as Kaye, Scholer to "bludgeon[] professionals with threats until they relent." Geary, *supra* note 12, at 534. Professor Brown posits that the imposition of a "gatekeeper" role on attorneys should not be rejected out of hand, discussing ways in which such a role could be effectuated and the overall benefits. *See* Brown, *Financial Institution Lawyers, supra* note 56, at 692-98.

122. *See, e.g.*, Robert B. Robbins & Kimberly V. Mann, *Ethics and Professional Responsibility for Attorneys in Securities Transactions*, SD5557 ALI-ABA 339 (1999) (SEC utilizing Rule 2(e) "to express the view that a lawyer's representation of a client in the face of the client's false and misleading disclosures or omissions implicates not only the lawyer's professional standards of conduct, but also legal responsibility for the consequences of her client's conduct."). *See also* Michael J. Connell, *SEC Sanctions of Security Counsel*, 1093 PLI/Corp. 471, 478 (January-February 1999) (SEC attempting to force securities attorneys into gatekeeper role).

123. Arguably, such a duty could arise whenever public health and welfare statutes are implicated.

Basing the regulatory focus on attorney conduct upon the notion of public risk, the first step is establishing whether the public interest in regulating the occurrence and effects of uncontrolled pollution provide a foundation for a heightened duty on environmental attorneys. In other words, even presuming that the public interest in truthful disclaimers is strong, the question remains whether environmental protection is a "significant" public interest? Clearly the public stake in the securities and banking industry was largely financial. In response to a query as to whether the trend towards imposing a gatekeeper role would extend to environmental attorneys,[124] one commentator concluded it would not, asserting that the motivation of the regulators in the banking industry was financial and ultimately political—to protect the federal deposit insurance fund.[125] This distinction, therefore, made it unlikely that environmental regulators would pursue a similar course. "Social costs are one thing; actual losses to federal funds backed by tax dollars are another. For the most part, environmental regulators have no comparable funds to protect."[126]

Yet if the determination of significant public interest reduces solely to a question of financial impact, then the underlying premise of public health and safety statutes is rendered meaningless. Absent a tangible economic harm, public health and safety arguably are not impacted and social costs, whether defined in terms of health, safety, or the environment, have no stature. Yet in reality, the social costs of pollution carry equally significant financial consequences in the form of increased health care costs, losses in the workplace due to illness, and the phenomenal costs to remediate contamination.[127] The "moral outrage" value cannot be discounted as the public becomes increasingly disenchanted with corporate indifference to the health and environmental risks of industrial pollution.[128] Although the public impact may differ in kind from the impact on economic stability risked in the securities and banking fields, economics alone cannot be the sole criteria. Rather, the inquiry must be whether the public, through the legislature, has determined that a given social ill is of sufficient import due to its impact on

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124. *See* Dana, *supra* note 4, at 80-81; *see also* Norton F. Tennille, Jr., *Criminal Prosecution of Individuals: A New Trend in Federal Environmental Enforcement?*, ENVTL. ENFORCEMENT 20, 21 (ABA Standing Committee on Environmental Law 1978) (suggesting that environmental attorneys may find themselves the target of criminal investigation for violations of environmental statutes).

125. *See* Schneyer, *supra* note 4, at 118-19.

126. *See id.* at 119. Schneyer acknowledges that replenishment of the Superfund is an exception to his comment. *See id.* at 119 n.87.

127. *See* Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-based Approach*, 21 HARV. ENVTL. L. REV. 337, 345-53 (1997).

128. *See, e.g.*, Peter Sandman, *Risk Communication: Facing Public Outrage*, EPA J. 21-22 (November 1987), *reprinted in* ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE LAW AND SOCIETY 124 (1992).

health and welfare, whether manifested in economic, ecological, or sociological terms, to vindicate the degree of regulation seen in the environmental statutes.

The environmental field appears to meet that standard and regulatory motivation should therefore be equally strong. Over the past three decades, demand for environmental protection has grown and has resulted in substantial pressure on Congress.[129] Pollution had become so pervasive by the late 1960s that legislators could no longer ignore the health and ecological impacts of environmental degradation.[130] Fueled by an increasingly alarmed public, legislators finally took notice[131] and enacted legislation designed to provide a comprehensive statutory scheme to control air, water, and soil pollution. Major legislation enacted during this period included the Clean Air Act (CAA),[132] the Federal Water Pollution Control Act (CWA),[133] the Safe

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129. Existing legislation had proven ineffective to combat the increasing spread of hazardous pollutants. Most legislation was primarily limited to regulation of interstate pollution, limiting regulatory authority to interstate pollution; still, the provision of federal funds to states was used to encourage the implementation and development of pollution control programs or the collection and publication of data on hazardous constituents. *See, e.g.*, Clean Air Act of 1963, Pub. L. No 88-206, § 3(c)(2), which was the successor to the Air Pollution Control Act of 1955. *See also* ADAM MARKHAM, A BRIEF HISTORY OF POLLUTION 125 (1994).

130. *See* Barry Commoner, *Failure of the Environmental Effort*, 18 ENVTL. L. REP. 10195 (1988); Thomas A. Sancton, *What on Earth Are We Doing?*, TIME, Jan. 2, 1989, at 24.

131. Public perception of pollution, shaped by nationwide broadcasting of environmental disasters and more immediate localized issues, helped to shift legislative focus to pollution control. *See, e.g.*, ANDREW SZASZ, ECOPOPULISM TOXIC WASTE AND THE MOVEMENT FOR ENVIRONMENTAL JUSTICE 38-47 (1994) (discussing media coverage of Love Canal and other contaminated communities). Other highly publicized incidents include the contamination at the Stringfellow Acid Pits in Riverside, California and the kepone contamination of the James River in Hopewell, Virginia. *See* Marc Lifsher, *State Adds Another Dimension to Cleaning Up Superfund Site*, WALL ST. J., April 14, 1999, at CA1; Sandra Suguwara, *10 Years After Kepone Dumping, Problems Persist*, WALL ST. J., July 29, 1985, at C01.

132. *See* 42 U.S.C. §§ 7401-7671(g). The Clean Air Act of 1963 was amended in 1970 and 1977 to establish a comprehensive scheme for regulation of emissions into the airshed. *See* 42 U.S.C. § 7401. (historical and statutory notes: short title 1977 and 1970 Amendments). The CAA as amended provided the newly created Environmental Protection Agency (EPA) with authority to establish national ambient air quality standards (NAAQS), set in terms of maximum concentrations of the ambient air levels of criteria pollutants, or those pollutants which "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §§ 7406-7410 (1994); *see generally* 40 C.F.R. §§ 50.4-50.12 (1999); 42 U.S.C. § 7408(a)(1)(a) (1994) (defining criteria pollutants). To date, EPA has identified six criteria pollutants: sulfur dioxide, nitrogen dioxide, suspended particulates, lead, carbon monoxide, and ozone, with hazardous air pollutants regulated under 42 U.S.C. § 7412 (1994).

133. *See* 33 U.S.C. §§ 1251-1387 (1994). The Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948), was the first federal legislation to address water pollution. *See generally* Frank J. Barry, *The Evaluation of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study in the Difficulty of Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970) (discussing history of water pollution legislation until 1970). The modern CWA arose through amendments to the Federal Water Pollution Control Act in 1972. *See* 33 U.S.C. § 1251. The CWA was designed to protect the quality of navigable waters through the regulation of the source of pollutants. *See id.* § 1251(a)(b). The CWA made it unlawful to discharge pollutants into navigable waters without a permit. *See id.* § 1321(b)(3)

Drinking Water Act (SDWA),[134] the Resource Conservation and Recovery Act (RCRA),[135] and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[136] Necessarily, these statutes were self-policing as environmental laws rely heavily on self-monitoring and reporting by the regulated industry.[137] Neither the EPA nor state environmental agencies have the resources or capability to directly monitor discharge, emission, or disposal compliance by the thousands of businesses subject to regulation. The EPA's heavy reliance on self-policing and reporting by industry, in order to evaluate and control pollution levels for the protection of public health, mandates truthfulness in reporting and supports a demand for gatekeepers.[138] Attorneys play an integral part in environmental compliance. The very nature of the environmental regulatory scheme indicates a need, equivalent to that present in the securities and banking arenas, for outside parties to perform gatekeeping functions.

(Supp. 1999). The CWA also mandated the creation of the National Pollution Discharge Emissions Systems (NPDES) permitting system, through which the CWA sought to achieve certain water quality levels and mandated the implementation of different control technologies by industries. *See id.* § 1342-43.

134. *See* 12 U.S.C. §§ 300f to 300j-26 (1994).

135. *See* 42 U.S.C. §§ 6901-6908 (1994). RCRA amended the Solid Waste Disposal Act of 1965, and was enacted to control solid waste disposal. *See id.* § 6902. RCRA covers both hazardous and non-hazardous waste with the bulk of its regulatory scheme directed towards management of hazardous waste disposal. *See id.* § 6901-02. RCRA has been referred to as a "cradle to grave" regulatory scheme, regulating the waste from its generation. *See* Shell Oil Co. v. EPA, 950 F.2d 741, 756 (D.C. Cir. 1991) ("RCRA's acknowledged objective [is] to establish a cradle-to-grave regulatory structure for the safe handling of hazardous waste."). RCRA sets up a fairly onerous tracking and reporting program and sets up a program to phase out dangerous land disposal practices. *See* 42 U.S.C. §§ 6921-6931. In addition, RCRA requires that all owners or operators of treatment, storage, and disposal facilities obtain a permit to continue operation and remediate any prior releases of hazardous waste at the facility prior to being granted a RCRA-required permit. *See* 42 U.S.C. § 6925(a)-(c); *see also id.* § 6924(u).

136. *See* 42 U.S.C. §§ 9601-9675. (1994). RCRA's sister statute, CERCLA, addressed environmental problems arising after disposal. *See id.* § 9604. CERCLA was promulgated following the widely publicized disasters of Love Canal and Times Beach, where the government discovered that in its arsenal of environmental laws, none provided for an immediate governmental response to hazards arising at inactive or abandoned hazardous waste sites. CERCLA also sought to ensure that in addition to providing for governmental intervention, the sites would be cleaned up in the first instance by those responsible for the contamination but, if necessary, by the government through the Superfund. *See id.* §§ 9607, 9611-9612.

137. *See, e.g.*, 42 U.S.C. § 1318 (CWA).

138. The U.S. Department of Justice (DOJ) "'views as extremely serious false reporting to the agencies that conceals or omits important information called for by the relevant reporting requirements.'" Tennille, *supra* note 124, at 21 (quoting Assistant Attorney General James W. Moorman).

B. The Emergence of Expanded Liability for Statutory Violations

Fundamentally, regulatory justification for imposition of a public duty on environmental attorneys can be based upon the existence of no disclosure provisions in environmental statutes which, although directly imposing disclosure obligations upon the polluting entity, can be read to implicitly extend that obligation to attorneys.[139] The major environmental statutes contain extensive monitoring, reporting, record keeping, and inspection provisions as well as the submission of information under various circumstances.[140] These record keeping and reporting requirements, as worded, impose the primary responsibility for disclosure upon the owner or operator of the regulated entity.[141] The civil sanctions available for statutory violations are similarly directed. For example, violation of permit limitations, discharge standards, or disposal requirements carry with them the risk of civil penalties and administrative enforcement actions for compliance.[142]

However, while recognizing the need for industry self-policing, Congress sought to ensure that the costs to industry from noncompliance would significantly outweigh any benefits.[143] As Congress began to appreciate the

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139. For example, RCRA requires that the movement of hazardous waste be documented from its generation to its disposal. *See* 42 U.S.C. §§ 6922-6924 (1994). RCRA provisions impose tracking requirements not only on generators and treatment, storage, and disposal facilities (TSDFs), but on the transporter as well. *See id.* The treatment and storage of hazardous waste is also accompanied by regulatory reporting and monitoring requirements. *See, e.g., id.* § 6924(a)(1)-(2). Records and reports relating to the generation, transportation, treatment, storage, or disposal of hazardous wastes must be provided to EPA upon request. *See id.* § 6927(a). Similar provisions are contained in other environmental statutes. Both the CWA and the CAA impose monitoring requirements for emissions and discharges as well as maintenance of records where applicable permit limitations are exceeded. *See id.* § 7661(c) (CAA); 33 U.S.C. § 1342 (CWA).

140. CERCLA requires that EPA or the appropriate state agency be notified in the event of an uncontrolled release of hazardous substances. *See* 42 U.S.C. § 9603. The CWA further requires immediate notification of the appropriate federal agency of any discharge of oil or other hazardous substance into navigable waters. *See* 33 U.S.C. § 1321(b)(5).

141. *See, e.g.*, 42 U.S.C. § 9603(a) (CERCLA) (limiting notification requirements to persons "in charge").

142. For example, the CWA authorizes the EPA Administrator to commence a civil action for injunctive or other relief for violations of conditions or limitations in a permit issued pursuant to an approved permit program. *See* 33 U.S.C. § 1319(b) (1982). Similarly, the CAA permits the imposition of administrative penalties for noncompliance by a regulated entity with the applicable requirements or prohibitions in a state implementation plan (SIP) or permit. *See* 42 U.S.C. § 7413 (1994). Under the CWA, the Administrator may issue a "civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(a) (Supp. 1999).

143. The federal and state governments have not hesitated to indict corporations and individuals for violation of the disclosure provisions in environmental laws. *See, e.g.*, United States v. Gordon Paul Cooper, 173 F.3d 1192 (9th Cir. 1998); United States v. Daryl Allen Freter, 31 F.3d 783 (9th Cir. 1994); United States v. McDonald Watson Oil, 933 F.2d 35 (1st Cir. 1991); United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726 (8th Cir. 1985); Alaska v. ABC Towing, 954 P.2d 575 (Alaska 1998); Ohio v. Gastown Inc., 360 N.E.2d 970 (Ohio 1975).

unique nature of those risks and harms targeted by environmental statutes, which removed offenses from the category of mere regulatory or administrative violations,[144] harsher criminal provisions were added to new environmental laws and statutes such as RCRA,[145] the CWA,[146] CERCLA[147]

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144. "Congress appreciated those characteristics of environmental pollution that render criminal sanctions at least as appropriate as they are for more traditional crimes. As one member of Congress aptly put it, 'environmental criminals are nothing but white collar criminals with ring around the collar.'" Richard J. Lazarus, *Meeting Demands of Integration in Evolution of Environmental Law: Refining Environmental Criminal Law*, 83 GEO. L. J. 2407, 2451 (1995) (internal citations omitted). *See also* Truxtun Hare, *Reluctant Soldiers: The Criminal Liability of Corporate Officers for Negligent Violations of the Clean Water Act*, 138 U. PA. L. REV. 935, 948 (1990) ("Environmental violations and resultant injuries are exceedingly difficult to detect, so that . . . 'even in the most egregious cases, the harm will often not appear for years, or decades,'" consequently legislation that imposes stringent sanctions is necessary to influence behavior) (internal citations omitted).

145. The 1980, RCRA amendments established the first felony sanctions, as well as the first "endangerment" offense in federal law. *See* Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The 'Knowledge' of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203, 207 (1988). Criminal provisions are found in 42 U.S.C. § 6928(d)(3). This section makes it a crime to knowingly transport or cause to be transferred hazardous waste to an unpermitted facility, knowingly treat, store, or dispose of hazardous waste without a permit or in violation of permit conditions, knowingly omit material information or make any false material statement or representation in any document filed, maintained, or used for purposes of compliance. *See id.* RCRA permits the imposition of fines up to $50,000 per day for each violation and/or imprisonment of two to five years. *See id.* § 6927(d)(7)(B). Violations that involve "knowing endangerment," as defined in the statute, carry fines of up to $250,000 and/or imprisonment of up to 15 years. *See id.* § 6928(e).

> The congressional history concerning the adoption of the knowing endangerment provision in 1980, and of subsequent revisions in 1984, reflect[s] the competing objectives of providing prosecutors with enforcement authority adequate to address the more egregious instances of improper waste disposal and protecting the rights of corporate executives whose knowledge of their companies' waste disposal practices was incomplete.

Harris et al., *supra* at, 207. Also, 42 U.S.C. § 6928(f) sets out the parameters under which a defendant can be convicted of "knowing endangerment" as defined in the Act. *See* 42 U.S.C. §§ 6928(f)(1)-(2). Corporations can be fined up to $1 million for violations involving "knowing endangerment." 42 U.S.C. § 6928(e).

146. *See* 33 U.S.C. §§ 1251-1387 (1994). "As initially enacted, the Federal Water Pollution Control Act of 1948 . . . provided no criminal sanctions for water polluters. The Act's prescribed pollution abatement procedures were so complex and convoluted that informal negotiations often proved more effective. In addition, federal civil action were used only as a last resort." Hare, *supra* note 144, at 945. Government prosecutors also had the ability even prior to the inclusion of criminal sanctions in the CWA, to pursue polluters under the Refuse Act of 1899, Rivers and Harbors Act, ch. 425, § 13, 30 Stat. 1121, 1152 (1899) (codified as amended at 33 U.S.C. § 407 (1988)), which imposed criminal sanctions for unlawful throwing, discharging, or depositing refuse matter in navigable waters of the United States. *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969). Criminal provisions are found in 33 U.S.C. § 1319(c), which imposes sanctions for both negligent and knowing violations of the Act. Penalties ranging from $2,500-25,000 per day of violation and/or imprisonment of up to one year for negligent violations to fines of $5,000-50,000 per day of violation and/or imprisonment of up to three years for knowing violations. *See* 33 U.S.C. § 1319(c)(1) and (c)(2). In addition, 33 U.S.C. § 1319(a)(3) provides for enhanced penalties for "knowing endangerment" of up to $250,000 and/or imprisonment of up to 15 years for individuals, and a fine of up to $1 million for corporations. The CWA makes it unlawful to violate a number of sections, including

and the CAA.[148] These statutes were amended to eliminate misdemeanor charges and substitute felony offenses in their stead.[149] In particular, Congress

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violations of permit limitations, or the negligent or knowing introduction into a publicly owned treatment works (POTW) of a pollutant or hazardous substance "which such person knew or reasonably should have known could cause personal injury or property damage." *Id.* § 1319(c)(1)-(2). The CWA also imposes criminal liability for false material statements, representations or certifications in documents required to be filed or maintained or for tampering with any monitoring device. *See* 33 U.S.C. § 1319(c)(4).

147. *See* 42 U.S.C. §§ 9601-9675 (1994). CERCLA civil penalties attach where parties identified as responsible under section 107 of the Act fail to comply with administrative orders issued under section 106 seeking to compel cleanup and can amount up to $25,000 per day for each day of non-compliance. Criminal liability attaches for, among other things, a failure to notify federal and/or state agencies of a release of a hazardous substance, or submitting false or misleading information. *See* 42 U.S.C. § 9603(b). Penalties include fines under applicable provisions of Title 18 U.S.C., as well as imprisonment of up to three years. *See* 18 U.S.C. §§ 3571-3586. Fines under Title 18 can be up to $250,000 for individuals and $500,000 for corporations. *See id.* § 3571(b)-(c). Criminal liability also exists for failure to notify EPA of the ownership or operation of a TSDF, of previous ownership or operation at the time of disposal, or of the acceptance for transportation of hazardous substances within 180 days of CERCLA's enactment. *See* 42 U.S.C. § 9603. Finally, CERCLA imposes criminal liability for any person to "knowingly destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph 1 of this subsection." 42 U.S.C. § 9603(d)(2). And, under the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-11050, added as subtitle III to CERCLA through the Superfund Amendments and Reauthorization Act (SARA), criminal sanctions are also available for the failure to report a release of certain chemicals. *See* 42 U.S.C. § 11045(b)(4). Prosecutions under RCRA and CERCLA make up half of the federal prosecutions.

148. *See* 42 U.S.C.§§ 7401-7671(g). Section 7413(q) permits imposition of criminal penalties for the negligent or intentional release of hazardous air pollutants, the violation of requirements of state implementation plans (SIP), and the violation of new source performance standards (NSPS). Section 7413(c) further contains a "knowing endangerment" provision, which can subject the violator, if convicted, to imprisonment of up to 15 years and a fine of up to $1 million for organizations. *See* 42 U.S.C. § 7413(c)(5)(A). Individuals are subject to the amounts allowable under Title 18. *See* 18 U.S.C. § 3571. This section also provides that if a "conviction of any person under this paragraph is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both the fine and imprisonment." 42 U.S.C. § 7413(2)(c). However, criminal liability may also be imposed on any person who knowingly "makes any false material statement, representation . . . or omits material information from, or knowingly alters, conceals or fails to file or maintain any . . . document required pursuant to this chapter to be filed or maintained." *Id.* § 7413(c)(2)(A). The failure to notify or report is also punishable by fine or imprisonment. *See id.* § 7413(c)(2)(B).

149. In recognizing the need for, and the enhancement of, environmental sanctions, Congress considered the risk of harm presented by environmental pollution, as well as:

> [t]he deliberateness of the conduct behind many environmental violations and the indistinguishability of the financial motive for that conduct from that for many other crimes . . . the need for incarceration, in addition to punitive economic sanctions, to deter environmental violations; and . . . the difficulty of proving mens rea and causation because of the character of environmental pollution.

Lazarus, *supra* note 144, at 2451. In structuring an environmental criminal legislative scheme Congress, with limited exception, adopted what one commentator referred to as an "administrative model," where it is the violation of the underlying administrative and regulatory process, not the existence of strict environmental harm or threatened harm, that subjects the violator to criminal sanction. *Id.* According to Lazarus, the exception is the "knowing endangerment" provisions added to the CAA, the CWA, and RCRA. *Id.* at 2450. Lazarus identifies two other possible models, in addition to the administrative model. *See id.* at 2449. The criminal law model follows traditional criminal law precepts, requiring moral culpability,

included, *inter alia*, criminal sanctions for the falsification or concealment of material facts or documents as well as the conveyance of false, fictitious, or fraudulent representations either through filings directed to a governmental agency or in documents required to be maintained under the applicable environmental law.[150] For example, section 7413(c) of the CAA is representative of the criminal disclosure provisions in the major environmental statutes, and permits imposition of criminal penalties on *any person* who knowingly "makes any false material statement, representation . . . or omits material information from, or knowingly alters, conceals or fails to file or maintain any . . . document required pursuant to this chapter to be filed or maintained."[151]

It is pursuant to these provisions that a regulatory agency such as the EPA can extract a duty from attorneys to at minimum serve as a gatekeeper, if not as a whistleblower. Unlike their civil counterparts, which clearly target conduct by the polluting entity and conceivably limit the reach of any definitional provision, the criminal provisions are not similarly constrained and, as drafted, reach well beyond the traditional corporate structure.[152] Liability is imposed upon "any person" and is not otherwise limited by the statutory language simply to the corporate entity, its owner or operator.[153]

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where the crime is defined in terms of environmental pollution or harm. *See id.* The second model is a hybrid integrating aspects of the administrative and criminal models. *See id.*

150. Under the CAA and the CWA, violators are exposed to criminal sanctions if they: fail to report emissions or discharges, fail to notify the appropriate agency, or knowingly make false material statements or omissions in the notification, or fail to file, or otherwise conceal required information. *See* 42 U.S.C. §§ 7413(2), (4), and (5)(A) (CAA); 33 U.S.C. §§ 1319(c)(1)-(c)(4) (CWA). CERCLA provisions impose civil penalties for the destruction, falsification or concealment of records required to be maintained under the statute. *See* 42 U.S.C. §§ 9609(a)(1)(B), (b)(2), and (c)(2). The CWA imposes liability for the failure to notify the appropriate agency of discharges of oil or hazardous substances into navigable waters at risk of a fine of $10,000 and imprisonment of up to one year. *See* 33 U.S.C. § 1321(5). But note that one can also be liable for false statements made during investigative process. *See generally* Karen A. Potts et al., *Responding to Government Environmental Investigation: Shaping the Defense*, 34 ARIZ. L. REV. 509 (1992). For examples of cases for failure to notify under CERCLA, see United States v. Carr, 880 F.2d 1550 (2d Cir. 1989) (failure to report release); United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (failure to report release); United States v. Derecktor, 17 Env't. Rep. (BNA) 1540 (1987) (failure to report asbestos release). Disclosure issues can also subject attorneys to liability under 18 U.S.C. § 1001 for making false statements to a governmental agency. *See* United States v. Rutana, 932 F.2d 1155 (6th Cir. 1991) (false reports); United States v. Brittain, 931 F.2d 1413 (10th Cir. 1991) (same); United States v. Gardner, 894 F.2d 708 (5th Cir. 1990) (same); United States v. Protex Indus., Inc., 874 F.2d 741 (10th Cir. 1989) (failure to notify); United States v. Ashland Oil, 504 F.2d 1317 (6th Cir. 1974) (same); United States v. Hugo Key & Son, 731 F. Supp. 1135 (D.R.I. 1989) (failure to maintain required records); United States v. Harford Sands Inc., 575 F. Supp. 733 (D. Md. 1983) (same); United States v. Olin Corp., 465 F. Supp. 1120 (W.D.N.Y. 1979).

151. 42 U.S.C. § 7413(c)(2)(A) (1994).

152. *See* 42 U.S.C. § 7413(c) (1994) (liability extends to "any person").

153. *See* United States v. NEPACCO, 810 F.2d 726, 743 (8th Cir. 1986) ("Congress could have limited the statutory definition of person [to owners and operators] but chose not to do so.").

Rather, "person" is broadly defined and generally includes individuals, organizations, corporations, and partnerships.[154] The thrust of the criminal provisions imposes upon anyone who maintains or files documents or other information required under the statutes, the obligation to insure truthful and accurate disclosure.[155] Accordingly, the inclusion of false statements within a permit application would be sufficient to trigger an enforcement action.[156] Furthermore, the courts have consistently interpreted environmental statutes broadly, particularly when considering the culpability of the parties.[157]

In *United States v. Johnson and Towers*, the Third Circuit addressed whether employees not in a position to secure a permit required under RCRA, could nonetheless be subject to criminal liability by handling the waste.[158] The court stated: "It would undercut the purposes of the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling the regulated materials."[159] Similar reasoning has supported a willingness to expand liability under other statutes.[160]

Environmental lawyers, although actively involved in the representation of clients facing EPA scrutiny, have not considered themselves targets absent direct or active participation in corporate misfeasance. And, although to date EPA enforcement action for environmental statutory violations has not focused on attorneys, the risk assessment radically changes once the criminal disclosure provisions are taken into account. The risk arises where their services, even though provided in a representative capacity, qualify as primary

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154. RCRA, for example, includes within the definition of "person" any "individual, trust, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, community, political subdivision of a state or any interstate body." 42 U.S.C. § 6903(15) (1994). *See also* 42 U.S.C. § 7413(c)(2) (1994) (CAA).

155. *See* 42 U.S.C. § 7413(c)(2). To the extent that attorneys undertake the client's disclosure or record keeping obligations or otherwise become providers of fact, they step into the shoes of the client and are subject to whatever requirements govern those submissions. *See generally* Weinstein, *supra* note 111, at 416.

156. *See* 42 U.S.C. § 7413(c)(2)(A).

157. Decisions interpreting CERCLA are perhaps most illustrative of judicial latitude. In part, this is due to a perceived need to increase the pool of funds available for remediation efforts before cleanup costs are funded through the Superfund. *See, e.g.*, United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989) (giving broad construction to "arrange for disposal" language in section 107(a)(3) of CERCLA); United States v. NEPACCO, 810 F.2d at 726 (broadly construing section 7003 of RCRA); United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (expanding lender liability).

158. United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984).

159. *Id.* at 667. *But see* United States v. Dotterwich, 320 U.S. 277, 285 (1943) (Murphy, J. dissenting). Justice Murphy argued that the fact that the statute was a public health and welfare measure did not permit the Court to impose liability on persons not specified in the statute as within the class of offenders. "It is not our function to supply any deficiencies in these respects, no matter how grave the consequences. Statutory policy and purpose are not constitutional substitutes for the requirement that the legislature specify with reasonable certainty those individuals it desires to place under the interdict of the Act." *Id.* at 287.

160. *See Johnson & Towers, Inc.*, 741 F.2d at 667 (discussing RCRA and Food and Drug Act).

misconduct which then exposes the attorney to liability for a substantive violation of the environmental laws.[161]

Environmental attorneys routinely prepare and file any number of documents on behalf of their clients on a variety of issues related to environmental compliance. They often serve as the conduit for numerous contacts between the regulatory agency and the client. They are actively involved at the investigative stage in assisting the client to determine what information is required to challenge administrative regulatory action. However, although these actions may have been undertaken in the lawyer's representative capacity, the statutes as drafted do not preclude agency prosecution of attorneys in addition to corporate clients for should they provide or maintain inaccurate or false statements, or decide not to include information that the agency considered to be material, necessary, or required.[162] The risks are increased because legal advice in the environmental arena often involves advice on how to avoid compliance with perceived burdensome and onerous regulatory demands, through the use of "loopholes" or vague and conflicting provisions. The soundness of this advice depends markedly on whether the provisions at issue are sufficiently ambiguous to support the interpretation offered by the lawyer.

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161. Attorneys face criminal exposure for counsel, advice and actions outside of issues of disclosures or failure to disclose. *See, e.g.*, David F. Axelrod et al., *Crime Doesn't Pay–But Counsel May. What Every Practitioner Needs to Know About Criminal Exposure in the Everyday Practice of Law*, 8 FALL CRIM. JUST. 27 (1993) (discussing risks faced by lawyers under Title 18). For example, attorneys can face indictment for concealment of a felony under 18 U.S.C. section 4 where they assist a client in remediating an illegal discharge of hazardous waste without notifying the appropriate agency that the discharge occurred. *See* 18 U.S.C. § 4. In California, the County District Attorney indicted a San Francisco law firm with several felonies based on the firm's alleged improper advice to its client on improper hazardous waste disposal. *See generally,* Amy Stevens and Milo Gevelin, *Law Firm Charged With Felonies Over Advice on Hazardous Waste*, WALL ST. J., June 14, 1991. A lawyer at the firm had informed the client's landlord via a letter that the client would not clean up hazardous waste at a laboratory it had operated. *See id.* "According to Solano County deputy district attorney Mark Pollock, the lawyer's act of writing the letter effectively abandoned the waste at an unlicenced site, thus 'causing' an illegal disposal." *Id.* The charges were subsequently dismissed. *See also* Don J. DeBenedictis, *Advice is Legal: Pollution Charges Dismissed Against Law Firm, Associate*, 77 A.B.A. J., Oct. 1991, at 17. Liability also exists under Title 18 for aiding and abetting. *See* 18 U.S.C. § 2 (1994). Any person who aids, abets, or otherwise attempts to procure the commission of a crime can be prosecuted as a principal under the statute. *See id.* A "principal" is defined in section 2 as anyone who "aids, abets, counsels, commands, induces or procures" the commission of a crime. *Id.* The statute may be construed to reach conduct which involved simply advising a course of action subsequently determined to be criminal. *See id.* (historical and statutory notes). Under 18 U.S.C. § 1001, the making of a false writing or statement or the concealment of any material fact on any matter within the jurisdiction of a federal agency is a felony. Statements need not be written, nor are they required to be under oath in order to impose liability. *See id.* It is further irrelevant that the statement was made voluntarily rather than part of a required government communication. *See id.* Thus, in addition to liability under the substantive provisions of environmental laws, attorneys face criminal sanction for false statements in regulatory filings prepared by or under their supervision.

162. *See infra* Part II.B.

Additional complications are presented where the client chooses not to reveal the false, misleading, or otherwise questionable information. A prime example is presented by the kepone contamination in Virginia by Allied Chemical and Life Science Products.[163] For economic reasons, Allied decided to list its discharge as a "temporary discharge" which would be discontinued within two years in order to obtain the necessary permit.[164] Upon the expiration of the permit, Allied became subject to the newly instituted NPDES program, which similarly required Allied to obtain a permit.[165] At this point, Allied considered choices which included to (1) do nothing; (2) divert its effluent to a pipe which already had a permit for a different discharge; or (3) improve the toxic effluent until a local municipal plant, into which they hoped to connect, was constructed.[166] Allied chose to "submit[ ] data to the Federal government describing the . . . discharges as unmetered, unsampled, temporary outfalls. As a result, [for eight years] Allied discharged untreated kepone . . . wastes . . . without revealing the nature of its discharges to the Federal government."[167] The company's continuation of the intentional discharge would have made its permit application, and subsequently submitted documents, false or at minimum misleading. Because of these actions, three criminal proceedings were filed against Allied and its employees.[168] Yet none of these criminal proceedings involved attorneys.[169] Should Allied's lawyers have proffered advice regarding prepared or submitted documents, those actions would be potentially criminal under today's environmental laws.

Certainly issues of *mens rea* and knowledge afford some limitations on liability. The *mens rea* requirement has long been considered a staple in criminal prosecution. "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[170] Environmental statutes, however, are considered

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163. Kepone is a pesticide that was produced by Allied Chemical at its Hopewell, Virginia plant. Kepone is highly toxic, causing cancer, liver damage, and reproductive system failure among other things. *See* William Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645, 646 (1978). Allied Chemical produced kepone, a relative of DDT, for about four years and discharged it directly into a tributary of the James River when the federal government began requiring industries to obtain permits for such discharges from the Army Corp of Engineers. *See id.* at 647.

164. *Id.* at 647-48.

165. *See id.*

166. *See id.* at 648.

167. *Id.* (It was only during four of those years that a permit was required.).

168. *See id.* at 653-57.

169. *See* Tennille, *supra* note 124, at 20 (153 count indictment issued against two Life Science officers, and 941 count indictment against five officers and employees of Allied Chemical).

170. Morrisette v. United States, 342 U.S. 246, 250 n.4 (1952).

public health and welfare statutes.[171] Public welfare statutes arose from a perceived need to protect the public in an increasingly complex and industrialized society from actions which were considered injurious to society as a whole.[172] These statutes are classic *mala prohibita* crimes,[173] and they regulate various aspects of society, such as food, drugs, and securities. Violating any regulatory measure is punishable as a criminal offense.[174] Unlike conventional criminal statutes, public welfare statutes permit the imposition of liability irrespective of the actor's state of mind and independent of the traditional requirement of awareness of wrongdoing.[175] As explained by the Third Circuit in *Johnson & Towers*, "[t]hough the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose."[176]

Consequently, although most environmental statutes impose criminal liability only for conduct that is engaged in "knowingly,"[177] this requirement does not mandate that the defendant be aware of the illegality of the activity[178]

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171. *See generally* United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975).

172. The Court in *Morisette* noted that:

> Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Morrisette, 342 U.S. at 254.

173. A crime is *mala in se* where it is intrinsically wrong. A *mala prohibita* offense is made criminal solely by regulation. *See* Diane M. Barber, *Fair Warning: The Determination of Scienter Under Environmental Statutes*, 26 LOY. L.A. L. REV. 105, 111 n.43 (1992).

174. *See id.* at 111.

175. *See, e.g.*, United States v. International Minerals & Chem. Co., 402 U.S. 558, 563 (1971); United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1995).

176. *Johnson & Towers, Inc.*, 741 F.2d at 666.

177. Under CERCLA, mere failure to notify violates 42 U.S.C. § 9603(a) and (b), and the government is not required to prove knowledge. *See, e.g.*, United States v. Greer, 850 F.2d 1447, 1453 (11th Cir. 1988) (defendant only required to have knowledge of the release and subsequently failed to report). *See generally* Kevin A. Gaynor et al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1 (1992). However, the CAA and CWA impose criminal liability for negligent releases of hazardous substances that endanger human life and CWA also provides for criminal penalties for negligent permit violations or unpermitted discharges regardless of endangerment. *See id.* at 3 n.5. The criminal penalties for negligent violations can be substantial. *See, e.g.*, Robert Deeb, *Environmental Criminal Liability*, 2 S.C. ENVTL. L. J. 159, 175 (1993).

178. *See International Minerals & Chem. Co.*, 402 U.S. at 563; *see also* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986); *Johnson & Towers Inc.*, 741 F.2d at 664-65. However, in *Liparota v. United States*, the Supreme Court held that unlike in *International Minerals* and *United States v. Dotterweich*, 320 U.S. 277 (1943), even though a public welfare statute was involved, the government was required to prove the defendant knew his

or even that the activity be characterized as knowing or willful.[179] All the government must prove is knowledge or awareness of one's actions, i.e., the activity itself.[180] This is the classic paradigm that ignorance of the law is no defense.[181] In *United States v. Dotterweich*, the Supreme Court explained the rationale for this relaxed standard as follows: "In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[182] As a result, the

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possession of food stamps was in violation of the statute, concerned that to hold otherwise would be to "criminalize a broad range of apparently innocent conduct." Liprarota v. United States, 471 U.S. 419, 426 (1985). *International Minerals* and *Dotterweich* were distinguishable, according to the Court, because "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.* at 432-33.

179. "[I]n construing knowledge elements that appear in so-called public welfare statutes--*i.e.*, statutes that regulate the use of dangerous or injurious goods or materials--the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful." United States v. Hopkins, 53 F.3d 533, 537 (2d Cir. 1995).

180. This does not mean that the government does not have to prove knowledge of certain underlying material facts. *See International Minerals & Chem. Corp.*, 402 U.S. at 563 (holding that the government must prove the defendant's knowledge that the material being shipped was hazardous); United States v. Laughlin, 10 F.3d 961, 964-67 (2d Cir. 1993). In addition, a defendant may raise a "good faith" defense of mistake of fact; however the burden of proof remains with the defendant. *See Hayes Int'l Corp.*, 786 F.2d at 1506. Further, the government may prove both the germane underlying facts supporting knowledge and rebut the good faith defense by inference through circumstantial evidence from which knowledge is inferred. *See id.* RCRA has generated several cases where courts have attempted to delineate what, under 42 U.S.C. § 6928, must be done knowingly. *See generally Johnson & Towers, Inc.*, 741 F.2d 662. Courts have struggled because of the traditionally broad interpretation given to public welfare statutes, which often disagree upon whether the "knowledge" requirement contained in the statute should be given a broad or restrictive interpretation. *See, e.g., Johnson & Towers, Inc.*, 741 F.2d at 669 (government required to prove defendant knew he was disposing of hazardous waste without a permit under 42 U.S.C. § 6928(d)(2)(A)); *Hayes Int'l Corp.*, 786 F.2d at 1503 (knowledge of illegality not an element of offense under 42 U.S.C. § 6928(d)(1), but government must prove defendant knew disposal site was unpermitted). *See also Hoflin*, 880 F.2d at 1038-39 (defendant's knowledge that facility was unpermitted is not an element the government must prove under 42 U.S.C. § 6928(d)(2(A)). RCRA, the CAA, and the CWA impose liability for any violation that places "another person in imminent danger of death or serious bodily injury." *See* 42 U.S.C. § 6928(e) (RCRA); 42 U.S.C. § 7413(c)(4) (CAA); 33 U.S.C. § 1321(b)(2)(A) (CWA). "Because of the extensive reach of these three statutes, virtually any polluter whose violation places 'another person in imminent danger of death or serious bodily injury' can be convicted of knowing endangerment." Deeb, *supra* note 177, at 165.

181. *See, e.g., International Minerals & Chem. Corp.*, 402 U.S. at 563. The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption . . . that [] 'ignorance of the law is no defense to a criminal prosecution.'" Cheek v. United States, 498 U.S. 192, 199 (1991) (Ginsberg, J., concurring) (internal citations omitted). Nor can a defendant shield himself from liability by willful blindness that an illegal activity is occurring. "Wilful blindness occurs when a defendant's suspicions of a criminal act are aroused, but the defendant makes no further inquiry into the activity in order to remain in ignorance." Deeb, *supra* note 177, at 170; If the defendant deliberately avoids discovering the facts, the defendant will still be liable. *See* Stone v. United States, 113 F.2d 70, 75 (6th Cir. 1940).

182. United States v. Dotterweich, 320 U.S. 277, 281 (1943) (citing United States v. Balint, 258 U.S. 250 (1922)). However, in *Liparota v. United States*, the Supreme Court adopted a different standard in a case involving criminal penalties for someone who "knowingly uses, transfers, acquires or possesses"

knowledge standard for environmental laws differs from the specific intent required for many other criminal acts.[183] Hence, while proof that an attorney acted "with knowledge" or "knowingly" affords a significant limitation on the imposition of liability, it is one that also provides limited comfort.[184]

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food stamps. *Liparota*, 471 U.S. at 423-24. The Court held that knowledge of illegality was required. *See id.* The Court distinguished several earlier environmental cases including *International Minerals*, saying that in *Liparota*, proscribed conduct, "not a type of conduct that a reasonable person should know[,] is subject to stringent public regulation and may seriously threaten community's health and safety." *Id.* at 433. Presumably then, to the extent that an environmental regulation is not directed toward alleviating a threat to community health and safety, the *Liparota* standard would apply, rather than the "knowledge of act, but not illegality" standard. *See also* Gaynor et al., *supra* note 177, at 11-12 n.39 (arguing that there are two standards and attempt to distinguish using RCRA).

183. The doctrine of "collective knowledge" has been utilized by the government to prove the knowledge of a corporation when violating an environmental statute. *See* Joseph B. Block, *Environmental Criminal Enforcement in the 1990's*, 3 VILL. ENVTL. L. J. 33, 44 (1992). This doctrine permits proof that some employees engaged in the proscribed conduct while other employees had the requisite intent to be combined to show collective knowledge on the part of the corporation, "even where [the government] cannot prove that any single employee both took the requisite action and had sufficient intent." *Id.*

184. In a development with significant implications for corporate counsel, as opposed to outside attorneys, governmental prosecutors were handed a potent tool in proving a defendant acted "knowingly" in the form of the "responsible corporate officer" doctrine. Several cases apply the responsible corporate officer doctrine in the environmental arena. *See, e.g., Johnson & Towers*, 741 F.2d at 662 (RCRA); United States v. Ward, 618 F. Supp. 884, 894 (E.D.N.C. 1985) (RCRA); *Hoflin*, 880 F.2d at 1037-39. The doctrine was established in *United States v. Dotterweich*, an early case under the Food, Drug and Cosmetic Act (FDCA), and is based on the premise that corporate officers and managerial employees with the authority to detect, correct, or prevent statutory violations should be held criminally accountable for the conduct of their subordinates. *See Dotterweich*, 320 U.S. at 281-82. In *Dotterweich*, the president and general manager of Buffalo Pharmacal Company was charged with a misdemeanor violation of the FDCA, which prohibited the "introduction or delivery for introduction into interstate commerce of any . . . drug . . . adulterated or misbranded." *Id.* at 278. Although Dotterweich did not actually participate in the activities leading up to the violation, his misdemeanor conviction was upheld. *See id.* at 284-85. Prior to the *Dotterweich* decision, corporate officers could not be held personally responsible for their company's statutory violations through the defenses of delegation or impossibility. *See* Deeb, *supra* note 177, at 171. *United States v. Park* reinforced the holding of *Dotterweich*, noting:

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

United States v. Park, 421 U.S. 658, 672 (1975). In *Park*, the Court then clarified, however, that a corporate officer may not be liable merely because of his position; rather, before liability can be imposed, the defendant must have the authority or responsibility to deal with the circumstances giving rise to the violation. *See id.* at 672-73. The Supreme Court, in reversing a finding by the Third Circuit that *Dotterweich* still required finding some direct "wrongful action" on the part of the responsible officer, stated:

> Thus Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission–and this is my no means necessarily confined to a single corporate agent or employee–the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.

Without doubt, criminal provisions in environmental statutes are primarily designed to deter corporate misfeasance and certainly enforcement efforts have targeted company principals. Because the criminal provisions are drafted broadly, there is no reason why lawyers would not also fall within their scope. The breadth of the defining provisions, combined with the increasing role attorneys play in client decisions, creates the springboard for an expanded reach and the basis for the imposition of a heightened duty, whether as gatekeeper or whistle blower.

III. THE IMPACT OF REGULATORY OVERSIGHT OF PROFESSIONAL RESPONSIBILITY AND THE ETHICAL DEBATE ON DISCLOSURE

A. The Ethics of Disclosure-Model Rule 1.6

The debate on the expansion of an attorney's obligations beyond the historical role as advocate and confidant has centered on the ethical conflicts posed by any regulatory insistence on disclosure by attorneys.[185] The ethical parameters governing legal professionals are found in the ABA Model Code of Professional Responsibility (Model Code) and the ABA Model Rules of Professional Conduct (Model Rules).[186] The Model Code was promulgated

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Id. at 672. Accordingly, *Dotterweich* and its progeny establish an affirmative duty on those in responsible positions who know or should know, to take steps to prevent the conduct or be held equally culpable as the actual polluter. For inside counsel, the responsible corporate officer doctrine presents a very real threat, as corporate counselors often function in dual roles.

185. *See, e.g.*, Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 427 n.94 (1997). The ability and propriety of the bar to exclusively regulate the legal profession has also been a matter of significant debate.

186. The early ABA Canons of Ethics, adopted in 1908, established a duty to preserve client confidences in Canon 37. Canon 41 expanded this obligation upon its adoption in 1928 by providing "[where] a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it . . . ." ABA CANONS OF ETHICS Canon 41. Canon 41 permitted the attorney to inform the injured person or their counsel if his client, upon being advised of the fraud, failed to rectify it.

> However, over the years, there were situations brought to the attention of the ABA Committee on Professional Ethics in which the confidentiality provisions of Canon 37 conflicted with the disclosure of fraud provisions of Canons 29 and 41. The Committee, in a series of opinions, addressed these conflicts by suggesting that, in such a case, the lawyer was to urge the client to disclose perjury, but if client failed to do so, the lawyer was only to withdraw, not disclose . . . . It was, however, unmistakable that under the ABA Canons that discretion to disclose confidential client information in the situations of client accusation against a lawyer and the announced intention of a client to commit a future crime was preserved.

Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protectionism of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT 439, 448-49 (1993). The Canons were ultimately

in 1969 and is comprised of canons, ethical considerations, and accompanying disciplinary rules.[187] The ABA Model Rules[188] were adopted by the ABA in 1983, following the determination that existing ethical proscriptions contained in the ABA Canons and subsequently the Model Code, did not adequately clarify disclosure obligations.[189] The Model Rules were designed to provide "a framework for the ethical practice of law"[190] and they contain both obligatory and discretionary provisions.[191]

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considered outdated given the growing complexity of issues and circumstances under which legal advice was sought and insufficient to govern the conduct of attorneys.

187. The Canons "embodied the general concepts from which the Ethical Considerations and Disciplinary Rules are derived." Tuoni, *supra* note 186, at 450-51. There were nine canons which contained fairly broad statements of an attorney's responsibilities. The Ethical Considerations were to provide guidance to attorneys in specific situations and "represented the objectives toward which every member of the profession should strive." *Id.* at 451 (quoting ABA Code Preliminary Statement (1969)). In contrast, the Disciplinary Rules "were mandatory and akin to statutory provisions in that they stated the minimum level of conduct to which one could fall without being subject to discipline." *Id.* Failure to follow the Disciplinary Rules could subject the attorney to disciplinary proceedings. *See id.*

188. The Model Rules themselves have no legal effect. *See* MODEL RULES OF PROFESSIONAL CONDUCT (hereinafter "MODEL RULES" or "MODEL RULE") Preamble (court's have ultimate authority over the legal profession). However, upon adoption as formal rules by a state, or local rules by the federal courts, the rules "are the equivalent of rules of court and thus generally have the force of law." Geoffrey C. Hazard, Jr. and William Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 206 (2d ed. Supp. 1998). Although the Model Rules have been adopted by 36 states, they have not been adopted verbatim. *See* Russell, *supra* note 185, at 444-45 (only six jurisdictions enacted Rule 1.6 verbatim). Of the remaining states, some follow the Model Code and others adopt their own rules. *See* Brown, *Financial Institution Lawyers*, *supra* note 56, at 656. Most states have enacted, in some form, a professional rule of confidentiality. *See id.* Accordingly, there are no uniform national standards "and currently the rules governing legal ethics present a welter of different standards varying from state to state." Simon Lorne and W. Hardy Callcott, *Administrative Actions Against Lawyers Before the SEC*, 50 BUS. LAW. 1293, 1301 (1995).

189. *See generally* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998). "Soon after the ABA Code was adopted, many concluded that its provisions were 'inadequate for the needs of the profession.'" Tuoni, *supra* note 186, at 457 (quoting Andrew Kaufman, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 17 (3d ed. 1989)). Professor Kaufman has commented on the factors that led to this conclusion:

> Shortly after [the ABA Code] was promulgated, the involvement of so many lawyers in Watergate focused the attention of the public and profession on lawyers' conduct. In addition, a number of substantive problems, especially conflict of interest and confidentiality, became part of the staple of lawyers' daily routine. Moreover, decisions of the Supreme Court held a number of the profession's rules relating to the provision of legal services unconstitutional. All these factors combined with a variety of particular criticisms to lead many people to conclude that the [ABA Code was inadequate].

Id. Accordingly, the ABA established a commission, known as the Kutak Commission and chaired by Robert Kutak, to draft a new code of ethics, which subsequently formed the basis for the Model Rules. *See id.* These rules reflect the current ABA position on legal ethical norms.

190. MODEL RULES Scope, para. 14 (1997).

191. *Id.*, at para. 13. Each rule is followed by an explanatory comment, "but the text of each rule is authoritative." *Id.* at para. 21. Similarly, the Scope to the Model Rules expressly cautions that any notes which provide comparisons between the Model Rules and other ABA Codes "have not been adopted, do

These ethical rules state that the lawyer should "represent a client . . . with zeal in advocacy,"[192] to "provide competent representation,"[193] to avoid "conflicts of interest,"[194] and "exercise independent professional judgment"[195] on the client's behalf. At the same time, the lawyer is to be cognizant of his obligations as an officer of the court and as a public citizen,[196] with a duty of "candor" owed to tribunals.[197] A pervasive precept, however, is the mandate to keep client confidences.[198] In the Model Code, DR 4-101 provides that except in certain limited circumstances, a lawyer "shall not knowingly . . . reveal a confidence or secret of his client."[199] The exceptions to DR 4-101 permit disclosures with the client's consent, disclosure where required by law, or disclosure when necessary to prevent the commission of a crime.[200] The Model Rules similarly contain prohibitions on the disclosure of confidential

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not constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments." *Id.* Although both the Model Rules and the Model Code govern professional conduct today, this article principally discusses the ethical proscriptions of the Model Rules with reference to the Model Code where relevant.

192. MODEL RULE 1.3, cmt. 1 (1997). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY ("MODEL CODE") Canon 7 (1997).

193. MODEL RULE 1.1 (1997).

194. *Id.* at Rule 1.7, 1.8.

195. *Id.* at Rule 2.1.

196. *See id.* at PREAMBLE, 1.

197. *See id.* at Rule 3.3, cmt. 1, 3.9.

198. *See id.* at Rule 1.6.

199. MODEL CODE DR 4-101(1997). It also provides:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person . . . .
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information is necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id.

200. *See id.*

information.[201] Model Rule 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client."[202] Model Rule 1.6 permits such information to be revealed only to prevent the client from committing a crime that would result in imminent death or substantial bodily harm[203] or in other narrowly prescribed circumstances.[204] Model Rule 1.6

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201. *See* MODEL RULE 1.6 (1997).

202. *Id.* at 1.6. Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. "Thus, Model Rule 1.6 'eliminates the two-pronged duty under the [Model] Code [to protect confidences and secrets] in favor of a single standard protecting all information about a client relating to representation.'" Tuoni, *supra* note 186, at 459.

203. Model Rule 1.6 makes disclosure under such circumstance permissive, not mandatory. *See* MODEL RULES 1.6(b) (1997). However, of those states adopting the Model Rules, nine have made disclosure mandatory. *See* Russell, *supra* note 185, at 446. Further, "twenty-two jurisdictions have broadened the category of 'crime' that qualifies as an exception by deleting the category of 'imminent death.' Of these jurisdictions fifteen have broadened the exception further by rejecting the qualifier 'substantial' to the category of 'bodily harm.'" *Id.* at 446-47.

204. MODEL RULE 1.6(b) (1997). Model Rule 3.3 requires candor towards a tribunal, and further permits disclosure of confidential information where a tribunal is involved and where the lawyer is unable to take adequate remedial measures. Under Model Rule 3.3 a lawyer "shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" and "shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material false evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." MODEL RULE 3.3 (a)(2) and (a)(4) (1997); *see also* MODEL RULE 3.3 commentary (setting forth the reasonable remedial measures referred to in the rule).

> Model Rule 3.3(a)(4) radically changed past practice under both the ABA Canons and the ABA Code. As indicated, under the ABA Canons and the ABA Code, client confidentiality prevailed over duties of the lawyer to disclose fraud to the court. However, under the Model Rules, a lawyer is now obligated to disclose client perjury to the court if nothing else works in remedying the fraudulent testimony or evidence.

Tuoni, *supra* note 186, at 467; *see also* Harry I. Subin *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1098 (1985) (arguing that despite their intrinsic juxtaposition with the attorney-client privilege, ethical rules are adopted without any consideration given to that relationship and that accordingly, "[n]o principled and coherent set of disclosure rules has been articulated"). Professor Subin asserts that instead of the separatist approach which has characterized the development of the ethical rules on confidentiality, competing interests would have been better served by the adoption of either the expansive view of confidentiality adopted by the bar or the narrower version reflected by the evidentiary privilege. *See* Subin, *supra*, at 1100.

> Instead, the ethics codifiers proposed, and the legislatures and courts accepted, a simple division of territory: an attorney must observe the ethical rules concerning

imposes an absolute rule of non-disclosure absent such circumstances, and thus reinforces the centrality of the duty of confidentiality.[205]

> From one perspective, Model Rule 1.6 enlarged the protections of client confidentiality previously existing under the ABA Code because it applies to all information about a client "relating to the representation." That definition avoids the constricted definition of confidence appearing in the ABA Code, as well as extends protection to information relating to the representation whether or not such information would be embarrassing or detrimental.[206]

Model Rule 4.1 permits disclosure of material facts to third parties where necessary to avoid assisting in criminal or fraudulent conduct.[207] However, if the information is confidential under Model Rule 1.6, its strictures prohibit disclosure.[208] To the extent disclosure of criminal or fraudulent conduct is required by law, it is unclear whether the attorney must disclose despite the protection of confidentiality offered by Model Rule 1.6.[209] Should a lawyer

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> confidentiality unless some other law requires a different course of action. In practice, therefore, virtually all information concerning the client is considered confidential until a formal demand (one made in or enforced by a court) for disclosure is made. At that point the much narrower evidentiary rule, the attorney-client privilege, becomes operative.

Id. at 1108-09. Subin offers as an explanation that the more expansive version of confidentiality expressed in the ethical rules was to prevent attorneys from making unilateral disclosure decisions, but suggests that this goal could have been equally achieved by including a prohibition against disclosure absent judicial mandate within the rules themselves. *See id.* at 1109.

205. *See* MODEL RULE 1.6 (1997).

206. Tuoni, *supra* note 186, at 459 (citations omitted).

207. *See id.* at 447.

208. MODEL RULE 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULE 4.1 (1997).

209. For example, the evidentiary protections extended by the attorney-client privilege don't apply where the communications sought to be protected were in furtherance of a crime or fraud. The exception would apply whether the attorney is aware of the fraud or crime at the time of the communication or counsel rendered, or when the client conceals his wrongful purpose. *See* David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986) (detailing history and evolution of this exception to the attorney-client privilege). Under such circumstances, the attorney would be required to disclose documents and other information in response to a validly issued governmental subpoena or demand. *But see* MODEL RULE 1.6, cmt. 21 ("Whether another provision of law supersedes Model Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession."); *see also In re* Price, 429 N.E.2d 961 (Ind. 1982) (disciplining attorney under rules for failure to disclose information to state agency where required by state law). In the debate over the Kutak Commission's proposed amendments to the Model

be unable to persuade his or her client to cease unlawful activity, the Model Rules require withdrawal if his or her services are to be used in "materially furthering a course of criminal or fraudulent conduct."[210]

The regulatory ethical paradigm proposed by federal agencies seeks to replace the ethical proscription against disclosure by reconfiguring the social utility balance. A lawyer acting in his professional capacity owes obligations not only to the client, but serves as an officer of the legal system and as a public citizen.[211] Although the Preamble to the Model Rules underscores the necessity of balancing these competing interests, the Model Rules in effect focus principally on a lawyer's ethical responsibilities in the relationship with the client.[212] The regulatory ethical model shifts the balancing of interests

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Rules, the House of Delegates deleted a proposed exception which would have required disclosure to "comply with other law." Russell, *supra* note 185, at 440. Model Code DR 4-101(C)(3) provided that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE DR 4-101(C)(3) (1997). Professor Russell has commented that

> [a]s a practical matter, deletion of this provision may have little or no effect on attorney obligations . . . . [L]egislatures have the power to regulate the conduct of all persons within their jurisdictions including attorneys. Thus, positive law, enacted by a legislature trumps self-regulation by attorneys so long as the legislation stops short of violating the separation of powers.

Russell, *supra* note 185, at 440-41.

210. MODEL RULES 1.6, 1.16(a)-(b) (1997). Model Rule 1.16 provides in relevant part:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the rules of professional conduct or other law . . . .
>
> (b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (2) the client has used the lawyer's services to perpetrate a crime or fraud. . . .

MODEL RULE 1.16 (1997).

211. *See* MODEL RULES Preamble, § 1 (1997).

> The fundamental problem associated with any framework for legal ethics is how to adequately address and balance the various professional functions a lawyer assumes—as a representative of clients, as an officer of the legal system, and as a private citizen responsible for upholding the law. Often these roles conflict.

Day, *supra* note 12, at 647.

212. MODEL RULES Preamble (1997).

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

Russell, *supra* note 185, at 427. However, Professor Tuoni argues, among other things, that through the confidentiality proscriptions, the Model Rules clearly place the interests of the client and the protection of client confidences, even if detrimental, above the interests of society and individuals, particularly when looking at the protections afforded client confidences relating to future criminal conduct or conduct involving only pecuniary harm, regardless of amount. *See* Tuoni, *supra* note 186, at 440. Although the

away from the lawyer as a representative of the client, towards the lawyer as an officer of the legal system and public citizen. The public interest in full disclosure is no longer viewed in the context of the attorney-client relationship, but rather in the context of the marketplace. The regulatory model would insist that the attorney's obligation as advocate can be superceded by his or her obligations to the public. It is unclear whether those obligations either encompass the public service model of lawyering posited by Professor Dana,[213] fit within the gatekeeper model articulated by Professor Kraakman,[214] or adopt the role suggested by Professor Brown enlisting lawyers as "quasi-public servants."[215] However constructed, regulatory enforcement would still ensure compliance whether achieved through administrative disciplinary actions or through pursuit of attorneys, as well as the clients, for substantive violations premised on a broad regulatory interpretation.[216]

The legal bar and scholars widely condemn any effort to force attorneys into gatekeeper roles.[217] Criticisms have ranged from attacks on the decline

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rules permit withdrawal as well as disaffirmance of opinions or documents previously prepared by the attorney, according to Professor Tuoni, such actions are inadequate to remediate the harm. *See id.* at 468. "While such disaffirmance may waive a 'red flag' alerting others that all is not right with the client, such notice hardly is explicit and is not likely to reach intended victims of the client's criminal design." *Id.* Professor Tuoni contends that the approach taken by the Model Rules "is detrimental not only to society and its individual members, but also to the integrity of the legal profession and the sustenance of its self regulation." *Id.* at 468-69.

213. *See generally* Dana, *supra* note 4.

214. *See* Kraakman, *supra* note 2.

215. George H. Brown, *Environmental Lawyers and the Public Interest: A Response to Professor David Dana*, 74 ORE. L. REV. 85, 97 (1995) [hereinafter Brown, Response]. Professor Brown, for example, maintains that in addition to a gatekeeping functions, "[a]dding a mandatory whistle blowing requirement . . . would enhance the effectiveness of lawyers in the third-party enforcement regime." Brown, *Financial Institution Lawyers*, *supra* note 56, at 697.

216. *See, e.g.*, Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436, 462 (1987); *but see generally* Kraakman, *supra* note 2 (discussing effectiveness of gatekeeping within various enforcement strategies).

217. *See, e.g.*, Kostant, *supra* note 99; Russell, *supra* note 185; Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH.U. L.REV. 191 (1978); J. Michael Callan and Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332 (1976); Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11 (1985); France, *supra* note 112 (questioning whether regulatory view of attorney as gatekeeper will prevail); Jonathan R. Macey & Geoffrey P. Miller, *Kaye, Scholer, FIRREA, and the Desirability of Early Closure: A View of the Kaye, Scholer Case from the Perspective of Bank Regulatory Policy*, 66 S. CAL. L. REV. 1115, 1130 (1993) (stating that the OTS position has no basis in law); Bank, *Thrift Attorneys React to Duties Outlined by OTS Chief Counsel Weinstein*, 55 BANKING REP. (BNA) 547, 547 (Oct. 1, 1990) ([L]awyers are not cops.). *But see* Brown, *Financial Institution Lawyers*, *supra* note 56, at 710 (arguing that under his proposal that a banking lawyer be required to provide a "certification"). Professor Brown notes that:

> the lawyer would serve as gatekeeper, and would merely advise the institution whether or not the transaction can be consummated. Close cases would be subject

of trust crucial in the attorney-client relationship, to the uncertainties created when the lawyer shifts from the role of advocate to gatekeeper.[218] "Ostensibly counsel would still serve to facilitate his client's aims; however, at some undefined point the attorney's new paramount role as regulatory gatekeeper would supersede the traditional role as advocate."[219] One member of the bar contended that the regulatory position was tantamount to making the attorney an "enforcer" of the government, effectively leaving the client unrepresented.[220] While recognizing that the existing ethical framework is far from perfect, commentators raise a number of arguments against the development of a new ethical model which would split the lawyer's traditional role as advisor and advocate to his or her client.[221]

Principal among them is the argument that such a shift is fundamentally contrary to the interests served in the attorney-client relationship. The traditional model of the lawyer-client relationship "vests the client with independence and decision making authority and views the lawyer as facilitator–an agent whose goal is to help the client achieve his mission."[222] Foremost and perhaps best known by the public is the lawyer's duty of unswerving loyalty to his client reflected in directives to maintain the confidentiality of client communications.[223] The theory underlying client

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> to a good faith exception, so lawyers would be protected from liability for honest and reasonable errors in judgment. If the proposed transaction would violate federal regulations, the lawyer simply would refuse to issue the required certification. Mandatory disclosure would occur where the lawyer later discovers that the transaction was completed even though it violated the banking regulations.

Id. at 710. Professor Brown maintains that conflicts between a lawyer's duty of loyalty to his client and a duty to act as a gatekeeper can be reconciled "by defining the lawyer's obligation as that of acting in the best interests of the client and taking reasonable steps to protect the client's interests." *Id.* at 709. According to Brown, mandatory disclosure would directly protect the interests of the financial institution and indirectly protect the public interest by maintaining the stability of the banking system. "Since the institution is jeopardized by illegal risk taking, the lawyer is protecting the institution by making the disclosures." *Id.* at 717.

218. *See* Day, *supra* note 12, at 665.

219. *Id.* at 666.

220. *See* Lawrence J. Fox, *OTS vs. Kaye, Scholer: An Assault on the Citadel*, 48 BUS. LAW 1521, 1524 (1993).

221. *See* Day, *supra* note 12, at 666.

222. *Id.* at 665. *See also* France, *supra* note 112, at 57 ("The client wants to be told how to do what he wants to do, and it is the lawyer's business to tell him how."); Brown, *Financial Institution Lawyers*, *supra* note 56, at 714-15.

223. "The privilege from disclosure to third parties of a client's communication with an attorney is a fundamental tenet of the attorney-client relationship. It is the oldest of common-law privileges and has as its purpose the encouragement of 'full and frank communications between attorneys and their clients . . .'" H. Lowell Brown, *The Dilemma of Corporate Counsel Faced With Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 782 (1996) [*hereinafter* Brown, *Dilemma*]. *See also* Butler v. United States, 414 A.2d 844, 849 (D.C. App. 1980) ("The protection of a client's confidences is so basic a tenet of professional responsibility that it yields only in the rarest of real

confidentiality is that society is better served in an environment that encourages free and full disclosure.[224] Since legal advice is often necessary in order to determine a preferred choice of action, lawyers can assist only where client disclosures are frank and unfettered by fear that confidences will become public.[225] Accordingly, the social utility of encouraging full disclosure within the attorney-client relationship outweighs the dangers to the community of non-disclosure.[226]

In addition, the Preamble to the Model Rules acknowledges that the preservation of client confidences serves the public interest "because people are more likely to seek legal advice and thereby heed their legal obligations when they know their communications will be private."[227]

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ethical dilemmas.").

> The notion that strict and absolute confidentiality is a fundamental requirement of the lawyer-client relationship is perhaps partially based on an antiquated view of the American legal culture. The need to assume unyielding loyalty on the part of the lawyer is, in part, based on the narrow paradigm of the client as an unsophisticated, mistrusting consumer of legal services, as in the classic example of the working-class criminal suspect.

Brown, *Financial Institution Lawyers*, *supra* note 56, at 711. The confidentiality protections found in the ethical rules stem from the evidentiary protections offered by the attorney-client privilege. *See* Tuoni, *supra* note 186, at 446. That privilege serves to exclude testimony by attorneys about confidential communications with the client, and similarly protects the client from revelations by the attorney out of court. *See id.* at 452-54. However, the ethical proscriptions offer substantially more protection.

> The ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information, or the fact that others share the knowledge. Indeed, it has been stated that the ethical protections under the disciplinary rule looked 'beyond technical consideration of secrecy in the evidentiary sense and [shielded] all information given by a client to his [or her] lawyer whether or not strictly confidential in nature.'

Id. at 453 (discussing the development of the ABA Codes of Professional responsibility and the birth of the confidentiality protections).

224. *See* Model Rules Preamble § 3 (1997).

225. *See* Illona Dotterer, *Attorney Client Confidentiality: The Ethics of Toxic Dumping Disclosure*, 35 WAYNE L. REV. 1157, 1173-74 (1989).

226. *See id.* at 1173 ("[S]ocial utility is based on the premise that society is better served when attorneys can offer clients 'professional refuge' even though certain dangers to the community are not disclosed.").

> The question is whether the moral balance shifts when the client's wrongful acts threaten harm to others, for then a conflicting moral proposition—that we should prefer the victim of wrongdoing over the perpetrator—emerges. The answer given by the advocates of strict confidentiality is that the values served by confidentiality require sacrificing the victim in almost all cases.

Subin, *supra* note 204, at 1159.

227. MODEL RULES Preamble § 7 (1997). "Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. . . . Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." MODEL RULE 1.6 cmt. 3 (1997).

Fear or threat of disclosure would reduce confidence in the legal system. This "rights based defense of confidentiality"[228] is grounded on the theory that "the primary objective of the legal system is the preservation of individual autonomy, through the protection of an individual's rights against encroachments by other individuals or the state."[229] Permitting disclosure at the attorney's discretion creates the risk of improvident disclosures, even further reducing client confidence.[230] Equally, if not more important, a lawyer with possession of all the facts is in a better position to counsel the client against engaging in conduct that carries with it the potential for harm.[231] Finally, a lawyer's role in the attorney-client relationship has been posited not as a decision-maker, but simply as an advisor carrying out a client's wishes. As explained by one commentator, this "hired gun" theory limits the attorney's moral role to the choice of clients.[232] Having accepted representation, the lawyer must zealously advocate the client's position,

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228. Subin, *supra* note 204, at 1160-61.

229. *Id.* Professor Subin identifies additional premises to this "defense" as:

> (b) in a complex society individuals can have meaningful access to the legal system, and therefore to the mechanism by which their rights can be protected, only if they are represented by attorneys who have the skill to guide them through the process; (c) attorneys can perform this function only if they are privy to all the client's information, because otherwise they would not be able to diagnose properly the legal problem or prescribe a resolution of it; (d) clients will not provide attorneys with all of the facts, including possibly damaging and embarrassing facts, if they believe that the attorney will disclose those facts; (e) therefore, confidentiality is essential to the preservation of individual autonomy.

Id. at 1160.

230. *But see* Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 WASH. & LEE L. REV. 823, 827 (1992) (arguing that obligation of silence undermines public confidence in the integrity of the profession).

231. *See* MODEL RULE 1.6 cmt. 9 (1997). However, Professor Russell, although acknowledging the potential for disclosure to chill client confidences, argues that the utilitarian argument, i.e., that permitting disclosure would eliminate the lawyer's ability to dissuade client misconduct, is flawed. *See* Russell, *supra* note 185, at 429. Rather, she maintains that from an economic perspective, knowledge of the potential of disclosure by the attorney would force the client to take the power to disclose into account. *See id.* at 429-30.

> The greater the client's certainty that the attorney has no power beyond admonishing compliance, the less likely the client will heed the attorney's advice. Some clients will be dissuaded from harmful conduct by learning that it is unlawful, but others may use the attorney's counsel, not to comply with the law but to exploit advantages.

Id. at 430.

232. *See* Freedman, *supra* note 217, at 192; *see also* Callan & David, *supra* note 217, at 332-33.

regardless of the lawyer's personal value choices.[233] Such a rule is contrary to that thrust upon attorneys by regulatory agencies.

The new regulatory ethical model embraced by regulatory agencies would, the argument goes, undermine the entire foundation upon which the attorney-client relationship is based.[234] "Historically, the interest of autonomous lawyers zealously advocating their clients' cases has complemented the democratic concept of individual freedom: Lawyers protect their clients, not government interests."[235] Clients fearful of when or under what circumstances an attorney might disclose confidences would simply decline to provide the lawyer with certain facts and information, keeping the lawyer in the dark and precluding the provision of effective legal counsel.[236] At the same time, the attorney would necessarily be cognizant of his potential for liability for a failure to disclose, thus impacting the given advice. Indeed in cases where the attorney also faces potential enforcement action for his advice or counsel, the attorney is placed in an ethical conflict with his client's interests, leading to the likelihood of less-than-zealous representation.[237] As one commentator described the legal environment in the securities field following *National Student Marketing* and other SEC actions against lawyers:

> Law firms anxious to avoid an SEC prosecution began to err by placing too much emphasis on their duty of candor to the government. The SEC's position intimidated attorneys, curtailed

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233. In fact, under this theory of vicarious responsibility, the lawyer can adopt, and concomitantly rationalize, a different moral set by virtue of being an agent for the client. "This vicarious responsibility allows the attorney to avoid difficult moral dilemmas, although not without some risk to her own moral equilibrium." Dotterrer, *supra* note 225, at 1175. One commentator suggests that the "hired gun" theory improperly limits the attorney's role. "The client is also hiring a legal representative, whose duty to our system of justice frequently takes precedence over the uncompromising loyalty and zeal the advocate owes to the client. Indeed, when these dual roles conflict, the attorney's duty to the judicial system supercedes that to the client." Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59, 65-66 (1997). Presumably, under this view, the lawyer's personal moral set is not removed from the equation but simply remains dormant until the duty owed the judicial system, and by extension the public, is compromised. *See* R.W. Nabstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 451 (1984) (supporting a narrower duty of confidentiality); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).

234. *See, e.g.*, Brown, *Financial Institution Lawyers*, *supra* note 56, at 655-62.

235. Day, *supra* note 12, at 667. *See* Brown, *Financial Institution Lawyers*, *supra* note 56, at 715 (Despite the debate as to the appropriateness of zealous advocacy in non-criminal cases, "most practicing lawyers–in most settings–probably view their role as an adversarial one.").

236. *See* Lorne and Callcott, *supra* note 188, at 1302-03.

237. *See, e.g.*, Krach, *supra* note 216, at 462.

> the zealous representation of clients, and interfered with the continuing development of the securities laws.[238]

These classic conflicts of interest would force a shift in the attorney-client relationship, once grounded in trust and common goals, to one with adversarial overtones.

B. The Environmental Lawyer as Gatekeeper?

Yet the arguments for shifting the role of lawyers from "technician," assisting the client in doing what he wants to do, towards a "gatekeeper" who keeps him from doing that which he ought not, are persuasive in an environment that is heavily regulated because of the potential for substantial public risk, particularly where the arena is self-policing.[239] In such cases, the balance currently tipped in favor of encouraging the free flow of information between attorney and client, as opposed to the community's interest in disclosure, becomes invalid.[240] In large part this is due to the lack of resources for compliance enforcement, necessitating self-policing but simultaneously creating the incentive for evasion. Noncompliance may remain undetected for some time, with its concomitant health and environmental hazards creating the need, if not demand, for the environmental lawyer to assume a role in seeking to reduce that risk even where that role carries with it implications of whistle blowing. Professor Baxter has commented that "to the extent that the legal profession cannot (and does not) claim absolute freedom from public

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238. *Id.* at 462. One Commentator observed in 1974 that the SEC's emerging trend towards imposition of a higher duty on attorneys "has already engendered greater care, more diligence, more meticulous and painstaking preparation of disclosure documents—a general movement towards higher professional standards among securities lawyers." Lowenfels, *supra* note 12, at 435.

239. *See generally* France, *supra* note 112 (suggesting that lawyer liability cases will decide how professional loyalties will be structured in the future). *See also* Brown, *Financial Institution Lawyers*, *supra* note 56, at 694 (proposing a "certification" requirement without which a transaction could not be closed); Lawrence C. Baxter, *Reforming Legal Ethics in a Regulated Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181, 194 (1995) (raising competing concerns of the public interest and regulators that create demand for gatekeepers); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 882-84 (1990) (discussing the gatekeeper approach to enforcing strategic prohibition against litigation); Kraakman, *supra* note 2 (discussing criteria necessary for effective gatekeeping); Jackson, *supra* note 75 (analyzing the effectiveness of gatekeeping functions in the banking field).

240. *See, e.g.*, *In re* Emanuel Fields, 45 S.E.C. 262, 266 n.20 (1973) (SEC's limited budget and staff places the responsibility for enforcement on attorneys.). Professor Brown has argued, for example, that lawyers representing financial institutions act in a quasi-public function, even though those institutions are privately owned. "In reality, the financial institution is neither completely private nor public, and perhaps would be better described as a quasi-public institution." Brown, *Financial Institution Lawyers*, *supra* note 56, at 702.

responsibility, the regulators have a legitimate societal claim to at least some assistance from them. Again, the question is how much?"[241]

Admittedly, adoption of a gatekeeping standard that includes components of whistle blowing clearly generates discomfort,[242] and certainly has stimulated much debate among the bar. Many of the discussions concerning the disclosure of confidential information by environmental attorneys have been within the context of the ethical rules, concentrating on Model Rule 1.6's permissive disclosure exception where the client reveals the intent to commit a crime that would result in imminent death or substantial bodily harm.[243] In the environmental arena, it is relatively easy to conceive of circumstances where the discharge or disposal of hazardous contaminants would result in death or bodily injury. The debate over when disclosure would be appropriate arises in part over whether the discharge is criminal, as opposed to merely negligent, as well as whether disclosure is triggered if death or bodily injury is not "imminent," even if certain.[244] However, a fundamental premise underlying the disclosure debate is that the community's "need to know" outweighs the social utility of confidential communications and the risk of improvident disclosures where environmental harms are involved. This premise warrants the exception to Model Rule 1.6 even while demanding more clarity as to its parameters.[245] Unlike crimes directed against a particular person, the illegal discharge of hazardous contaminants can have wide-ranging consequences, affecting populations across large geographic areas, regardless of intent. For example, the dispersal of pollutants through an airshed resulted in the Bhopal disaster and the discharge of kepone into tributaries of the James River shut down fishing for twelve years.[246] As aptly noted by Professor Russell:

> Today devastating harm is a real risk rather than a nightmare fantasy . . . . Millions of tons of hazardous substances are produced each year in this country by private industry, federal facilities, hospitals, clinics, physicians' offices and other sources. Because

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241. Baxter, *supra* note 239, at 188. If there is too much assistance, the attorney-client relationship is effectively undermined. "Perhaps the most insidious effect of the SEC's actions was the subtle influence on attorneys' thought processes. Under the circumstances, attorneys' fears of liability conceivably color their advice to clients." Fortney, *supra* note 91, at 393.

242. *See* Kraakman, *supra* note 2, at 58 ("Part of the answer may be no more than our deeply felt aversion to mandatory informing. . . .").

243. MODEL RULE 1.6 (1997).

244. *See, e.g.*, Dotterrer, *supra* note 225, at 1159.

245. *See* Russell, *supra* note 185, at 441-42.

246. *See id.* at 414.

> of the dramatic risks posed by these sources, the next mass murderer may be the perpetrator of an environmental crime.[247]

The attorney by virtue of his or her integral involvement in assisting clients in navigating the environmental regulatory regime, has a greater opportunity to influence client conduct. In short, even while not explicitly advancing a gatekeeper or whistle blower model, recognition clearly exists in the scholarly discourse that the "lawyer as zealous advocate" requires modification in the environmental arena.

Of course, should environmental provisions be construed as imposing statutory disclosure obligations on attorneys, they would likely prevail over any dictate against disclosure embodied in the professional rules.[248] It is unclear whether the criminal provisions in the environmental laws would be judicially interpreted as imposing a duty upon attorneys to correct prior submissions subsequently discovered to have been incorrect. The Seventh Circuit, in *Ackerman v. Schwartz*, held that the securities laws in fact did impose such a duty on lawyers, and that the attorney faced liability upon discovery of the misrepresentation for failure to correct (and thereby disclose).[249] "Offering materials must be correct and non-misleading at the time of the sale, and not just as of the time they were written. This duty comes from federal securities law rather than state law."[250] According to *Ackerman*, the duty dissolved upon the termination of the offering. So long as the offering continued, "[t]he duty to correct statements [authorized by the attorney for inclusion] . . . snaps into place."[251] Under the Seventh Circuit's ruling, the question of confidentiality of information was removed from the protection of the ethical rules by virtue of the statutory demand.[252] Accordingly, the disclosure debate, however contentious, would become inapplicable and the confidentiality rules would offer no protection, nor would they have any impact.

In reality, such a scenario suggests the true concern of the bar to be in part, if not wholly, economic. Professor Daniel R. Fischel has argued that the

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247. Russell, *supra* note 185, at 459-60.

248. *Id.* at 441-42.

> The Model Rules seek to confine the attorney's analysis of disclosure issues to the universe they construct. Deletion of references to disclosures required by other law obscures the backdrop of substantive law and its relation to the attorney's decision, suggesting that the stage occupied by Model Rule 1.6 provides the full inquiry.

Id. at 454.

249. Ackerman v. Schwartz, 947 F.2d 841, 848-49 (7th Cir. 1991).

250. *Id.* at 848 (citations omitted).

251. *Id.*

252. *But see* Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1965).

beneficiaries of the confidentiality privilege are really the attorneys.[253] "Another way to ask why encouraging communication with the legal profession is so important is to inquire who benefits from these communications. Stated this way, the question answers itself: confidentiality benefits lawyers because it increases the demand for legal services."[254] Fischel maintains that the privilege from its inception was designed to, and did little more than, increase the incentives for clients to hire attorneys.[255] Under the regulatory ethical model, the attorney faced with information of client non-disclosure or misrepresentation would be required to ultimately withdraw, even noisily, should the client fail or refuse to correct the disclosures.[256] Since withdrawal directly impacts the lawyer's livelihood,[257] withdrawal, therefore, becomes something to be avoided wherever possible. An even more directly utilitarian argument is presented by the concern that enforcement risks and civil suits created by the imposition of a heightened duty will increase the costs of legal representation.[258] Accordingly, the bar's argument that a gatekeeper standard impairs the attorney-client relationship merely represents an objection to the threat this creates to the lawyer's bottom line. The objection to disclosure is an assertion that the lawyer's interest should transcend the interest of the public.[259]

Among the strongest considerations supporting a clearly defined gatekeeping role in the environmental arena, with or without whistle blowing components, is removing the responsibility from the lawyer's shoulders for the moral decision as to whether the public interest, reflected by statutory goals and policies, should prevail over the interests of the client. By contrasting the public service model of lawyering with the dominant client service model in the context of environmental compliance, Professor Dana concluded that numerous obstacles existed for those interested in public service lawyering,

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253. *See* Fischel, *supra* note 189, at 3.

254. *Id.*

255. *See id.*

256. *See* MODEL RULE 1.16(b).

257. *See, e.g.*, Fischel, *supra* note 189, at 5 ("Confidentiality rules, therefore, increase the value of legal advice and hence the demand for lawyers.").

258. *See* Baxter, *supra* note 239, at 188 (citing practitioner concerns raised during the December conference and noting that legal costs have already risen).

259. Professor Fischel argues that lawyers benefit from confidentiality rules because although lawyers may face liability for knowing participation in client misconduct, "[c]onfidentiality rules create powerful obstacles to the discovery of attorney participation in an unlawful scheme." Fischel, *supra* note 189, at 9. Fischel further maintains that the self-interest at work is an interest in avoiding being sued that coincides with an attorney's obligations to keep information confidential (other than the self-defense exception). *See id.* at 12.

including the lawyers' own self-interest.[260] Professor Dana argues that some aspects of the existing conflict between the profit-making goals that permeate corporate decision-making and a public service model of lawyering are resolved by implementing clearly defined gatekeeping functions imposed from outside the attorney-client relationship.[261] These force client compliance while still maintaining the basic integrity of the attorney-client interaction. Whether this function includes a certification process, e.g., requiring legal certification with a concomitant mandate to the legal profession to withhold such certification absent full disclosure or compliance,[262] or some other method of due diligence, would undoubtedly depend upon the nature of the statute in question. One commentator has suggested that environmental hazardous waste regulations could be amended to require attorneys who become aware of impropriety in the handling of hazardous substances to be responsible for "ensuring that such substance and the violation is reported to the responsible environmental agency in a timely manner."[263] The key is reconciling the interests of the client, the public (as represented by the regulators), and the lawyer, while recognizing that the necessary accommodations alter the role of the lawyer within the attorney-client relationship.

For example, the role of securities attorneys, whose opinions impact the financial markets, clearly underwent a marked change in the eyes not only of the SEC, but also the ABA Committee on Ethics and Professional Responsibility (ABA Committee). In a formal opinion issued in 1974, the ABA Committee viewed the responsibility of an opining securities attorney as including the obligation to make further inquiry into the validity of the facts where the attorney has reason to believe that they may be suspect or incomplete, and to refuse to issue the opinion should a material deficiency remain.[264] This opinion was a clear step away from the traditional view of the client as an independent decision-making authority, with the lawyer's role to maintain the confidentiality of client communications while assisting in the

260. *See generally* Dana, *supra* note 4; Kraakman, *supra* note 2 (discussing criteria needed for successful gatekeeping).

261. *See generally* Dana, *supra* note 4.

262. *See, e.g.*, Brown, *Financial Institution Lawyers*, *supra* note 56, at 694-96. *See generally* Brown, *Response*, *supra* note 215.

263. Brown, *Response*, *supra* note 215, at 93.

264. *See* Johnson, *supra* note 14, at 347.

achievement of client goals.[265] Although the ABA opposed the imposition of any affirmative disclosure obligation upon attorneys, except as provided for under the Model Code of Professional Responsibility, this opposition was apparently based on a view that the SEC infringed upon the legal profession's rights to self-regulate, rather than upon a substantive objection.[266]

> We do not believe that the policy of disclosure as embodied in the SEC law warrants an exception to the basic confidentiality of the attorney-client relationship. Such exceptions have to date been carefully reserved by the Code of Professional Responsibility for far more critical and limited situations. The statutes administered by the SEC give it no power to require disclosure by lawyers concerning their clients beyond what is provided in the [Code of Professional Responsibility].[267]

Perhaps it is simply time for a shift in the perspective of a profession notoriously resistant to change. At worst, requiring lawyers to incorporate gatekeeping functions into their client representation may simply result in a return to practicing law with prudence, caution, and ethics, characteristics that

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265. *See* Day, *supra* note 12, at 666.

> The critical human element in this vision of the attorney-client relationship is trust. Part of this trust stems from the established canons of legal ethics, which command a lawyer to zealously advocate his client's interests within the bounds of the law, even when this entails disagreeing with and challenging government regulators.

Id. at 665-66.

266. In 1982, the SEC general counsel advised that the SEC should not initiate Rule 102(e) proceedings unless there had first been a judicial determination that the securities laws had been violated. *See* Greene, *SEC General Counsel's Remarks on Lawyer Disciplinary Proceedings*, 14 Sec. Reg. L. Rep. (BNA) 168 (Jan. 20, 1982). "Since 1982, the SEC has generally not brought Rule 102(e) proceedings against attorneys unless there has first been an adjudication by a court that the attorney violated, or aided and abetted a violation of, securities laws." Michael J. Connell, *SEC Sanctions of Security Counsel*, 1093 PLI/Corp. 471, 488 (Jan.-Feb. 1999).

267. *American Bar Association Report to the House of Delegates Section of Corporation, Banking and Business Law Recommendation*, 31 BUS. LAW. 544, 547 (Nov., 1975). *See also Federal Criminal Code, Amnesty, Gun Control, Bank Secrecy Are Debated by the House of Delegates*, 61 A.B.A. J. 1079, 1085-86 (Sept., 1975). In addressing the obligations of securities attorneys under the Code of Professional Responsibility, the ABA had expressed the opinion that any such disclosures by securities attorneys would have to be in accordance with Model Code DR 7-102, under which the attorney who continues representing his client would in certain circumstances be required to disclose to "affected persons" existing misstatements or omissions which have been made by the client. *The Code of Professional Responsibility and the Responsibility of Lawyers Engaged in Securities Law Practice–A Report by the Committee on Counsel Responsibility and Liability*, 30 BUS. LAW. 1289 (July, 1975). At the same time, however, the ABA viewed the attorney role as an advisor, not as a guarantor of the correctness of the client's conduct: "But if the client's conduct in the lawyer's good faith judgment is not clearly illegal, even though contrary to the lawyer's recommended course of action, the lawyer has no duty to act. In such a case, the securities laws should not hold the lawyer accountable for the client's conduct." *Id.* at 1298.

seem to have all but disappeared in the past twenty-five years.[268] Indeed, Professor Harry Subin commented:

> [T]here is a strong case for imposing on attorneys a broad duty to disclose client misconduct. . . . and enhancing the duty to disclose will neither subvert individual rights nor impair the attorney's ability to ensure that the client complies with the law . . . . It is both possible and right for the attorney to provide the client with access to the system while providing others with protection against the client, even if the attorney must become the source of the information used to prevent the client's encroachments. What must be sacrificed to accomplish this is not, as some have claimed, the principle of representational justice, but the extravagant version of it advocated by those who insist on an almost mystical bond between attorney and client and who view that bond as the sine qua non of our way of life.[269]

The fears expressed by commentators and the bar that clients may abandon lawyers that practice the "whole law" in favor of less scrupulous attorneys, or even non-lawyers,[270] are ultimately grounded in utilitarian self-interest. Unscrupulous attorneys abound under any system. And the complexity of doing business in today's environment virtually ensures that lawyers will not become obsolete as recognized in the comments to Model Rule 1.6: "Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct . . . . Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[271] Fundamentally, however, the public has come to perceive the central defining role of lawyers as advocate and confidant in large part because the profession has championed advocacy as the lawyer's role, further solidifying the rationale for not only

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> [T]he 'corporatization' of the practice of law altered the culture of many law firms in ways that blunt the ethical sensibilities of some banking lawyers. Rampant growth, the opening of branch offices, the big increase in lateral movement of partners and associates, the fragmentation of work into one-shot assignments up for grabs by the most aggressive firm, the rise of the 'star system,' which rewards rainmaking over seniority–all these developments weakened the ability of firms to retain traditional prudential standards.

France, *supra* note 112, at 54-55 (referencing views expressed by Professor John Coffee of Columbia Law School). *See generally* Richard W. Painter, *Toward A Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221 (1995).

269. Subin, *supra* note 204, at 1097-98.

270. *See, e.g.*, Dana, *supra* note 4, at 75.

271. MODEL RULE 1.6 cmt. 3 (1997).

reliance, but continued consultation. The legal profession should not be exempt from a redefinition of its role where societal changes demand different solutions.

IV. THE LAWYER AS DE FACTO CRIMINAL—UNDERMINING THE ATTORNEY-CLIENT RELATIONSHIP IN THE ENVIRONMENTAL ARENA?

A. The Regulatory Ethical Paradigm and Environmental Attorneys–The Risk of Criminal Prosecution in an Uncertain Environment

While a regulatory ethical paradigm imposing public obligations upon attorneys representing regulated entities may be appropriate under narrowly prescribed circumstances, its current form is fraught with pitfalls for the unwary. The danger is reflected not only in the threat to the heart of the traditional role of advocate, but also by the fact that there is as yet no concrete distillation of the function of attorney as "gatekeeper" which would satisfy regulatory expectation.[272] This is particularly unacceptable in the environmental arena to the extent it is premised upon affirmative disclosure obligations culled from the criminal provisions in the environmental statutes, in light of the constantly shifting rules, standards, and interpretations characterizing the environmental laws.

The nature of the administrative forum in fields such as environmental or securities regulation, where the standards are constantly in flux, highlights the inability of the attorney to determine just when his or her conduct crosses the line. The ABA Committee on Counsel Liability of the Section of Corporation, Banking and Business Law, cautioned that:

> Rather than presenting his client with a reasoned range of the possibilities under the law, counsel confronted with the possibility of sanctions for advice that turns out to be incorrect, would tend to offer the most conservative advice . . . . This result is, of course, inappropriate in the context of a field like securities regulation, where the law is often unclear, where the standards change and where the Commission itself revises its views from time to time.[273]

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272. Discussions of gatekeeping in broad sweeps creates the greatest risk of uncertainty. Some definition and structure is needed, tailored to the industry in which third-party enforcement assistance is sought. Nor does a gatekeeping model require that it reach *all* avenues for misconduct.

273. *The Code of Professional Responsibility and the Responibility of Lawyers Engaged in Securities Law—A Report by the Committee on Counsel Responsibility and Liability*, *supra* note 267, at 1298.

Thus the issue becomes contentious, in part due to the ambiguity of culpable conduct–distilled into a question of *mens rea* but nonetheless stemming from what in the past would have been viewed as acceptable conduct in accordance with the attorneys' traditional advisory role. Some guidance perhaps was provided by the SEC in *In re Carter and Johnson*, distinguishing between "those professionals who may appropriately be considered as subjects of professional discipline and those who, acting in good faith, have merely made errors of judgment and have been careless."[274] In the same proceeding, the SEC also announced the principle that mere awareness of client misconduct would be viewed as insufficient to satisfy intent for aider and abettor liability,[275] and unlike the position adopted by the OTS, commented that it would only be necessary for the attorney to resign in the rare, egregious case.

> Some have argued that resignation is the only permissible course when a client chooses not to comply with disclosure advice. We do not agree. Premature resignation serves neither the ends of an effective lawyer-client relationship nor, in most cases, the effective administration of the securities laws. The lawyer's continued interaction with his client will ordinarily hold the greatest promise of corrective action. So long as the lawyer is acting in good faith and exerting reasonable efforts to prevent violations of the law by his client, his professional obligations have been met.[276]

Yet under a broad interpretation of the regulatory paradigm, the mere continuance of the representation may not alone constitute the requisite affirmative act. Any subsequent material submission, filing or representation by the attorney that fails to disclose, or the discovery and non-disclosure of incorrect prior submissions would qualify as misleading and false and therefore potentially culpable.

The overtones of the attorney as whistle blower permeating the regulatory model transcend mere gatekeeping and raise the specter of the attorney as policeman. In the face of allegations that the OTS had determined attorneys were required to police their clients and turn them in for any transgressions, OTS Chief Counsel Harris Weinstein commented that:

> The disclosure principle of the Kaye, Scholer case does not turn lawyers into policemen or whistle blowers. A lawyer has no duty

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274. *In re Carter and Johnson*, 1981 WL 36552, at *25.

275. *But see generally* Riley v. Brazeau, 612 F. Supp. 674 (D. Or. 1985) (noting that an attorney who signs the registration statement may be liable, but whether the attorney prepared documents is not determinative).

276. *In re Carter and Johnson*, *supra* note 12, at *31 n.77.

> to disclose wrongdoing to the regulator. Those who see a different message in the case have missed the essential point. The point is that the lawyer may not utter misleading partial truths in circumstances where the law would preclude the client from taking the same course.[277]

Weinstein's contention that the agency was not seeking to make the attorney a whistle blower is facially accurate if indeed the position of the OTS was and remains as Weinstein stated. The law consistently recognizes that a lawyer acting on behalf of his client stands in the client's shoes. Rules of procedure bind a client to a lawyer's assertions in court, with recourse under theories of malpractice for lawyer misfeasance *vis-a-vis* the client. Similarly, documents sent on a client's behalf are deemed to represent the position and factual assertions of the client. A lawyer has never been able, within the confines of the Model Code and the Model Rules, to make false statements or representations on behalf of his client or otherwise through his actions knowingly permit the client to engage in perjury, fraud, or violations of the law. Weinstein correctly maintains that "[w]hen the lawyer takes responsibility for factual representations, the lawyer at the same time assumes the client's responsibility for disclosure . . . . If the lawyer engages in factual representations, then the lawyer is neither ethically bound nor legally privileged to deceive."[278] This position is not in conflict with existing ethical rules circumscribing professional behavior. It is not outlandish to require a lawyer, to the extent that he or she continues the representation, to insist that the client make full and adequate disclosure.

The recourse under the Model Rules is to move up the chain of client authority and, failing to persuade, to withdraw.[279] There is no divergence between the regulatory model and the current ethical rules on this point either.[280] The purported requirement of disclosure implicitly, if not explicitly, advocated by the regulatory model has not yet been triggered. Neither the SEC nor the OTS continue to insist that a lawyer, upon learning of his or her client's intent to defraud or engage in criminal conduct, has an obligation to disclose to the agency. The divergence appears by way of the inquiry into

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277. Harris Weinstein & Lewis Segall, Address Before the National Conference of Bar Presidents, San Francisco, CA (Aug. 8, 1992), *in* 637 PLI/Comm. 389, 444 (Oct-Nov. 1992).

278. *Id.*

279. The lawyer has the ability to make a "noisy" withdrawal under Model Rule 1.6, disaffirming outstanding documents or statements which have the effect of alerting those concerned that there are problems with the disclosures and providing the lawyer with an "out" in the face of criminal or tort liability. MODEL RULE 1.6 cmt. 16 (1997).

280. Reflecting regulatory indecision in *In re Carter and Johnson*, however, the SEC suggested that withdrawal is a last resort. *See In re Carter and Johnson*, 1981 WL 36552, at *30.

exactly *when* the line is crossed and when the lawyer becomes a participant in, or even a cause of, client misconduct.[281] It is at this point that the nascent ethical regulatory model would insist on accurate disclosure and the correction of prior misstatements, and failure to disclose would risk liability.[282] However, at the risk of mis-characterizing, even if the disclosure obligations imposed under the regulatory paradigm arise, it appears that they arise only where the attorney engages in some affirmative act or conduct which could be construed as "in furtherance" of client misfeasance. This constitutes primary misconduct by the attorney as well as the client in the eyes of the agency. To the extent the statute legitimately reaches such primary acts, liability seems facially appropriate, even where such liability was criminal.[283] Where statutory obligations fall short of imposing liability, but enforcement is nonetheless pursued based on a regulatory duty of disclosure culled by the agency, it is less certain that the regulatory agency should prevail.

Presumably, the lawyer's continued representation of a client in the face of client misfeasance would violate existing ethical rules; however, it would not erase the attorney's obligation to maintain client confidentiality under Model Rule 1.6. Nonetheless, under the regulatory model as it has emerged from the banking and securities field, should the lawyer continue the representation, he or she would be placed in the uncompromising position of disclosing confidential information to a regulatory agency or risk prosecution as a primary participant. One resolution is to have a separate set of ethical rules established to govern professional obligations before regulatory agencies.[284] Alternatively, the existing professional rules could be modified to take into account the specialized considerations entailed in representing regulated industry.[285] Under the current professional standards, however, the fears expressed by the critics of a regulatory model would have substance, and certain aspects of the attorney-client relationship conceivably would be implicated, with the impact on social utility aspects perhaps carrying the greatest weight.

Among the criticisms of the withdrawal-versus-mandatory-disclosure model is that withdrawal removes the opportunity for counseling the client

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281. *See In re* Kern, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,815 (June 21, 1991).

282. Weinstein did take the position that even withdrawal might be insufficient, and that in accordance with Model Rule 1.6 and its comments, the attorney would be required to actively disaffirm his prior work. "A lawyer who neither withdraws nor disaffirms continues at his peril." *OTS Chief Defends Enforcement Action, Asset Order Against Kaye Scholer Firm*, *supra* note 97, at 496 (internal citations omitted).

283. For example, section 11 of the 1933 Act requires disclosure to the SEC if the attorney has signed the registration statement.

284. *See* Phillips, *supra* note 230, at 829 (securities lawyers may need a separate professional code).

285. *See id.* at 827 (arguing that there is a need for change in the ethical rules).

against misconduct. Professor Russell argues a client would take the power to disclose into account in seeking and utilizing advice.[286] This would unquestionably impact the information disclosed by the client to the attorney, in turn impacting the ability of the lawyer to counsel against misconduct. Where the consequences are criminal, the personal self-interest of the attorney necessarily rises to the forefront and inevitably places the lawyer in the role of not only moral decision maker, but adversary looking out for no one's interest but his or her own. Assuming continued client representation, the attorney becomes potentially subject to criminal sanction should he or she fail to disclose or to correct prior incorrect submissions where the EPA utilizes those sanctions to support imposition of a heightened duty. The current ethical regulatory model would thereby force a choice between risking criminal liability, disclosure of confidential information, and discontinuing the representation. This presents the environmental attorney with an inherent conflict between the obligations owed to the client and his or her own self-interest, both business and personal.[287] To the extent that the criticisms expressed by the commentators and the profession on the ramifications to the attorney-client relationship have merit, those ramifications are most apparent where the conflict involves potential criminal exposure. And at this point, the balance that weighed heavily in favor of the regulatory need for a gatekeeper begins to shift towards a recognition that some accommodation must be accorded.

At issue then is defining an appropriate balance between the public interest and the lawyer's role, even if redefined, that stops short of whistle blowing but nonetheless accomplishes the goals sought to be achieved by the regulatory model. Fundamentally, any regulatory ethical paradigm sought to be asserted against attorneys in the environmental arena should be limited to the imposition of clearly-defined gatekeeping obligations, and refrain from seeking to impose whistle blowing requirements. The issue of disclosure, while significant, would be more aptly addressed through clarification, or better yet, revision of the ethical rules.

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286. *See* Russell, *supra* note 185, at 430.

287. The ethical rules require that the attorney (1) disclose the conflict to the client and/or (2) withdraw, depending upon the circumstances. *See* MODEL RULE 1.6 (1997). Should the lawyer be required to withdraw, the client then is deprived of the right to counsel, as every attorney would face the same conflict. Another argument of critics of the regulatory ethical paradigm is that it deprives individuals of the right to counsel guaranteed by the United States Constitution's Sixth Amendment.

B. The Practical Implications for Environmental Attorneys Under a Gatekeeping Standard

Whether EPA will follow in the footsteps of its financial counterparts remains an open question. Unlike either the SEC or OTS, EPA currently does not have "practice rules" such as Rule 201(e) which mandates a certain level of conduct from environmental attorneys and permits the Agency to temporarily or permanently deny attorneys and other professionals the privilege of appearing or practicing before it.[288] The SEC relied heavily upon the hammer of its disciplinary rule to force conformity to its view of the securities lawyer's "duty" under the securities laws.[289] The public interest was deemed significant enough by the Agency to warrant close scrutiny of the lawyer's role and attempted to shift the focus of the lawyer's obligations from that of advocate on behalf of the client, to protector of the public interest.

However, the impact of such a rule in the environmental field would be greatly diffused. Both the securities and banking laws are narrowly targeted either towards transactions or industry. The securities laws, for example, seek to regulate the manner in which certain specific types of transactions take place to ensure full disclosure and diminish investor fraud. The banking laws focus specifically on the financial and banking industries. The environmental laws, on the other hand, apply regardless of industry lines so long as the company in question emits, discharges, produces, or otherwise generates pollutants. They also impact and control day-to-day operations. Many contacts occur directly and continuously between the client and the agency, and compliance with environmental requirements does not necessarily require "practice" before EPA. Indeed, under the CAA and CWA, states retain the authority to implement the requisite permitting systems. Rather than EPA further distancing the impact of a purported "hammer" similar to Rule 201(e), the interaction is between the company and the state agency. To the extent EPA concludes that environmental attorneys owe a "heightened duty," it is more likely that the Agency will rely on the disclosure provisions contained in the environmental statutes as the vehicle through which such a duty would be imposed.

However, the risk of enforcement against attorneys is unknown. Despite the existence of criminal provisions, it was only recently that environmental

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288. As with other federal agencies, however, the EPA is authorized to enact any rules deemed necessary to fulfill its purpose. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970) (In 1970, President Nixon reorganized numerous environmental agencies, and created the EPA. In doing so, the principal role of the EPA became to ensure the establishment and enforcement of environmental protection standards consistent with national environmental goals.).

289. *See, e.g., In re Carter and Johnson*, 1981 WL 36552, at *30.

offenses generated public or prosecutorial interest.[290] Enforcement activity centered on the imposition of civil penalties; there was a conceded reluctance to seek criminal penalties as well.[291] Instead, EPA focused its resources on the oversight and implementation of large and complex statutory delegations and the promulgation of regulations to implement Congressional mandates.[292] As public consciousness of environmental hazards increased, so did public support for the criminal prosecution of polluters.[293] "Once viewed as mere economic/regulatory offenses lacking an element of moral delict, environmental crimes now provoke moral outrage and prompt demands for severe sanctions and strict enforcement."[294] And, although EPA, and by extension the Department of Justice (DOJ),[295] have substantial discretion in

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290. During the 1970s, under President Carter's administration, only 25 federal environmental prosecutions were commenced. Between 1982-1989, under President Reagan, there were more than 450 indictments, more than 325 pleas or convictions (almost 100 of which were against corporations) with fines totaling $13 million, and jail terms totaling 200 years. *See* PLATER, ET AL., *supra* note 128, at 881.

291. *See id.* at 877-79. In discussing the 1976 sentencing of the Allied defendants in the kepone contamination, Goldfarb commented: "The American Public does not look favorably upon the imprisonment of corporate officers for corporate crimes. This explains why jail terms were never a viable alternative in the kepone case." Goldfarb, *supra* note 163, at 661.

292. *See* Deeb, *supra* note 177, at 161. Even today, EPA continues to predominantly take a civil and administrative approach to environmental enforcement. *See* THEODORE M. HAMMETT AND JOEL EPSTEIN, LOCAL PROSECUTIONS OF ENVIRONMENTAL CRIME 13 (1993). *But see* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1256-57 (1998) (detailing instances of low or insufficient penalties even in the face of significant noncompliance, particularly at the state level).

293. *See* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 823 (1990).

294. Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 489 (1996). Environmental crimes have ranked as high as seventh in a poll conducted by the DOJ of public attitudes on crime, and a number of cases are the result of complaints by ordinary citizens or employees of polluting facilities. *See Criminal Enforcement of Environmental Laws Seeks Deterrence Amid Need for Increased Coordination, Training, Public Awareness*, 17 Envtl. Rep. (BNA) 800, 806 (Sept. 26, 1986). "Many also believe that the unique moral stigma and threat of jail time from criminal enforcement constitute the most powerful incentives to obey the law." Rechtschaffen, *supra* note 292, at 1187; *see also* Hare, *supra* note 144, at 949.

295. Although EPA handles administrative enforcement actions internally, EPA refers civil and criminal cases to DOJ for prosecution. The wide variety of enforcement options available–administrative, civil, and criminal–vest substantial discretion in EPA and DOJ in pursuing environmental violators. *See, e.g.*, Steven E. Chester, *Environmental Crime and the EPA's Exercise of Criminal Investigative Discretion*, 1994 MICH. BAR J. 1064 (Oct. 1999). Some basic criteria impacting the decision of EPA and DOJ to bring an action include: (1) the degree of harm to health and/or the environment; (2) the degree of culpable or criminal intent; (3) any prior record of environmental violations; (4) history of cooperation with the investigation; (5) public interest; (6) the deterrent effect of civil penalties; and (7) the involvement of organized crime. *See* Dotterer, *supra* note 225, at 1168-72; *see also* Rechtshaffen, *supra* note 292, at 1245 n.266 (citing DEPARTMENT OF JUSTICE, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991) for the inclusion of self-auditing, policing, and voluntary disclosure as other mitigating factors).

decisions to pursue criminal sanctions, clearly the impact of public pressure enters into the balance as to whether enforcement is appropriate.[296]

Accordingly, the disappearance of public tolerance for pollution coincided with an increase in EPA's[297] and DOJ's[298] enforcement of environmental crimes. The early 1980s saw a marked increase in indictments for environmental violations under each of the major environmental statutes.[299] Prosecutors targeted both corporations and individuals in seeking criminal fines, [300] imposition of jail time,[301] and other sanctions[302] against

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296. Fromm maintains that public pressure has changed the regulatory climate towards increased criminal enforcement in cases which previously have been pursued through administrative or civil actions. "Zealous and politically motivated prosecutors see such cases gaining the rapt attention of the public and, unfortunately, sometimes view them as a means of enhancing their careers. Prosecutors have broad discretion in determining whether a case will be brought as a civil or criminal action." Fromm, *supra* note 293, at 823. Fromm argues that the Exxon Valdez indictments exemplify the impact that public pressure has on prosecutorial decisions to seek criminal indictments under the CWA and the Migratory Bird Treaty Act, as well as other statutes.

> Under the Migratory Bird Treaty Act, Exxon is essentially being charged as a poacher, by having killed migratory birds without a permit. Arguably, this statute was not intended to cover birds perishing as a result of an accidental spill. Obtaining convictions can certainly not be the intent of the prosecutors in this case; appeasing the public appears to be the intended result.

Id. at 824.

297. EPA established an independent Office of Criminal Enforcement (OCE) in 1981 to investigate and assist in the prosecution of criminal cases. *See* Deeb, *supra* note 177, at 162; Chester, *supra* note 295. Steven Chester, Deputy Director of OCE in Washington D.C. in 1994, commented that OCE was underutilized until the early 1990s when the EPA criminal program took off. He attributes the rapid growth of criminal enforcement efforts to four developments: (1) the enhancement of criminal penalties in the environmental statutes; (2) the passage of the Pollution Protection Act; (3) legislation granting full law enforcement authority to investigators; and (4) the new U.S. Sentencing Guidelines. *See* Chester *supra* note 295, at 1064-65. EPA investigators were granted full law-enforcement authority in 1988. *See* Brickey, *supra* note 294, at 495.

298. In 1982, the DOJ concomitantly supplemented the Environmental Enforcement Section (EES) of its Natural Resources Division, which focused on civil matters, with the Environmental Crimes Section as a unit within EES. The goal was to create an environmental crimes program that could effectively prosecute criminal referrals by combining criminal and environmental expertise within one repository. *See* Lazarus, *supra* note 144, at 2462 (discussing the internal and external conflicts impacting the ability of the various agency efforts to integrate criminal and environmental law practice). The Environmental Crimes Section became a separate section with a life of its own in 1987, growing from three to 28 attorneys within five years after its establishment. This commitment of resources reflected the DOJ prosecutorial belief that criminal prosecution makes a far greater impact on violators, not only because it carries with it the possibility of jail time and the "stigma of criminality," but because those sanctions could not be passed on to consumers or insurers. *See, e.g.*, Gaynor et al., *supra* note 177, at 2; Fromm, *supra* note 293, at 822.

299. "Not surprisingly, the recent growth in the EPA's environmental crimes program has brought with it concomitant increased in the number of criminal investigations initiated, number of criminal cases referred, amount of criminal fines assessed, and years of imprisonment imposed." Chester, *supra* note 295, at 1065.

300. *See, e.g.*, *In re* the Exxon Valdez, 1995 WL 527988, *8 (D. Alaska Jan. 27, 1995) (requiring Exxon to pay $25 million in fines for criminal misdemeanor and an additional $100 million to clean up Prince Georges Sound); *see also* Tennessee Gas Pipeline Co. v. FERC, 809 F.2d 1138 (5th Cir. 1987)

culpable individuals.[303] The past fifteen years have witnessed not only a growing willingness by the EPA and the DOJ to pursue criminal sanctions in addition to civil penalties, but has also resulted in a burgeoning environmental crimes program at both state and federal levels.[304]

($15.7 million fine sought against Tennessee Gas Pipeline Company of Houston, Texas). After the Exxon Valdez fine, the next largest fine imposed was $22 million on Iroquois Operating Company. *See* Iroquois Gas Transmission System, L.P. v. FERC, 145 F.3d 398 (D.C. Cir. 1998).

301. Sentences are also now subject to the Federal Sentencing Guidelines, which set base offense levels for various federal crimes as well as specific offense characteristics that can increase the offense level and, correspondingly, the mandatory sentence which must be imposed. *See* Deeb, *supra* note 177, at 177. The guidelines significantly increase the penalties individuals now face for violations. *See id.* One of the impacts of the guidelines is to effectively shift sentencing power from the judge to the prosecutor. *See id.* at 177-78. The guidelines do not permit judicial discretion in sentencing decisions, leaving the only alternative for a defendant to strike a bargain with the prosecutor, who has a "wide array of charges to utilize." *Id.* at 179. "Thus punishment may vary even in identical factual circumstances because some polluters may be more effective in bargaining with the prosecutor." *Id.*

302. Mere indictment of criminal conduct under any environmental statute can result in suspension from federal contracting pursuant to EPA's discretion.

> EPA has its own suspension and debarment official who determines what action the federal government will take with respect to federal contracts . . . . Whereas several years ago, few companies convicted of environmental crimes had to worry seriously that the conviction would affect their ability to contract with the federal government, the landscape is now changing.

Block, *supra* note 183, at 39. The CWA further provides that companies or individuals convicted of criminal violations under the statutes will be automatically "listed" or banned from further government contracts until the violation is remedied. *See* 33 U.S.C. § 1368 (CWA) and 40 C.F.R. § 15. "Due to EPA's broad ability to define the 'condition(s) of non-compliance,' its listing authority is a powerful enforcement tool." Block, *supra* note 183, at 38-39.

303. Cities also are not immune, with the *Los Angeles Times* reporting on April 5, 1998 that the City of Thousand Oaks and the City of San Bernadino could face federal criminal prosecution for violation of the CWA for the release of 86 million and 4.5 million gallons of raw sewage, respectively. In San Bernadino, city officials allegedly covered up the magnitude of the releases. *See* Kate Folmar, *U.S. Investigation into Spill Puts Thousand Oaks in Rare Company[;] Sewage Prosecutions of Cities for Clean Water Act Violations Are Rare, but San Bernadino Provides a Lesson in What Local Officials Can Expect*, LOS ANGELES TIMES, April 5, 1998. According to Steve Solow, Chief of the DOJ Environmental Crimes Section, "[w]e don't really look at private versus municipal as being the controlling factor. The question is what was done." *Id.* Approximately 25 municipal sewer plant operators have been convicted of criminal violations of the CWA in recent years. *See id.*

304. *See, e.g.*, Deeb, *supra* note 177, at 160 (asserting trend towards increasing criminal enforcement will continue to rise as "criminal sanctions are popular and are therefore safe for politicians to support"); Fromm, *supra* note 293, at 823 (public opprobrium to environmental offenses encourages politically astute prosecutors to pursue criminal sanctions). *See generally Criminal Enforcement of Environmental Laws Seeking Deterrence Amid Need for Increased Coordination, Training and Public Awareness*, 17 Envtl. Rep. 800 (1986) (describing several state enforcement efforts). Some argue, however, that environmental enforcement is undergoing a "reform movement," where states in particular, but the federal government as well, have been moving away from traditional enforcement methods and towards cooperative, less adversarial approaches. *See, e.g.*, Rechtschaffen, *supra* note 292, at 1234-35. These approaches encompass, for example, implementation of policies focusing on environmental compliance, audit privileges, and immunity measures which serve to reduce or waive penalties where environmental violations result from self-audits. Professor Rechtschaffen suggests, among other things, that traditional enforcement systems, utilizing deterrence and punishment as mechanisms for environmental compliance,

In light of the seriousness with which the DOJ views the reporting of false information in the environmental arena,[305] environmental attorneys should be aware that the possibility of increased scrutiny by EPA on the attorney's role is on the horizon. Federal environmental laws are designed to force necessary technological change in order to achieve control over, and ultimately reduction in, pollution. As such, they are in a constant state of flux,[306] based on underlying scientific assumptions that are uncertain and evolving. Environmental statutes are also overlapping and many are either ambiguous or internally inconsistent. An impermissible discharge may prove a violation of not just one, but several different environmental laws.[307] Statutes such as RCRA and the CAA are supplemented with seemingly unending implementing regulations; compliance is both onerous and expensive. The sheer number of statutes, together with the overwhelming regulations that accompany them, make full compliance often difficult if not impossible. Legal advice thus becomes mandatory for companies seeking to wind their way through the statutory morass unscathed.

The lawyer's role in assisting clients on environmental matters can run the gamut of services including: defense of an environmental claim, review of real estate purchase agreements, structuring environmental audit and compliance programs, provision of legal opinions on the regulatory consequences of a proposed course of conduct, representation of the client before the agency or in administrative proceedings, preparation of documents necessary for permit applications, providing counsel during a regulatory investigation, and advice on compliance issues. Although enforcement efforts have indeed increased, clearly not all environmental violations are, or even can be, either detected or pursued by the agency. As with ensuring compliance with the securities laws, however, legal assistance in the

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should not be discarded. "A system that is purely or primarily cooperative-based . . . will lose some of the expressive character of enforcement, suffer serious risks of substantial noncompliance, agency capture and inconsistent treatment, and negate citizen enforcement." *Id.* at 1234. Rather, the cooperative model should be integrated with the traditional deterrence system and thereby more effectively achieve environmental compliance.

305. *See* Tennille, *supra* note 124, at 21.

306. Professor Lazarus describes the certainty of environmental laws' uncertainty as follows: "The only constant in environmental law is change. The field is marked by 'dynamics and flux where a regulation is inseparable from a revision, a statute not far from an amendment.'" Lazarus, *supra* note 144, at 2426 (internal citations omitted).

307. For example, the Endangered Species Act, 16 U.S.C. § 1538(a)(2)(B), prohibits malicious damage or destruction of protected plants in knowing violation of any law or regulation of any state or in the course of a violation of a criminal trespass law. The CWA, 33 U.S.C. § 301(a), makes the discharge of any pollutant by any person into navigable waters without a permit unlawful. CERCLA, 42 U.S.C. § 107(a)(2), makes liable any person who, at the time of disposal of any hazardous substance, owned or operated any facility at which such hazardous substances were disposed of.

environmental arena becomes a critical component in client decision-making, and the lawyer's involvement can be extensive. The ambiguities of many statutory provisions, as well as the abundance of legal loopholes permitting an exemption or "escape" from full compliance, afford myriad opportunities to counsel clients around compliance. Such counseling is arguably within the scope of the lawyer's role as "zealous advocate." The advice could include, for example, counsel as to the number of permit violations tolerated by the relevant agency prior to the institution of regulatory enforcement action, or the ability to apply for an exemption to delay the institution of costly pollution control devices.

Under the somewhat amorphous regulatory gatekeeper model, the lawyer conceivably would be expected to consider the broad goals sought to be achieved by the environmental statutes and to advise clients not on the best way to avoid or minimize the expense of compliance, but rather on courses of action consistent with the purposes of the statutes regardless of whether those goals mirror those of the client.[308] Practicing the "whole law," as urged by Harris Weinstein, would require due consideration to "(1) the entirety of the scheme of federal statutes and regulations affecting such institutions; (2) concepts of safety and soundness . . . ; (3) concepts of fiduciary responsibility (that is to the government); and (4) the principle that imposes hostility to law avoidance schemes."[309] At minimum, satisfaction of the attorney's "duty" could be construed as requiring the outline of all available options while declining to stress, or even provide, those options which would conflict with statutory interests. "Loophole lawyering" would be negatively received.

Where the client is subsequently found in violation of environmental requirements, the lawyer's role may come under scrutiny.[310] Should EPA adopt a regulatory ethical paradigm similar to those in the securities and banking fields, the issue undoubtedly comes down to one of the diligence due in order to avoid exposure to liability under the disclosure provisions.[311] Presumably, provisions as broad as the disclosure requirements in environmental statutes make the "attorney as scrivener" no longer an attractive role. Rather the attorney must become pro-active in order to avoid liability. Yet, the environmental attorney typically is not involved in the general corporate legal affairs of its client, or in its day-to-day operations, nor is he or

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308. *See generally* Dana, *supra* note 4 (discussing differences between attorney counsel under the client service and public service model of lawyering).

309. Fisher, *supra* note 106, at 52. Fisher further comments that the "whole law" concept "remains somewhat inchoate, even somewhat mystical . . . ." *Id.*

310. There can be little argument that the attorney should not be insulated from liability for any knowingly false submission. *See generally* Fischel, *supra* note 189.

311. Both the securities and banking lawyers have been held to due diligence standards. *See id.*

she in a position to interpret technical data or to supervise matters that require significant chemical and technical expertise. Despite Congress' stated goal of creating a comprehensive statutory scheme of environmental law, the reality is that the statutes, together with their implementing rules, are incredibly detailed and technical, with the applicable standards driven by technological advances. Environmental lawyers rely heavily on the technical expertise of the client, not outside entities, in counseling a course of action. Thus one question becomes the level of "authentication" of client data the lawyer must require prior to filing a permit application on a client's behalf to the regulatory agency or complying with applicable reporting requirements. The court in *Escott v. BarChris Construction Corp.*, an enforcement action brought by the SEC, commented:

> It is claimed that a lawyer is entitled to rely on the statements of his client and that to require him to verify their accuracy would set an unreasonably high standard. This is too broad a generalization. It is all a matter of degree. To require an audit would obviously be unreasonable. On the other hand, to require a check of matters easily verifiable is not unreasonable. Even honest clients make mistakes.[312]

In the environmental field, what is "easily verifiable" may translate into simply a review of the technical data supporting a claim that there had been no permit violations during the reporting period. Once the review enters areas outside the lawyer's expertise, any further obligation would seem facially unreasonable. Alternatively, the growing use of environmental audits and compliance measures, where adequately reviewed by attorneys, could be sufficient to preclude any determination that the attorney acted with the requisite "knowledge" to support the imposition of liability. In short, the regulatory paradigm would impose upon environmental attorneys an explicit due diligence requirement, present in the securities and banking industries, and implicit in the existing professional rules.[313] The goal of the environmental lawyer would be to place as many "checks" upon the information relied upon as possible to avoid becoming a target. Thus, the attorney can take steps to minimize his or her liability whereby the attorney clearly identifies to the agency the information upon which the

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312. Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 690 (S.D.N.Y., 1968) (involving outside counsel sued as a director under section 11 of the 1933 Act). *See also* SEC v. Management Dynamics, Inc., 515 F.2d 801, 809 (2d Cir. 1975) (attorney cannot simply rely on information provided by his client).

313. *See, e.g.*, FED. R. CIV. P. 11 (imposing a due diligence requirement upon attorneys prior to the filing of papers with the court and permitting sanctions for lawyers who urge unsound positions).

communication is being submitted, and without in any way warranting independent verification of its accuracy. The attorney can also establish procedures requiring client certifications as to the accuracy of information being transmitted by the attorney. If the attorney fails to obtain such a certification, he or she may decline to prepare documents based upon uncertified information.[314] Ultimately, the attorney's insistence on due diligence may prevent violations that might otherwise have occurred.

CONCLUSION

The lawyer-client relationship is not a natural balance. It exists in a state of disequilibrium and flux. By definition a lawyer's obligations are to and beyond his client; society's continuing transformation assures the constant testing of the elasticity of these boundaries. The concept that an attorney's duty and loyalty is only to his client has begun to erode. There has been a concomitant shift towards an examination of the role that notions of "citizen" and "officer of the court" should play in an ethical scheme.

The public policies supporting the comprehensive environmental regulatory scheme virtually assure that regulatory focus will turn to the conduct of attorneys representing regulated industry. The debate as to the propriety of the imposition of a gatekeeper standard in environmental practice will center, as in the securities and banking industries, on the role of the confidentiality privilege and whether it is, or should be, inapplicable when in conflict with broad legislative and regulatory goals. However, the imposition of criminal liability on attorneys within *mala prohibita* scenarios, represents one of history's most chilling impacts on the legal profession. It cuts at the very foundation of the lawyer-client relationship and places the attorney starkly at odds with the client. Adoption of a gatekeeper standard without clear parameters, but which draws its strength from criminal sanction, could stretch the relationship beyond its ability to ever retain a whole. If regulatory agencies take this approach, the standards agreed upon and applied must be clear, absolute and without ambiguity. Anything less would create an environment where a lawyer must always weigh personal liability against the client's interests. While it is arguable that such a balance is limited to regulatory actions, it would only be a matter of time before these rulings became *stare decisis* and provided the bridge to undercut other areas of the attorney-client relationship or privilege. The baseline question is what type

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314. In the banking field, for example, banking attorneys adopted policies requiring specific engagement letters, instituted peer review proceedings, and employed trained ethics experts among other things. *See* Fortney, *supra* note 91, at 394.

of world do we want to live in? Do we want to live in a world where lawyers' responsibility, because of potential liability, is to "[t]o say nothing, to do nothing . . . ?"