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Table of Contents

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I. Introduction

Thousands of Superfund sites – discovered and undiscovered – now dot the American landscape.[1] The contaminated condition of these sites creates a variety of risks and tempts some owners to transfer the property without disclosing the condition. While such sites are hardly the only (or the most dramatic) environmental hazards, they provide an example of common environmental hazards and the problems faced by attorneys in complying with positive law and the duty of confidentiality.[2] An attorney's nightmare related to contaminated sites is that a client will refuse to inform a purchaser of the existence of dangerous contamination. Imagine you represent a vendor of realestate. You learn that the property to be sold is contaminated with hazardous wastes and that the buyer is ignorant of this problem. Although both state and federal statutes require owners to disclose environmental hazards, the client refuses to reveal the dangers and forbids you to disclose any information regarding the site. You fear that the contamination may cause injury for the buyer and, additionally, that the buyer may sue you for damages resulting from the contamination. What is your ethical duty?[3] If an attorney knows that her client has created environmental hazards that threaten others, should she

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1. *See* COMPTROLLER GENERAL, REPORT TO THE CONGRESS OF THE UNITED STATES, CLEANING UP HAZARDOUS WASTES: AN OVERVIEW OF SUPERFUND REAUTHORIZATION ISSUES, at 9-10, 21 (noting that between 1500 and 4170 sites await cleanup under federal programs and indicating that number of sites could reach into hundreds of thousands); John P. Forde, *Foreclosures on Toxics Sites Pose Big Risks: Potential Liability Is Huge, Often Overlooked by Banks*, AMERICAN BANKER, May 31, 1988, at 17 ("In a recent study . . . the Environmental Protection Agency said that, with some minor changes in its definition of contamination, the number of cleanup sites could mushroom to between 400,000 and 600,000 nationwide."); *see also* SAMUEL S. EPSTEIN ET AL., HAZARDOUS WASTE IN AMERICA (1982) (describing some problems caused by hazardous waste disposal).

2. In this Article, environmental hazards serve as examples dramatizing the risks of attorney silence in the face of client conduct that endangers others.

3. Although lawyers are used to looking to the American Bar Association (ABA) ethical rules as the applicable rules of ethics, the term should have a broader connotation. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 1 (1978) (defining "ethics" as "imperatives regarding the welfare of others that are recognized as binding upon a person's conduct in some more immediate and binding sense than *law* and in some more general and impersonal sense than *morals*").

disclose the dangers or maintain her silence in order to protect the client's confidences?

The rules of ethics created by the American Bar Association provide little guidance to the attorney facing the dilemma posed by client secrets that can harm third parties.[4] Unless the jurisdiction makes the transfer described above a crime,[5] Model Rule 1.6 appears to require that the attorney remain silent concerning the danger to the purchaser and his family – even if that danger is likely to result in serious bodily injury or death.[6]

Considering the expansion of tort liability and the judicial abrogation of the bar of privity for professionals in most jurisdictions, this nightmare scenario could result in negative personal consequences for attorneys.[7] The potential for personal liability for lawyers is not trivial.[8] Additionally, developing tort law suggests that a professional may face liability for a failure to warn third parties of dangers created by clients.

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4. For a summary of recent cases in which attorneys have been charged with failing to reveal client secrets that pose dangers, see Paul M. Barett, *Silent Partners: When Lawyers See Fraud at a Company, What Must They Do?*, WALL ST. J., Aug. 22, 1997, at A1.

5. It is unlikely that the refusal to disclose this information is a crime. Although numerous states allow for avoidance of a contract to purchase property before conveyance when a seller fails to disclose contamination, they do not invalidate a transfer based on a failure to disclose information and they do not impose criminal penalties. Additionally, it would be difficult for an attorney to determine in a short time whether the client's actions fit the elements of these statutes. *See* IDAHO CODE §§ 55-2515, 55-2517 (1994 & Supp. 1997) (providing for rescission by transferee); IND. CODE §§ 24-4.6-2-10, 24-4.6-2-13 (1996) (requiring that owner submit disclosure to buyer before offer is accepted for sale and allowing buyer to nullify contract within two business days of receipt of disclosure); MICH. COMP. LAWS §§ 565.954, 565.964 (1997) (allowing termination by written notice); *see also* Sarah L. Inderbitzin, *Taking the Burden Off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENVTL. LAW. 513, 558 (1995) (arguing that buyer should have option of voiding transfer of property contaminated with hazardous wastes when seller failed to disclose contamination).

6. The Model Rules make clear that the attorney must not aid a client's fraud or crime, must withdraw if the representation will result in a violation of law and may withdraw if the client persists in wrongful conduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.16, 4.1 (1997) [hereinafter MODEL RULES]. The MODEL RULES do allow the attorney to disavow his work product if the client is using it to perpetrate a fraud. *See* MODEL RULES Rule 1.16. For a discussion of withdrawal, see Ernest F. Lidge III, *Client Perjury in Tennessee: A Misguided Ethics Opinion, an Amended Rule, and a Call for Further Action by the Tennessee Supreme Court*, 63 TENN. L. REV. 1, 47 (1995). The rules do nothing, however, to protect third parties when the attorney learns of dangers after completing transfer documents. Moreover, if the attorney learns of the dangers before her work is completed, the most she can do is disassociate herself from the seller under Rule 1.16 unless the fraud is also a crime subject to disclosure under Rule 1.6(b)(1).

7. *See generally* J.B. Ruhl, *Malpractice and Environmental Law: Should Environmental Law "Specialists" Be Worried?*, 33 HOUS. L. REV. 173 (1996).

8. *See* Geoffrey C. Hazard Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 283-84 (1984) (noting risks to lawyers of fraud by clients).

Our system of laws seeks to minimize risks in a variety of ways. Positive law requires disclosure of environmental hazards by the owner or person in charge of a site.[9] Both statutes and the common law create prohibitions and sanctions as a means of controlling unreasonable risks. Environmental statutes recognize the unreasonable risks created by environmental hazards and create incentives to minimize these risks. The common law also seeks to reduce risks (both environmental risks and other sorts of risks), generally by imposing liability for conduct deemed negligent or otherwise culpable. It encourages due care by imposing liability for harm that results from a defendant's creation of unreasonable risk of harm to others.

Despite the predominance of positive law in our system of justice, Model Rule 1.6 fails to acknowledge the force of judicial or statutory law and sets a standard of confidentiality separate and unhinged from the mandates of positive law. This Article explores the disjuncture of positive law and the duty of confidentiality as formulated by Model Rule 1.6. Its central purpose is to question the decision to exclude positive law from the framework of analysis created by the Rule. Part II of the Article summarizes the duty of confidentiality owed to clients by attorneys. Part III examines Model Rule 1.6, studying the Rule's text, its origins in a rule proposed by the Kutak Commission, and other legislative history. It focuses on the deletion of two exceptions from the Proposed Rule on confidentiality: (1) the exception allowing disclosures to comply with the law, and (2) the exception allowing disclosures of client fraud that will result in serious harm. Because environmental hazards present pressing problems of application of the ethical rule, Parts IV and V explore the mandates of positive law in this context. Part IV surveys environmental statutes, noting the strong public policy in favor of protection against environmental hazards. Part V explores common law liability, noting the effect of recent developments in the law such as the abrogation of the bar of privity and the growth of the concept of the professional's duty to warn third parties of dangers created by a client. Part VI considers the need for viable exceptions to the prohibition against disclosure. It summarizes state modifications to Model Rule 1.6 and examines the Proposed Rule of the *Restatement (Third)*

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9. *See, e.g.*, Solid Waste Disposal Act (SWDA) (as amended by the Resource Conservation and Recovery Act of 1976 (RCRA)) § 3008(d)(3), 42 U.S.C. § 6928(d)(3) (1994) (knowing omission of material information or falsely filing required RCRA report subject to criminal penalties); SWDA § 3008(d)(4), 42 U.S.C. §§6928(d)(4) (1994) (knowing failure to file record or report or document required under SWDA subject to criminal penalties); Clean Air Act § 113(c)(2), 42 U.S.C. § 7413(c)(2) (1994) (knowing omission of information or failure to report releases required under the Clean Air Act subject to criminal penalties); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 103(b), 42 U.S.C. § 9603(b) (1994) (knowing failure to report release subject to CERCLA notification requirements subject to criminal penalties).

of the Law—The Law Governing Lawyers. Finally, Part VI suggests a reassessment of Model Rule 1.6 in light of positive law, including both statutory law and common law.

II. The Duty of Confidentiality

The duty of confidentiality is one of the oldest and most basic tenets of the legal profession.[10] The principle of confidentiality is central to the attorney's duty of loyalty to the client. Additionally, the duty serves to insure the free flow of information between clients and attorneys.[11] Although the duty is central to the attorney-client relationship, it has not been viewed traditionally as an absolute.[12] "Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[13] In 1983 the American Bar Association (ABA) adopted the Model Rules of Professional Conduct. These Rules provide the most current statement of the ethical obligations of attorneys by the leading professional association for lawyers in the United States. Model Rule 1.6 is the ABA's articulation of the attorney's duty to protect client confidences.

III. Model Rule 1.6

Model Rule 1.6 sets forth the balance endorsed by the ABA regarding the attorney's duty to protect client information and the right of the attorney to reveal client information in unusual circumstances implicating other interests. Controversy has surrounded Model Rule 1.6 from its beginnings.[14]

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10. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.3, at 299 (1986); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1096 (1985).

11. *See* WOLFRAM, *supra* note 10, §§ 6.7.1-.3, at 296-300 (1986).

12. The duty does not require an attorney to assist a client's fraud or to allow it to go unpunished. *See* Nix v. Whiteside, 475 U.S. 157, 158 (1986); State v. Metcalf, 540 P.2d 459, 465 (Wash. Ct. App. 1975) (holding attorney-client privilege inapplicable to advice sought in furtherance of crime or fraud); *see also* MODEL RULES Rule 1.2; 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:109, at 168.1-.4 (1997); WOLFRAM, *supra* note 10, § 6.1.4, at 245.

13. *Nix*, 475 U.S. at 158.

14. *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 831 (1986) ("The rules that have been most controversial throughout the country and which are the least justifiable as enacted in the [Model Rules], are [Model Rules] Rule 1.6 and 3.3 dealing with the tension between the lawyer's duties of candor and confidentiality."); *see also* Marvin G. Pickholz, *The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client Relationship: Does "Serving the Public Interest" Disserve the Public Interest?*, 36 BUS. LAW. 1841, 1842 (1981).

Although nearly four-fifths of the states have adopted the ABA Model Rules of Professional Conduct, the vast majority of these states rejected or modified Rule 1.6.[15] The legal profession has questioned the policy choices of Model Rule 1.6. Legal scholars have criticized the categorical nature of Model Rule 1.6 and its failure to consider third party interests in the balance with clients' needs.[16] The body of criticism of Rule 1.6 is significant and growing.[17] In 1991, the ABA Committee on Ethics proposed amending Rule 1.6.[18]

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15. *See* ALA. RULES OF PROF'L CONDUCT Rule 1.6 (1996); ALASKA RULES OF PROF'L CONDUCT Rule 1.6 (Michie 1997-98); ARIZ. RULES OF PROF'L CONDUCT Rule 1.6 (1997); ARK. RULES OF PROF'L CONDUCT Rule 1.6 (Michie 1996); COLO. RULES OF PROF'L CONDUCT Rule 1.6 (1997); CONN. RULES OF PROF'L CONDUCT Rule 1.6 (1997); DEL. RULES OF PROF'L CONDUCT Rule 1.6 (1996); D.C. RULES OF PROF'L CONDUCT Rule 1.6 (1997); FLA. RULES OF PROF'L CONDUCT Rule 4-1.6 (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6 (1997); IDAHO RULES OF PROF'L CONDUCT Rule 1.6 (1996); ILL. RULES OF PROF'L CONDUCT Rule 1.6 (Supp. 1997); IND. RULES OF PROF'L CONDUCT Rule 1.6 (1996); KAN. RULES OF PROF'L CONDUCT Rule 1.6 (1997); KY. RULES OF PROF'L CONDUCT Rule 1.6 (1996); LA. RULES OF PROF'L CONDUCT Rule 1.6 (West 1996); MD. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MISS. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MO. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MONT. RULES OF PROF'L CONDUCT Rule 1.6 (1997); NEV. RULES OF PROF'L CONDUCT Rule 156 (1995); N.H. RULES OF PROF'L CONDUCT Rule 1.6 (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6 (1997); N.M. RULES OF PROF'L CONDUCT Rule 16-106 (Michie 1996); N.C. RULES OF PROF'L CONDUCT Rule 4 (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6 (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6 (1997); PA. RULES OF PROF'L CONDUCT Rule 1.6 (1997); R.I. RULES OF PROF'L CONDUCT Rule 1.6 (1995); S.C. RULES OF PROF'L CONDUCT Rule 1.6 (Law. Co-op 1997); S.D. RULES OF PROF'L CONDUCT Rule 1.6 (Michie 1995); TEX. RULES OF PROF'L CONDUCT Rule 1.05 (1997); UTAH RULES OF PROF'L CONDUCT Rule 1.6 (1996); WASH. RULES OF PROF'L CONDUCT Rule 1.6 (1997); W. VA. RULES OF PROF'L CONDUCT Rule 1.6 (1997); WIS. RULES OF PROF'L CONDUCT SCR 20:1.6 (1997); WYO. RULES OF PROF'L CONDUCT Rule 1.6 (Michie 1997).

16. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:102, at 130.2 (noting that "literature on the soundness of the adversary system" and "moral ambiguity of simply being a lawyer" – frequent topics of news and scholarly articles today – focus on issue of confidentiality).

17. *See id.* § 1.6:110, at 168.4 (explaining provisions deleted in final ABA rule "must exist in the responsible practice of law"); WOLFRAM, *supra* note 10, at 301 (asserting that it is "hardly imaginable that [Model Rule] 1.6 should be read literally to prohibit a lawyer from revealing absolutely any information about a client except in the limited exceptions explicitly provided in the rule"); *see also* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1027 (1981); W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 745 (1981); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 102-06 (1994); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1096 (1985); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 396 (1989).

18. *See generally* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 721-24 (1993).

The Proposed *Restatement (Third) of the Law – The Law Governing Lawyers* rejects the categorical approach of the Model Rules.[19] Recently, Professor Monroe Freedman called for a new exception to the rule to allow attorneys to reveal confidences to protect the lives of third parties.[20]

A. The Text of the Rule

The text of Model Rule 1.6 provides:

> Confidentiality of Information.
> (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).
> (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.[21]

Rule 1.6 prohibits attorneys from revealing any information relating to a client.[22] The exceptions to this prohibition empower the attorney to disclose information in two situations: (1) to prevent the client from committing a crime that is likely to result in "imminent death or substantial bodily harm,"[23] and (2) to protect attorney interests. Although each of the exceptions is permissive, the elements of the provisions create vastly different effects. The second exception is broad, allowing liberal disclosure to protect attorney interests.[24] This exception reaches most conceivable situations in which the

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19. *See* RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 112 (Proposed Final Draft No. 1, 1996); *see also infra* notes 298-316 and accompanying text.

20. *See* Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought To Be*, 29 LOY. L.A. L. REV. 1631, 1636 (1996).

21. MODEL RULES Rule 1.6.

22. Additionally, the scope of the duty of confidentiality is broadened by Rule 1.6's use of the term "information" rather than the traditional terms "confidences and secrets" used in the Model Code. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(A) (1980) [hereinafter MODEL CODE].

23. *See* MODEL RULES Rule 1.6(b)(1). In this Article, the term "serious crimes" is a shorthand reference to the exceptions stated in Rule 1.6(b).

24. *See* MODEL RULES Rule 1.6(b)(2).

attorney would wish to disclose client information to protect his own interests.[25] It allows disclosure when the attorney reasonably believes a revelation is necessary to establish a claim or defense on his behalf in a suit by the attorney, by the client or by some third party. This liberal disclosure exception gives the attorney the power necessary to protect his own interests. By contrast, the exception for dangerous crimes constrains the attorney's discretion. This exception is narrowly drawn to apply only when an extreme consequence, such as imminent death or substantial bodily harm, is present in conjunction with the most reprehensible conduct – commission of a crime.[26] The Rule invests the attorney with the discretion to choose to disclose client information only when these two elements coalesce.

B. The Message of the Rule

Although Rule 1.6 permits disclosure in described exceptions, it appears to advocate silence in virtually all circumstances.[27] The categorical nature of the Rule depends on careful drafting. On its surface the Rule presents the familiar paradigm of general rule and exceptions. But while the general Rule is plain and powerful, the exceptions defy confident application. The general Rule is a flat prohibition against disclosure of client information. It is clear cut and mandatory. By contrast, the exceptions to the prohibition are permissive. And the exception for serious crimes is far from clear cut; it depends on imponderable elements such as whether the client intends a crime that will result in "imminent death." Moreover, the uncertainty inherent in all future acts is used by the Rule to caution attorneys against disclosure.[28] The Rule neither requires nor encourages disclosure in any situation. The comments to the Rule acknowledge that a client may pose harm to others and that the attorney may not be successful in dissuading the client from harmful conduct in every case.[29] Nevertheless, in no case does the Rule set a normative stan-

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25. Some exception for attorneys seems necessary because, without it, an attorney could never defend against a claim by a client or collect a fee.

26. The Proposed Draft of the *Restatement (Third) of the Law – The Law Governing Lawyers* also includes the requirement that the client conduct creating peril be a criminal act. *See* RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 1, 1996) (authorizing disclosure of confidential client information to prevent "death or serious bodily injury from occurring as the result of a crime that the client has committed or intends to commit").

27. The momentum of Rule 1.6 seems to encourage silence to such an extent that the attorney who makes the decision to reveal client information does so outside the operation of the rule. *See infra* notes 26-48 and accompanying text.

28. *See* MODEL RULES Rule 1.6 cmt. 13.

29. The Model Rules' primary response to concerns about harm to others is that generally it is better for attorneys to be able to counsel clients to comply with the law. *See* MODEL RULES

dard or state that an attorney *should* disclose client information.[30] Additionally, in a comment to a related rule, Rule 1.2, it is clear that dangers to third parties are outside any normative role for the attorney. Rule 1.2 addresses the "Scope of Representation" and drives home the point that attorneys should not take into consideration third-party interests. "The lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and *concern for third persons who might be adversely affected.*"[31]

Although the Model Rules prohibit attorneys from aiding a client's crime or fraud,[32] they never encourage action by the attorney to counter client wrongdoing.[33] Whatever the future crime – transfer of contaminated property or the bombing of the World Trade Center[34] – Rule 1.6 creates no norm for disclosure. Proponents of Rule 1.6 argued that this broad duty is necessary to prevent the legal system from using lawyers as "policemen" of their clients.[35] Proponents also believed that the flat prohibition was necessary to "encourage fuller and franker communication between a lawyer and client,"[36] and to

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Rule 1.6 cmt. 9; *see also* MODEL RULES Preamble ¶ 7; CENTER FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 13 (1987) [hereinafter LEGISLATIVE HISTORY].

30. The Model Rules has numerous uses of the word "should," but none is used in relation to the disclosure situation. Rule 1.6 provides no guidance in identifying a situation that justifies disclosure. *See* LEGISLATIVE HISTORY, *supra* note 29, at 22.

31. MODEL RULES Rule 1.2 cmt. 1 (emphasis added).

32. *See* MODEL RULES Rule 3.3. Additionally, a lawyer may be liable for failure to disclose information. *See* Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395, 399 (1993). "A lawyer can be held liable under criminal law for aiding or abetting a crime, including the crime of fraud. A lawyer also can be held civilly liable on essentially the same terms." *Id.*

33. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:302, at 168.49 (noting that in area of client fraud "command of Rule 1.6(b)(1) as adopted is clear[;] . . . lawyers who have mere knowledge of an impending client fraud, and who cannot plausibly be charged with participation or facilitation must suffer in silence").

34. Although it is admittedly unlikely that one planning such an act would inform his attorney of his plans, the Rule gives no norm for attorney disclosure in the event this unlikely contingency occurs.

35. *See* LEGISLATIVE HISTORY, *supra* note 29, at 48.

36. *Id.*; *see* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing Trammel v. United States, 445 U.S. 40, 51 (1980)). Comment 4 to Rule 1.6 states the purposes of encouraging clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." MODEL RULES Rule 1.6 cmt. 4. In arguing for deletion of the exception for fraudulent conduct likely to injure another, the consensus of the discussion of the ABA House of Delegates was that such an amendment "would encourage fuller and franker communication between a lawyer and client by narrowing the circumstances in which the lawyer could disclose client confidences." LEGISLATIVE HISTORY, *supra* note 29, at 48.

encourage people to seek advice from lawyers.[37]

> In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.[38]

Although the drafters recognized that a client may intend "serious harm" to others, they concluded that the social good is best served by silence. "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[39]

Likewise, the Scope section of the ABA Rules advises against judicial evaluation of the attorney's decision not to disclose client information: "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."[40] This suggestion of judicial restraint states a clear preference for the duty of confidentiality over positive law. Similarly, Comment 20 to Rule 1.6 states a presumption in favor of nondisclosure.

C. Acknowledgement of Positive Law

The Model Rules acknowledge positive law in a limited way. The Preamble to the Model Rules states: "A lawyer should keep in confidence information relating to representation of a client *except so far as* disclosure is required or permitted by the Rules of Professional Conduct or other law."[41] This statement acknowledges the attorney's duty to obey the law. The rules themselves do not, however, mention such an exception to comply with law. In discussing the attorney-client evidentiary privilege, Comment 19 to Rule 1.6 does note the existence of authority outside the Model Rules.[42]

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37. The Rule "not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal representation." MODEL RULES Rule 1.6 cmt. 2; *see also* Board of Prof'l Responsibility of the S. Ct. of Tenn., Formal Op. 85-F-99 (1985).

38. MODEL RULES Rule 1.6 cmt. 9.

39. MODEL RULES Rule 1.6 cmt. 3; *see* LEGISLATIVE HISTORY, *supra* note 29, at 52.

40. LEGISLATIVE HISTORY, *supra* note 29, at 23.

41. *Id.* at 12 (emphasis added). The Preamble also acknowledged the importance of conscience in a lawyer's decision making: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers." MODEL RULES Preamble ¶ 5.

42. "[A] lawyer may be obligated or permitted by other provisions of law to give information about a client." MODEL RULES Rule 1.6 cmt. 20; *see* 2 HAZARD & HODES, *supra* note 12,

> The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.[43]

This comment notes the existence of positive law, but it does so in a markedly circumscribed manner. It notes the attorney's duty to comply "with the final orders of a court or other tribunal."[44] Although this statement endorses limited disclosure, it falls short of creating an exception to comply with positive law. The appearance of this point in the comment rather than the Rule minimizes its importance both because it is easy for the reader to miss the point altogether and because comments are merely explanatory.[45] More important, Comment 19 to Rule 1.6 authorizes disclosure only in the case of a court order; it does not authorize compliance with positive law established by statutes or judicial decisions. Thus, the Model Rules appear to accept law as a basis for disclosure only when a court has made a finding relating to the law in the present case. This limitation takes the decision regarding application of the law out of the hands of the attorney with knowledge of a violation of a statute or the common law by his client. He cannot provide the information that would support a court order until such an order exists, presumably based on the same information from some other source. Similarly, Comment 20 to Rule 1.6 refers to other law outside the Model Rules.[46] It states:

> The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.[47]

The strength of the ABA's aversion to disclosure is clear from this Comment's statement of the presumption against a suppression of other laws and

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§ AP4:103, at 1260-61 (asserting that exception for disclosures "required by law" must be provided by interpretation).

43. MODEL RULES Rule 1.6 cmt. 19.

44. *Id.*

45. Comments do not create obligations within the scheme of the Model Rules: "Comments do not add obligations to the Rules." MODEL RULES Scope ¶ 1. The Scope section of the Model Rules also notes that disciplinary action should not be taken for actions within the bounds of attorney discretion. *Id.*

46. MODEL RULES Rule 1.6, cmt. 20.

47. *Id.*

the fact that all roads lead back to the labyrinth of Rule 1.6 for the determination concerning whether disclosure should be made. Although Comment 20 acknowledges the possibility of disclosures based on other rules, none of these other rules call for disclosure in situations that do not meet the requirements of Rule 1.6. In fact, Rule 4.1 expressly limits the obligation of the attorney to disclose a "material fact to a third person," stating that disclosure must be made "unless disclosure is prohibited by Rule 1.6."[48]

One might argue that it is not necessary for the text of the Model Rule 1.6 to reference positive law or the fact that positive law trumps the Rule. The predominance of positive law does not depend on Rule 1.6 and the force of positive law makes such a reference unnecessary. Along this line, one would reason, the Rule deals with its proper sphere of operation and leaves alone matters outside its scope. Nevertheless, the deletion of the reference to the attorney's duty to comply with positive law is significant. It renders disclosure unlikely despite risks to third parties because of the hermeneutical challenge of applying the Rule.

D. Legislative History: Deletion of References to Positive Law

In 1983, the ABA adopted the Model Rules of Professional Conduct, superseding the ABA Code of Professional Responsibility (Code) of 1969.[49] Model Rule 1.6 was the most debated provision of the proposed rules before the ABA House of Delegates.[50] The Rule departed dramatically from the previous institutional statement of the duty of confidentiality set forth in the ABA Code, and as adopted, it rejected significant exceptions specified by the Commission that had drafted the rules to be considered by the ABA House of Delegates.

The ABA Code gave greater discretion to attorneys considering the issue of confidentiality. The duty of confidentiality defined by the Code encom-

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48. *Id.* at Rule 4.1.

49. In 1978, the ABA added the designation "Model" to the title of the Code in compliance with a settlement agreement it entered with the Justice Department to resolve antitrust charges. *See* WOLFRAM, *supra* note 10, § 2.6, at 57 (1986). The Code superseded the Canons of Professional Ethics of 1908, the ABA's first statement of legal ethics. *See* AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT vii (1996).

50. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:101, at 127 ("By a wide margin, Rule 1.6 was the most controversial rule during the drafting and adoption process."); Aronson, *supra* note 14, at 831 (describing Rules 1.6 and 3.3 as "most controversial throughout the country" and "least justifiable"); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 91 (1997) (noting that Rule 1.6 is "most amended provision" of the Model Rules).

passes[51] client confidences and secrets.[52] The Code allows disclosure of client secrets or confidences when permitted under the Disciplinary Rules[53] or when required by law or by a court order.[54] Under the Code an attorney may reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."[55]

Proposed Rule 1.6, drafted by the Kutak Commission, provided as follows:

> (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).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
> (2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon conduct in which the client was involved; or
> (4) to comply with other law.[56]

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51. Ten states have retained the Model Code. *See* GA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1996); IOWA CODE OF PROF'L RESPONSIBILITY DR 4-101 (1996); MASS. CANONS OF ETHICS DR 4-101 (1996); NEB. CODE OF PROF'L RESPONSIBILITY DR 4-101 (West 1995); N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1995); OHIO CODE OF PROF'L RESPONSIBILITY DR 4-101 (Banks-Baldwin 1996); OR. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1996); TENN. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1995); VT. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1995); VA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1996). Vermont and Virginia are considering adoption of the Model Rules. *See generally* A. Jeffry Taylor, Essay, *Work in Progress: The Vermont Rules of Professional Conduct*, 20 VT. L. REV. 901 (1996); *Proposed Model Rules of Professional Conduct*, VA. LAW., Mar. 1997, at 38, 38.

52. *See* MODEL CODE DR 4-101.

53. *See id.* at DR 4-101(C)(2). This exception requires balancing the duty of confidentiality against other professional duties, permitting the attorney to reveal a confidence when another section of the Code would allow the revelation. *See id.* DR 7-101(B)(2), DR 7-102.

54. *See id.* at DR 4-101(C)(2). This exception may include both statutory mandates such as reporting requirements of environmental releases or hazards and duties arising from tort law. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:113, at 168.9.

55. MODEL CODE DR 4-101. The provision does not qualify the type of crime justifying disclosure. *Id.*; *see* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 55 (1995).

56. LEGISLATIVE HISTORY, *supra* note 29, at 47-48.

In addition to allowing attorneys to make disclosures necessary to establish a claim or defense on behalf of the lawyer, the Proposed Rule drafted by the Kutak Commission allowed attorneys to disclose client information to prevent serious harm from a client's threatened crime or fraud, to rectify serious harm from such acts, and to comply with other law. Indeed, as originally drafted, the Kutak Commission Rule imposed a duty of disclosure on attorneys when necessary to protect another person or to comply with the law.[57]

During the process of debate and ratification of the Model Rules, the House of Delegates either dispensed with or substantially narrowed each of the exceptions in the Proposed Rule except for the attorney self-defense exception. These changes came about primarily as a result of criticism from the American College of Trial Lawyers.[58] The ABA House of Delegates' amendments made attorney disclosure of client information more difficult.[59] During the February 1983 Midyear Meeting,[60] the Delegates deleted the Proposed Rule 1.6(b)(4) exception, which permitted disclosures necessary "to comply with other law."[61]

E. The Effect of Deletion of References to Positive Law

In addition to the Model Rules' reference to positive law in the Preamble, scholars have suggested that Model Rule 1.6 must implicitly allow disclosures required by positive law.[62] Shortly after the passage of the Model Rules, Professor Hazard noted that "an innocent lawyer cannot take care of himself in a client fraud situation unless he has some kind of out."[63] Because of the

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57. *See* MODEL RULES OF PROF'L CONDUCT Rule 1.7(b) (Discussion Draft 1980). Originally the Rule on confidentiality was numbered 1.7. Specifically the discussion rule provided as follows: "a lawyer *shall* disclose information about a client to the extent that it appears necessary to prevent the client from committing an act that will result in death or serious bodily harm to another person, and to the extent required by law or the rules of professional conduct." *Id.* (emphasis added).

58. 2 HAZARD & HODES, *supra* note 12, § AP4:103, at 1260. "The ABA House of Delegates retained the basic structure of Rule 1.6 but rejected most of the exceptions to confidentiality that had been proposed [by the Kutak Commission]." *Id.*

59. *See generally* 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, 433-44 (1997) (examining each of the changes to Rule 1.6). For a thorough history of the ABA Rules, see Hodes, *supra* note 17.

60. *See* LEGISLATIVE HISTORY, *supra* note 29, at 48.

61. Ultimately, comments 19 and 20 added limited acknowledgement of positive law. *See id.* at 54-55.

62. *See* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 285 (1984).

63. *Id.*

peril posed to the innocent lawyer by client fraud, Professor Hazard rejected the literal meaning of Rule 1.6 and advocated recognition of an exception "in practice" for disclosure of a client's fraud.

> [The] peril to the innocent lawyer is so obvious as to impugn the seriousness of the notion that competent lawyers can take care of themselves under a confidentiality rule that does not have an exception concerning client fraud. In pondering the rhetoric in favor of such a rule, I indeed conclude that [Model Rule 1.6] is not intended to be taken seriously. Instead, the idea is that the confidentiality rule should *state* no qualifications concerning client fraud, but should be *understood* as having an exception "in practice."[64]

However necessary, no "in practice" exception is implied by the language or structure of the Rule. The text of the Rule suggests no exception for the attorney's protection.[65] Explication of the Rule indicates that an exception for disclosure necessary to comply with positive law must be implied from outside rather than from the force of the language of the Rule.[66] Like the implied-in-law promise recognized in contract law, the exception comes from necessity and fairness rather than from the intent of the drafters of the document.[67]

One may well ask what difference it makes whether the exception is found in the Rule or imposed from outside the Rule. Because the predominance of positive law is established outside the Rules and acknowledged in a general way by the Model Rules,[68] the power of positive law should be

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64. *Id.* at 284-85.

65. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:112, at 168.7 (noting that Rule fails to "survive even linguistic analysis" unless duty to comply with other law is acknowledged).

66. This seems analogous to an implied-in-law promise that is created by a court as opposed to an implied-in-fact promise that inheres in the agreement between parties. The implied-in-law promise is not necessary as a matter of implication of the parties but must be created by a court to achieve the court's (and society's) view of fairness. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 181-83 (3d ed. 1990) (discussing implied-in-law contracts).

67. *See* Artukovich & Sons v. Reliance Truck Co., 614 P.2d 327, 329 (Ariz. 1980) (noting that implied-in-law contract is "imposed for the purpose of bringing about justice without reference to the intentions of the parties"); *see also* Willard L. Boyd, III, & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 606-09 (1991) (stating that implied-in-law contracts have "no requirement" of "mutuality of intent or mutual assent").

68. The Scope statement to the Model Rules notes: "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes . . . substantive and procedural law in general." MODEL RULES Scope ¶ 2. "A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." MODEL RULES Preamble ¶ 3.

clear.[69] Attorneys are not exempt from positive law by virtue of rules of ethics[70] and they know that the duty of confidentiality does not mean they can ignore positive law. Positive law embodied in either statutory law or the common law trumps ethics rules.[71] Legislators are empowered to proscribe conduct of all persons within their jurisdictions and courts apply the law despite conflicts with ethical rules created by a bar association.[72] Accordingly, the argument runs, deletion of the exception for client fraud and references to positive law should have no effect on the obligations of attorneys.

Nevertheless, the failure of Model Rule 1.6 to acknowledge the fact and power of positive law creates a disconnect between ethics rule and positive law that can result in both abstract and concrete problems. Deletion of references to positive law minimizes the significance of positive law and diminishes the likelihood that an attorney will fully analyze her duties under statutory or common law principles.[73] The universe of the Rules includes no placeholder or hook for considering positive law. Thus, the categories of acknowledged exceptions obscure the backdrop of substantive law and its relation to the attorney's decision, suggesting that the full inquiry on confidentiality is accomplished within the confines of the Rule.[74] The analysis of a disclosure issue seems complete within the universe constructed by Model Rule 1.6, without reference to external positive law.

Choosing a covert exception for client fraud or dangerous conduct is evidence of the strong preference for silence held by the drafters of the Model Rules. Reliance by attorneys on a covert or hidden exception for the "out" needed to protect them is risky, however. A covert exception is hard to discover and hard to apply. Thus, such an exception is far from reliable.

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69. *See* MODEL RULES Rule 1.6 cmts.

70. *See* LEGISLATIVE HISTORY, *supra* note 29, at 13 (noting that self-regulation must be adequate to avoid government regulation); *see also* 1 HAZARD & HODES, *supra* note 12, § 1.6:109, at 168.1-.2 (noting that "the operation of law external to the law of lawyering – other law – will sometimes 'force' further exceptions, regardless of what a disciplinary code might say").

71. *See* 1 HAZARD & HODES, supra note 12, §§ 1.6:103-06, at 134-63; Hodes, *supra* note 17, at 758-60; Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1411-12 (1992).

72. *See* David B. Wilkins, *In Defense Of Law And Morality: Why Lawyers Should Have A Prima Facie Duty To Obey The Law*, 38 WM. & MARY L. REV. 269, 276-77 (1996); *see also* Koniak, *supra* note 71, at 1412 (indicating that courts "often state that the only instances in which they are bound to treat the ethics rules as binding precepts are in disciplinary proceedings against lawyers").

73. *See* Koniak, *supra* note 71, at 1413-14 (noting that MODEL RULES "contain no explicit statement on the general hierarchy of norms" and even suggest that they supersede positive law).

74. The Model Code specifically noted the predominance of positive law in its text. *See* MODEL RULES Rule 1.6 cmt. 20.

According to Professor Llewellyn, "covert tools are never reliable tools."[75] The social utility of employing such an exception is open to question. Is an implicit or covert exception sufficient to protect third parties and attorneys from client misconduct? Will the attorney facing the dilemma of whether disclosure is appropriate divine the existence of an implicit exception? In a situation of urgency will the attorney be able to plumb the issue sufficiently to discover the argument for this unstated exception?

Attorneys face a difficult choice when positive law appears to require disclosure.[76] Model Rule 1.6 provides no basis for analyzing a contest between positive law and Rule 1.6, and the Scope section underscores the message of silence by declaring that the attorney's "exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."[77] Rather than protecting attorney discretion in a content-neutral manner, this statement seeks to insulate an attorney's decision from review by courts or state boards of professional responsibility in one circumstance: when the attorney decides not to reveal client information. It urges judicial restraint only in the circumstance of attorney silence. Control of attorneys is properly within the realm of courts and, to some extent, legislatures.[78] Bar associations have taken up the work in this area by a kind of implied delegation from the courts.[79] However, such delegation should not be interpreted as

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75. K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939). Professor Llewellyn made this statement in the context of criticizing the practice of courts to construe language to reach a desired result rather than overtly refusing to enforce unconscionable contracts. *Id.* He criticized covert construction as leading to "unnecessary confusion and unpredictability." *Id.* He also noted that such construction fails to "accumulate either experience or authority in the needed direction." *Id.* In legislating a categorical rule, the ABA may have fallen into the same pitfall.

76. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1064 (1978) (noting that confusion in client confidentiality area is "compounded" by fact that ABA "has taken a quite different approach to attorney-client confidentiality"); *see also* Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 293 (1984) (discussing Model Rule 1.6 and noting that Model Code is "almost totally incoherent on the subject" of client fraud).

77. LEGISLATIVE HISTORY, *supra* note 29, at 23.

78. Although courts have primary responsibility for controlling the conduct of attorneys, legislatures can also control attorneys so long as they do not impinge on the authority of the judicial branch. *See* 1 HAZARD & HODES, *supra* note 12, § 1.6:103, at 134 (stating that, in context of constitutional protections of those accused, "it is safe to say little more than that a state could not constitutionally *abolish* the rule of confidentiality . . . in criminal cases").

79. A criticism against reporting requirements has been that the legislation impermissibly tampers with the separate branch of the judiciary. "[T]hrough mandatory child abuse reporting laws, we are experimenting with the use of attorneys as crime detectors and informants and concomitantly encroaching on the legal protections for attorney-client confidences." Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the*

elevating the bar's judgment above that of courts. Notwithstanding the ABA's entreaty against reexamining the decision to remain silent,[80] courts, as the arbiters of disputes, should consider both statutory and common law in determining disputes – even when the defendant is an attorney. Accordingly, it seems appropriate to consider Rule 1.6 in light of positive law.

IV. Statutory Protection Against Environmental Hazards

Model Rule 1.6 is based on an assumption that clients will not inform their attorneys of all relevant information absent a strong rule in favor of confidentiality. Environmental scholars suggest that the public's paramount interest in a safe environment should influence professional responsibility in the environmental area.[81] This Part considers the application of the duty of confidentiality in the context of environmental hazards, noting the strong policy favoring environmental protection in legislative action, judicial enforcement of statutes, prosecution initiatives and public opinion.

A. The Risks

Undisclosed contamination of real estate is only one example of the environmental hazards present today. Environmental hazards are diverse as well as numerous.[82] Over two billion pounds of hazardous substances are

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Specter of Lawyer as Informant, 42 DUKE L.J. 203, 207 (1992). This criticism seems inapposite when applied to judicial decisions because of the valid assumption that courts can and should control attorneys.

80. *See* LEGISLATIVE HISTORY, *supra* note 29, at 23.

81. *See* George W. Van Cleve, *Environmental Law in the 1990's and Its Principal Implications for Professional Responsibility*, ENVTL. LITIG., C534 A.L.I.-A.B.A. 405, 408 (1990) (stating that "full measure of professional responsibility here is that members of the bar should assist the public in its effort to become stewards for the environment"); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 200 (1997) (suggesting separate rules of ethics related to environmental and other matters where third party interests are implicated).

82. Hazardous substances are pervasive in the United States and the world today.

> Regarding catastrophic environmental disasters, some monumental ones (worse than Bhopal) have occurred in this country but have been slow and subtle enough to be categorized differently. The most obvious one is the dissemination of cigarettes, which through lung, breast and bladder cancer, emphysema, heart disease, stroke and hypertension have killed many millions – probably the largest environmental disaster to date and the largest cause of early death in the developed world. Another is the gradual destruction of the ozone layer leading to a melanoma epidemic and extinctions among amphibians.

Letter from Robert Hutchison, M.D., Asst. Professor of Pathology, State University of New York (SUNY) Health Science Center, Syracuse, to Irma S. Russell, Asst. Professor, Cecil C. Humphreys School of Law, University of Memphis (September 13, 1997) (on file with author).

produced in this country each year.[83] Despite advances in technology, disposal and storage of hazardous substances present intractable problems.[84] According to the EPA, seventeen accidental chemical releases in the United States from 1982 to 1986 had the potential for results as tragic as the Union Carbide spill in Bhopal, India.[85] The dangers posed by environmental hazards are exacerbated by the fact that, to a large extent, environmental compliance and enforcement depend on self-monitoring and disclosure.[86]

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83. The figures for release of toxic substances subject to the Emergency Planning and Community Right-to-Know Act have decreased in recent years. The EPA recently reported that in 1994 releases of toxic substances declined by 8.6 percent. *See 1994 Toxics Release Inventory, Public Data Release*; *see also Emergency Planning: Toxic Chemical Releases Decrease By 8.6 Percent in 1994, Report Says*, [May 1996-Apr. 1997 File Binder] 27 Env't Rep. (BNA) No. 10, at 531 (July 5, 1996). Nonetheless, the amount of toxic chemicals is still substantial: 2.26 billion pounds in 1994. *Id.*

84. Recently, the House of Representatives passed a bill that would create an interim storage site for radioactive waste in the Yucca Mountain in Nevada. *See Radioactive Waste: House Passes Legislation to Create Interim Waste Storage Facility in Nevada*, 28 Env't Rep. (BNA) No. 27, at 1337-38 (Nov. 7, 1997) [hereinafter *Radioactive Waste*]. Although the government has studied the Yucca Mountain site for a permanent disposal area for more than 12 years, the House Bill indicates that the study of the area must continue. *See Radioactive Waste Revision of Nuclear Waste Policy Act Sought* [May 1996-Apr. 1997 File Binder], 27 Env't Rep. (BNA) No. 37, at 1771-72 (Jan. 24, 1997); *Radioactive Waste*, *supra*, at 1337. "Under the measure (HR 1270), DOE also would be required to continue characterization activities at Yucca Mountain . . . to determine its suitability as a permanent repository for waste generated by commercial nuclear power plants and government defense-related activities." *Id.* Meanwhile, production of hazardous substances (including radioactive wastes) continues to increase despite waste reduction incentives created by state and federal agencies. The three sites that inspired the passage of CERCLA—Love Canal, Times Beach, and the Valley of the Drums, in Bullit County, Ky. – have only recently completed clean up under the act. *See Superfund: Remediation Complete at Times Beach; Site Helped Inspire Passage of Statute*, 28 Env't Rep. (BNA) No. 11, at 474-75 (July 11, 1997).

85. *See* S. REP. NO. 101-228, at 134-35 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3519-20; *see also* Bradford C. Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 OHIO ST. L.J. 761, 793-94 (1991) (arguing that during period of EPA study, firms "were not allocating sufficient resources to safety").

> These [American] events had caused 309 deaths, 11,341 injuries and the evacuation of 464,677 people from homes and jobs. . . .
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> . . . EPA analyzed 29 events with the highest potential for damage to health and the environment. These events were compared to the release at Bhopal, India, which killed 3,000 and injured over 200,000. Considering only the toxicity and volume of the chemicals released in the 29 U.S. events, 17 of these events had the potential for more damage than Bhopal and all 29 had a potential of 50 percent or more of the Bhopal effects. That few were killed or injured in these accidents (650 people were injured in one event and 5 killed in another) is due principally to the location of the facilities and climate and operating conditions at the time of the release.

S. REP. NO. 101-228, at 134-35 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3519-20.

86. *See* Marianne Lavelle, *EPA's Amnesty Has Become a Mixed Blessing*, NAT'L L.J.,

B. Environmental Policy: Political Will and Positive Law

1. Legislation

Both federal and state governments have indicated a strong interest in protecting the public from environmental hazards. The prescriptive nature of environmental laws indicates the strength of this interest.[87] Federal laws require that persons report hazardous releases and environmental contamination within prescribed time limits.[88] Statutes set levels for permitted discharges of pollution[89] and prescribe technology to reduce the discharge of pollutants.[90] They also set standards to require the clean up of contaminated property.[91] Statutes provide for punishment of those who fail or refuse to control environmental risks at prescribed levels and by prescribed mechanisms.[92]

Feb. 24, 1997, at A1 (noting need for amnesty because many violations go undetected). *See generally* W.M. VON ZHAREN, ISO14000: UNDERSTANDING THE ENVIRONMENTAL STANDARDS (1996). The fact that self-reporting is a requirement of environmental laws enhances the need for good counsel from attorneys regarding the obligation to report hazardous releases. *See generally* F. Henry Habicht, II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, [1987 File Binder News & Analysis] 17 Envtl. L. Rep. (Envtl. L. Inst.) at 10,478 (Dec. 1987).

87. Highly specific environmental requirements control industry practices. Additionally, some laws and regulations now reach private enterprises that have an effect on the environment. For example, HUD and EPA recently issued regulations that require disclosure of lead-based paint on leases and sales of housing constructed before 1978. *See* 24 C.F.R. § 35.8 (1997). The prescriptive nature of these laws provides a contrast to the nonnormative stance of Rule 1.6.

88. *See* CERCLA § 103(a), 42 U.S.C. § 9603(a) (1994) (requiring any person in charge of vessel or facility to report release of hazardous substance "as soon as he has knowledge of any release" in specified quantities); Pollution Prevention Act of 1990 (PPA) § 6607(b)(1), (3), (7), 42 U.S.C. § 13106(b)(1), (3), (7) (1994) (requiring annual report of chemicals discharged into environment); *see also* United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989) (concluding that person "in charge" of facility must report release of hazardous substances).

89. Under the Clean Water Act (also known as the Federal Water Pollution Control Act), the owner or operator of any discharger of pollutants must record and report information about discharges into the waters of the United States. *See* Clean Water Act §§ 308(a), 502(14), 33 U.S.C. §§ 1318(a), 1362(14) (1994). Under the Clean Air Act, the owner or operator of a source of acid deposition must monitor and report all emissions to the state permitting authority. *See* Clean Air Act §§ 412(a), 502, 42 U.S.C. §§ 7651k(a), 7661a (1994).

90. For example, the Clean Air Act requires auto makers to reports compliance with specifications for controlling auto emissions. *See* Clean Air Act § 208(a), 42 U.S.C. § 7542(a). The Clean Air Act also requires that new stationary sources of air pollution meet technology standards set by EPA. *See* Clean Air Act § 111(a)(2), 42 U.S.C. § 7411(a)(2).

91. CERCLA requires that contamination at a site listed as a superfund site be cleaned up to levels consistent with the National Contingency Plan promulgated by the EPA. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

92. *See infra* notes 112-13.

Although environmental crimes are sometimes referred to as regulatory in nature,[93] violations of environmental law can result in catastrophes. State and federal environmental statutes provide both civil and criminal sanctions, including imprisonment for knowing violations.[94] Under the Resource Conservation and Recovery Act (RCRA), for example, one who knowingly transports hazardous waste to an unpermitted facility or disposes of hazardous waste without a permit is guilty of a felony.[95] Punishment for such violations includes imprisonment for up to five years and fines of up to $50,000 per day.[96] A violator convicted of a subsequent similar violation can face a prison term of up to ten years and fines twice the maximum for first-time offenders.[97]

Environmental statutes are based on a legislative judgment that certain activities affecting the environment and public welfare are unreasonably dangerous. Such statutes seek to minimize the unreasonable risk posed by environmental hazards. Although laws regulating the environment have existed throughout the history of the United States,[98] the government has

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93. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1551 (1995) (noting environmental violation as example of regulatory violation in "the Broad Middle Ground" when determining attorney's obligation is difficult).

94. In recent years, legislatures have increased civil penalties for violation of federal and state environmental laws. *See Air Pollution: New Civil Penalty Policy Will Boost Fines, Speed Processing of Cases, EPA Attorney Says*, 22 Env't Rep. (BNA) No. 41, at 2327 (Feb. 7, 1992); *Enforcement: Corporations Face Increased Penalties Under Revised RCRA Civil Enforcement Policy*, 21 Env't Rep. (BNA) No. 27, at 1245 (Nov. 2, 1990). Additionally, judicial doctrines on enforcement have resulted in liability that extends beyond dissolution of the corporation in some circumstances. *See* Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273, 1285-91 (1995) (discussing cases that apply "dead and buried" rule to allow CERCLA suits against dissolved corporations).

95. *See* SWDA § 3008(d), 42 U.S.C. § 6928(d) (1994); Sidney M. Wolf, *Finding an Environmental Felon under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA*, 9 J. LAND USE & ENVTL. L. 1, 24 (1993) (noting relaxation of scienter requirement in environmental statutes).

96. *See* SWDA § 3008(d), 42 U.S.C. § 6928(d). Environmental fine structures also seek to defeat the benefits of violating the law by setting penalties at an amount that is twice the economic benefit to the violator of engaging in the violation or twice the loss suffered by the public in the event of a violation. *See id.*

97. *See id.*

98. *See* J. William Futrell, *The History of Environmental Law*, *in* ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 2, 4-6 (Celia Campbell-Mohn et al. eds. 1993). Environmental law as we know it would not have been possible without the development of administrative law and principles of "judicial review of government actions." JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION viii (2d ed. 1992).

sought to control environmental hazards in a comprehensive manner only in the last three decades.[99] "Over the last two decades, the growing conviction by our citizens that pollution is an intolerable social and physical evil has led to strong legislation, resulting in a pervasive statutory scheme for regulation of activities that affect the environment."[100]

Concern about environmental risks has grown as the public has learned about the magnitude of the risks[101] and the pervasive nature of environmental hazards.[102] Although no federal law expressly endorses a right to a clean environment,[103] Congress and state legislatures have passed numerous acts

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99. *See* David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 145-46 (1995) (noting beginnings of environmental movement and support for criminalization of polluting behavior in 1960s); Jeff Gimpel, Note, *The Risk Assessment and Cost Benefit Act of 1995: Regulatory Reform and the Legislation of Science*, 23 J. LEGIS. 61, 61 (1997) (noting "broad and interrelated network" of statutes developed over past 35 years).

100. Van Cleve, *supra* note 81, at 408.

101. Some have charged that the EPA used public concern to promote additional laws and regulations. *See* MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING 12 (1995). "The EPA, which had for some time been advocating a new statute to control inactive hazardous waste disposal sites, used the massive publicity generated by the Love Canal incident to push through Congress the Comprehensive Environmental Response, Compensation and Liability Act." *Id.* (footnote omitted).

102. The Exxon Valdez disaster "triggered a national reassessment of the laws and regulations relating to accidental releases of hazardous substances." Thomas S. West et al., *Accident Prevention and Emergency Response Planning Under the Clean Air Act: Emerging Requirements*, [May 1993-Apr. 1994 Current Developments File Binder] 24 Env't Rep. (BNA) No. 34, at 1555 (Dec. 24, 1993). Despite the dramatic damage done by the Exxon disaster, worse spills have occurred and cumulative spills dwarf the Exxon case. In December of 1989, the amount of oil spilled off the coast of Morocco was 186% of the amount of oil spilled by the Exxon Valdez. *See Harper's Index*, HARPER'S, Mar. 1990, at 19. By March 1991, only eight percent of the oil from the Valdez had been removed. *See Harper's Index*, HARPER'S, Apr. 1991, at 15.

103. Early drafts of the National Environmental Policy Act (NEPA) included declarations of the right of American citizens to a clean environment. *See* H.R. CONF. REP. NO. 91-765, at 8 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2768 (noting that language of Senate bill stated that "each person has a fundamental and inalienable right to a healthful environment" and that this language was deleted in compromise resulting in final legislation). In 1994, after the failure of the Environmental Justice Act, President Clinton issued an Executive Order to promote environmental justice. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994). The Order was conceived as an "administrative solution[] to the inequitable distribution of environmental hazards" burdening minorities and the poor. *See* Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 434 (1994). While declaring that each federal agency "shall make environmental justice part of its mission," the Executive Order refused to create or acknowledge a right to a clean environment. Exec. Order No. 12,898, § 1-101. "This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity." *Id.* § 6-609.

protective of the environment. From 1964 to 1980, Congress responded to a growing public consensus by enacting the basic canon of environmental protection. [104] After these protections were in place, Congress "pressed ahead with significant amendments"[105] to the major statutes and state legislatures continued to pass a wide array of statutes aimed at protecting the environment and the public.[106] Although the system of federal environmental laws has received criticism[107] federal statutes attempt to form a comprehensive framework of environmental protection.[108] In passing the numerous protective environmental statutes, state and federal legislatures have recognized the crucial need for protection of human health and the environment. For exam-

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104. The acts included the Water Conservation Act of 1964, the Wilderness Act of 1964, the National Environmental Policy Act of 1969, the Clean Air Act of 1972, the Clean Water Act of 1972, the Endangered Species Act of 1973, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1160-61 (1995).

105. BONINE & MCGARITY, *supra* note 98, at ix.

106. After the basic canon of environmental statutes relating to pollution control came into force, more stringent provisions passed state and federal legislatures. *See* Carol E. Dinkins, *Criminal Enforcement of Environmental Regulations: The Genesis of Environmental Enforcement Through Criminal Sanction*, in ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 13 (Donald A. Carr ed. 1995); Futrell, *supra* note 98, at 35.

107. *See, e.g.*, STEPHEN J. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 8, 42-43 (1993) (referring to "alphabet soup of agencies and programs"); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1231 (1995) (calling federal environmental law "irrational potpourri" of statutes); Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 586 (1996) (criticizing "the elaborate system of regulatory commands" set forth by federal environmental statutes).

108. One group of statutes deal with the control of deposit or release of hazardous substances into the media of the planet: the air, water and soil. These statutes include the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994); SWDA, 42 U.S.C. §§ 6901-6992k (1994); and CERCLA, 42 U.S.C. §§ 9601-9675 (1994). A group of statutes control particularly hazardous substances. These include the Toxic Substance Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994); the Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1994); SWDA, 42 U.S.C. §§ 6901-6992k; and CERCLA, 42 U.S.C. §§ 9601-9675. The third group of statues seeks to protect resources deemed to be particularly fragile or in need of special intervention to preserve them. In this category are the Forest and Rangeland Renewable Resources Acts, 16 U.S.C. §§ 1600-1687 (1994); the Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. §§ 528-531 (1994); the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1994); the Clean Water Act provisions that afford protection to wetlands, known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994); the Migratory Bird Treaty Act of 1976, 16 U.S.C. §§ 703-718j (1994); and other acts aimed at protecting specific resources. *See, e.g.*, The Wild and Free-Roaming Horses and Burrows Act, 16 U.S.C. §§ 1331-1340 (1994).

ple, the text of the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA) indicates the preeminence of environmental concerns represented by this legislation in declaring its sanctions "[n]otwithstanding any other provision or rule of law."[109]

The foregoing environmental policies establish in a general way the strong public policy interest in safety from environmental hazards. Environmental statutes and regulations also create a legal obligation on the part of an owner or operator of property to disclose information relating to environmental hazards or environmental damage. These policies undercut the owner's interest in confidentiality, requiring that the owner (the attorney's client) abandon secrecy with respect to such hazards. For example, under the Clean Air Act Amendments of 1990, facilities that produce, handle or store extremely hazardous substances must assess the dangers of such substances. The Amendments require that operators formulate a hazard assessment plan to outline and evaluate the potential for release and to determine "downwind

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109. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). The strength of the legislative judgment of danger – and its financial ramifications – is also evident in the controls imposed on corporations by the Securities and Exchange Commission Act. Although the SEC does not require companies to disclose their general environmental policies, it does require disclosure of conditions that constitute a "materially adverse condition." *Id.* The strength of the legislative judgment of danger can also be seen in the controls imposed on corporations by the Securities and Exchange Commission Act. Although the SEC does not require companies to disclose their general environmental policies, it does require disclosure of conditions that affect the financial status of the companies. *See* 17 C.F.R. § 229.303(a) (1997) (requiring disclosure relating to liquidity, capital resources, results of operations); Securities Exchange Act of 1934 ch. 404, § 10(b), 15 U.S.C. § 78j (1994) (noting general prohibition against fraud); 17 C.F.R. § 240.10b-5 (1997) (requiring disclosure of particular events or conditions when mandated or when facts are of "sufficient significance to affect decision making by reasonable investors"). *But see* John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 266-67 (1995) (citations omitted).

> The Securities Act of 1933 is specifically intended to "provide full and fair disclosure of the character of securities . . . to prevent frauds in the sale thereof, and for other purposes." The courts have interpreted this mission to optimize corporate financial and non-financial disclosures and thereby provide investors with adequate information to make reasonable trading decisions. The SEC is empowered to provide detailed guidance on the form and content of disclosure . . . as the SEC deems "necessary or appropriate in the public interest for the protection of investors." The SEC itself is sometimes willing to expand beyond this purpose of advancing "informed investor trading" by recognizing "that appropriate publicity tends to deter questionable practices and to elevate standards of business conduct," a position echoed by distinguished commentators. However, the SEC's experience in addressing the disclosure of environmental liability exhibits greater emphasis on the former goal even as it appears that its recent disclosure mandates would support the latter.

Id. (citations omitted).

effects, including potential exposure to affected population."[110] In other words, companies that store or use hazardous substances must now tell the government – and citizens who seek this information under the Community Right to Know Act or The Freedom of Information Act – what would happen to people in the vicinity of the facility in the event of an accident.[111] Legislatures have also revealed a strong policy of protection through the imposition of criminal penalties. Both federal and state environmental statutes criminalize the knowing failure or refusal to comply with environmental reporting requirements.[112] Many environmental statutes declare that a criminal violation constitutes a separate offense for each day it continues.[113]

Support for environmental protection does not appear to be a passing fad.[114] Americans and the government have begun taking environmental

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110. Clean Air Act § 112(r)(7)(B)(ii)(I), 42 U.S.C. § 7412(r)(7)(B)(ii)(I) (1994).

111. *See* Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) § 313, 42 U.S.C. § 11023 (1994). Additionally, the Administrator of EPA must promulgate a list of substances deemed extremely hazardous under the Act. The EPA promulgated the first such list 1993. *See* 58 Fed. Reg. 5102-19 (1993). EPA has promulgated a final rule adding 286 chemicals to the list of chemicals that must be reported under EPCRA. *See* 59 Fed. Reg. 61,432-01 (1994). For a thorough treatment of the risks present in the practices of storage and use of extremely hazardous substances in the United States, see Mank, *supra* note 85, at 762 (arguing that tax on industry is necessary to force U.S. industries to create buffer zones and to internalize costs of preventing catastrophic accidents).

112. For example, the Clean Air Act classifies as a felony any knowing failure to make required reports or keep records of compliance. *See* Clean Air Act § 113(c)(2), 42 U.S.C. § 7413(c)(2). Likewise, the Tennessee Hazardous Waste Management Act of 1977, TENN. CODE ANN. §§ 68-212-101 to -121 (1996), and the Tennessee Hazardous Waste Management Act of 1983, TENN. CODE ANN. §§ 68-212-201 to -224 (1996) authorize criminal penalties for knowingly providing false reports to state authorities. *See* TENN. CODE ANN. §§ 68-212-114, 68-212-213 (1996). The Tennessee Petroleum Underground Storage Tank Act, TENN. CODE ANN. §§ 68-215-101 to -128 (1996), also authorizes criminal penalties. *See* TENN. CODE ANN. § 68-215-120 (1996).

113. *See* Clean Water Act § 309(c)(1), 33 U.S.C.§ 1319(c)(1) (1994) (authorizing fine of $2,500 to $25,000 "per day of violation"); *see also* TENN. CODE ANN. § 68-212-213 (1996).

114. *See* James Gerstenzang, *GOP Clouds the Future of Environmental Protections; Regulation: Conservatives See a Chance to Ease Tough Antipollution Rules. But They Risk a Popular Backlash*, L.A. TIMES, Dec. 24, 1995, at A1; *see also* Bill Line, *What Voters Say About the Environment Today: Poll Shows Widespread Support for Green Causes*, 21 E.P.A. J. 17, 17 (1995); *State Official Sees Tight Squeeze for Carb Gas*, PLATT'S OILGRAM NEWS, Mar. 27, 1995, at 3. In a 1994 poll of 1,201 people who had voted in the 1994 presidential election, 41% of those polled agreed that existing laws "don't go far enough in protecting the environment." Line, *supra*, at 17. Only 18% said that environmental regulations "go too far." *Id.* Of those polled, 76% favored strengthening drinking water laws. *Id. See generally* Everett Carll Ladd & Karlyn Bowman, *Public Opinion on the Environment*, RESOURCES, Summer 1996, at 5 (noting that significant numbers of Americans are "committed to a safe and healthful environment").

dangers seriously.[115] Public opinion polls indicate that Americans consistently favor maintaining the environmental protections established over the last two decades.[116] In response to public demand, Congress has enacted strict controls on hazardous substances[117] through laws that regulate dischargers and punish individuals who knowingly violate[118] environmental regulations.

The environmental policies noted above are strong. They address issues that have the possibility of creating long-term and far-reaching harm. Never-

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115. "The American people have made clear their desire to have clean air – air which is safe to breathe, which does not harm trees, lakes and coastal waters, and which doesn't pose a threat of a Bhopal type accident in the United States." S. REP. NO. 101-228, at 406 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3788 (statement of Senator Frank Lautenberg in support of S. 1630); *see also* Gary Vajda, *Pollution Prevention Through Total Quality Management*, *in* ENVIRONMENTAL SCIENCE AND TECHNOLOGY HANDBOOK 347, 355 (Kenneth W. Ayers et al. eds. 1994).

116. Recent plans to reform existing environmental protection have met with public disapproval. *See* Jim Nichols, *Revisionists Retreat: Republicans Back Off Touted Reform of Environmental Law in Light of Polls Showing Support for Protection of Resources*, PLAIN DEALER, Oct. 22, 1995, at 1B. "The GOP phalanx is retreating in the face of public-opinion polls that show Americans are more protective of the environment than some regulatory revisionists previously believed." *Id.*; *see also* Brad Knickerbocker, *Americans Go "Lite Green"*, CHRISTIAN SCI. MONITOR, Apr. 18, 1995, at A1 ("Americans still favor strong environmental protection."); Jessica Mathews, *Battle for the Environment*, WASH. POST, Nov. 27, 1995, at A21 (noting that "[p]olls show solid to overwhelming opposition to environmental rollbacks").

117. For example, the Clean Air Act requires a risk management plan relating to extremely hazardous substances. The plan must be prepared and implemented by owners or operators of "stationary sources at which a regulated substance is present in more than a threshold quantity" and also must include "a hazard assessment to assess the potential effects of an accidental release of any regulated substance." Clean Air Act § 112(r)(7)(B), 42 U.S.C. § 7412(r)(7)(B). This assessment must include the following: (1) an estimate of potential release quantities, (2) a determination of downwind effects, (3) a previous release history of the past five years, and (4) an evaluation of worst case accidental releases. *See* Clean Air Act § 112(r)(7)(B)(I), 42 U.S.C. § 7412(r)(7)(B)(I); *see also* James R. Arnold, *Disclosure of Environmental Liabilities to Government Agencies and Third Parties*, IMPACT OF ENVTL. L., C831 A.L.I.-A.B.A. 585, 603-04 (1993) (explaining requirements of 42 U.S.C. § 7412(r)).

118. *See* Futrell, *supra* note 98, at 45; John F. Seymour, *Civil and Criminal Liability of Corporate Officers under Federal Environmental Laws*, [May 1989-Apr. 1990 Current Developments File Binder] 20 Env't Rep. (BNA) No. 6, at 337 (June 9, 1989); *see also* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1343 (9th Cir. 1992) (holding excavator liable under CERCLA as "transporter" of hazardous substance); United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989) (noting duty under CERCLA of persons "in charge" to report release of hazardous substances includes persons of relatively low rank in position to detect, prevent and abate release of hazardous substances); Ganton Techs., Inc. v. Quadion Corp., 834 F. Supp. 1018, 1022 (N.D. Ill. 1993) (holding contractor hired to clean up hazardous waste liable as "operator" under CERCLA); International Union, United Auto. Aerospace and Agric. Implement Workers of Am. v. Amerace Corp., 740 F. Supp. 1072, 1080 (D.N.J. 1990) (stating that presence of regulated pollutant must be reported under Clean Water Act regardless of whether permit requires monitoring).

theless, these policies arguably are no stronger than the general policies of prevention of crimes that create physical peril for individuals or groups. Indeed, all legal obligations should be a reflection of important social policy. Rather than presenting a unique demand for disclosure, public policy arguments for disclosure of environmental hazards simply provide a new and sometimes startling context for evaluating the confidentiality rule.

2. Interpretation and Enforcement of Environmental Statutes

Prosecutors and courts as well as regulators have recognized the public interest represented in this area.[119] Courts have frequently interpreted environmental statutes liberally.[120] In *Midatlantic National Bank v. New Jersey Department of Environmental Protection*,[121] the United States Supreme Court noted the importance the goals of the Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA).[122] Other courts have read this environmental statute broadly in light of its remedial purpose.[123]

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119. Recently, EPA increased the maximum civil and administrative penalties by 10%. *See* Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. pt. 19 (1997); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 285-97 (1996) (suggesting that courts interpret CERCLA too broadly by recourse to remedial purpose of act).

120. *See* United States v. Johnson & Towers, Inc., 741 F.2d 662, 667 (3d Cir. 1984) (applying criminal provision to employee who was not owner or operator). "[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." *Id.* at 666.

121. 474 U.S. 494 (1986).

122. *See* Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502 (1986) (holding that Chapter 7 liquidating trustee lacked power to abandon property in bankruptcy estate when property was contaminated with PCBs because to abandon property would endanger public safety). "Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." *Id.*

123. *See* Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1303 (W.D.N.Y. 1996) (stating that "the reasoning followed by the majority of courts is that Congress intended that CERCLA provide for broad liability, and that CERCLA should supersede other laws or rules that would ordinarily limit that liability"). "[M]ere dissolution should not be allowed to block further inquiry into the status of the identifiable resources of the companies responsible for that pollution." *Id.* at 1303-04; *see also* John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1437-40 (1997) (criticizing judicial reliance on purpose interpretation of CERCLA).

Enforcement of environmental laws has increased over the last decade,[124] with greater interaction and cooperation between local, state, and federal agencies and organizations[125] and increased use of criminal sanctions.[126] State prosecutors, the EPA and the Department of Justice have instituted enforcement programs[127] to investigate and convict those who violate environmental laws.[128] Since the time Congress instituted criminal penalties, a significant

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124. The EPA's enforcement efforts have evolved from administrative negotiation to greater use of judicial enforcement. EPA has increased enforcement, using a combination of criminal and civil penalties, and administrative remedies. *See* JOEL A. MINTZ, ENFORCEMENT AT THE EPA 134 (1995). However, some scholars have noted a retreat by the courts from liberal enforcement of environmental protections. *See* Futrell, *supra* note 98, at 43-44; Robert Glicksman & Christopher H. Schroeder, *Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 249 (Autumn 1991) (noting that judicial enthusiasm for environmental protection has been replaced by "neutrality toward environmental values" and "skepticism about whether environmental legislation expresses coherent public policy").

125. *See generally* James E. McElfish, Jr., *State Hazardous Waste Crimes*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10465 (1987); Seymour, *supra* note 118, at 337. Federal, state, and local enforcement agencies have begun cooperative programs aimed at escalating the levels of enforcement for environmental crimes. See THEODORE M. HAMMETT & JOEL EPSTEIN, LOCAL PROSECUTION OF ENVIRONMENTAL CRIME 19-25 (1993). For example, the FBI, EPA, the Department of Justice and U.S. District Attorneys have acted in conjunction to develop training programs and to carry out investigations of environmental crimes. *Id.* at 33-37. Local police and fire departments report violations uncovered in routine inspections or in efforts directed at enforcing unrelated laws such as drug laws. *Id.*

126. *See* John F. Cooney et al., *Criminal Enforcement of Environmental Laws*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,459, 10,462 (1995), (citing Memorandum from Peggy Hutchins, Paralegal to Ronald A. Sarachan, Chief, Environmental Crimes Section, Environmental Criminal Statistics FY 1983 Through FY 1994 (Apr.7, 1995)).

> The number of environmental crimes criminally prosecuted over the last decade has been significant.
>
> From the crucial events of October 1982 until April 7, 1995, Justice obtained indictments against 443 corporations and 1,068 individuals. During that time, 334 organizations were convicted by plea or verdict. Justice recovered $297 million in criminal penalties, $125 million of which was obtained from the *Exxon Valdez* oil spill alone. Sentences totalling 561 years of imprisonment (not counting actual time served) were imposed against those convicted.

Id.

127. Until the 1980s, enforcement of statutes was accomplished by civil enforcement despite the existence of criminal sanctions in the statutes. *See* Richard J. Lazarus, *Assimilating Environmental Protection Into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 868-69 (1994). *See generally* DONALD A. CARR ET AL., ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 12 (1995); MINTZ, *supra* note 124, at 60-89. For a thorough history of enforcement of environmental criminal laws, see Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TULANE L. REV. 487 (1997).

128. *See* Cooney et al., *supra* note 126, at 10,474. The agencies prosecute individuals as well as corporations for violations of environmental laws. *Id.* at 10,469.

number of individual violators have been convicted and have served prison time[129] for knowingly violating environmental laws.[130] When an agency receives information that a corporation has violated an environmental law or regulation the agency generally seeks to identify and prosecute the highest ranking official in the corporation responsible for the violation, seeking imprisonment as well as fines.[131] "Incarceration is the one cost of business that you can't pass on to the consumer."[132]

> [T]here is a renewed focus on prosecution of individual corporate officials who can be prosecuted not only for acts in which they personally participated but as responsible corporate officers who could have prevented environmental harm but did not do so. The Department is committed to imposing meaningful criminal liability on both corporations and individual corporate officers in appropriate cases.

Van Cleve, *supra* note 81, at 409.

129. *See* Cooney et al., *supra* note 126, at 10,462.

> From . . . October 1982 until April 7, 1995, Justice obtained indictments against 443 corporations and 1,068 individuals. During that time, 334 organizations were convicted by plea or verdict. Justice recovered $297 million in criminal penalties, $125 million of which was obtained from the *Exxon Valdez* oil spill alone. Sentences totalling 561 years of imprisonment (not counting actual time served) were imposed against those convicted.

Id. (citation omitted); *see also* Judson W. Starr, *Prosecuting Pollution*, LEGAL TIMES, May 31, 1993, at 6.

130. *See, e.g.*, United States v. Laughlin, 10 F.3d 961, 962 (2d Cir. 1993) (upholding sentence of concurrent terms of three years and three and one-half years for knowingly disposing of hazardous waste without permit and knowingly failing to report release of hazardous substance); United States v. Johnson & Towers, Inc., 741 F.2d 662, 664-65 (3d Cir. 1984) (concluding that courts may hold employees criminally liable for illegal disposal made at direction of company); *Government Defense Contractor Guilty of "Knowing Endangerment" Under Water Act*, 5 Toxics L. Rep. (BNA) 21, 21 (May 23, 1990) (discussing case in which court convicted president of company of "knowing endangerment" for illegal dumping of nitric acid and nickel plating waste in public sewer system); *Cocaine Charge Fails to Materialize; Justice Gets Hazardous Waste Conviction*, 2 Toxics L. Rep. (BNA) 1399, 1399 (April 13, 1988) (discussing case in which court convicted defendant of knowing endangerment and knowing transport of hazardous waste to unlicensed facility for disposal in residential area).

131. *See* Cooney et al., *supra* note 126, at 10,469 (noting Justice Department's unpublished policy); *see also* United States v. Brittain, 931 F.2d 1413, 1414 (10th Cir. 1991) (upholding 18 count conviction of director of utility company who submitted false information); United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 337 (N.D. W. Va. 1997) (finding president of company personally liable for improper waste disposal).

132. *DOJ, EPA Enforcement Officials Outline Plans to Bolster Actions Against Corporate Polluters*, [May 1989- April 1990 File Binder] 20 Env't Rep. (BNA) No. 52, at 2012 (Apr. 27, 1990) (quoting Joseph G. Block, Chief of Environmental Crimes Unit of Department of Justice). Commentators in other areas such as antitrust have made the point that incarceration provides a strong deterrent by preventing penalty-shifting. *See* Amanda Kay Esquibel, Note, *Protecting Competition: The Role of Compensation and Deterrence for Improved Antitrust Enforcement*, 41 FLA. L. REV. 153, 172, 174 (1989).

C. Implications of Statutory Law for Attorney Confidentiality

Many states have imposed disclosure requirements on owners who transfer residential[133] or commercial property.[134] Generally, environmental statutes create a duty only on the owner or operator of a site.[135] Although some federal environmental statutes impose criminal liability for the knowing endangerment of another,[136] whether these would apply to attorneys is a difficult question. This question is even more difficult, of course, when an attorney must analyze and answer it in urgent circumstances such as those posed by the introductory hypothetical. Some environmental statutes place responsibility for reporting a dangerous environmental condition on "any person" having knowledge of the condition.[137] Such statutes are rare and appear to be predicated on a determination that the hazardous condition is so dangerous that any person should have an obligation to report it to environmental authorities. When such a statute applies to a case, an interpretive question may arise as to whether the legislature intended to include attorneys within the group of persons having an obligation to report the dangers.[138] In other contexts,

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133. *See* Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 299-303 (1996) (table); *see also* Idaho Property Condition Disclosure Act, IDAHO CODE §§ 55-2501 to -2518 (1994).

134. *See* Ram Sundar & Bea Grossman, *The Importance of Due Diligence in Commercial Transactions: Avoiding CERCLA Liability*, 7 FORDHAM ENVTL. L.J. 351, 357, 382 (1996).

135. For example, the Tennessee Petroleum Underground Storage Tank Act, TENN. CODE ANN. §§ 68-215-101 to -128 (1996), creates penalties for anyone who endangers the public by a release of petroleum. *See* TENN. CODE ANN. § 68-215-120 (1996). The act contemplates monitoring and reporting of dangerous environmental conditions by the owner or operator of a petroleum tanks. *See id.* § 68-215-104. Congress requires "owners and operators" of "stationary sources" that produce, process, handle or store listed chemicals "to identify hazards which may result from such releases using appropriate hazard assessment techniques" and then to prevent releases and to minimize the consequences of accidental releases. Clean Air Act § 112(r)(1), 42 U.S.C. § 7412(r)(1) (1994).

136. *See* Clean Water Act § 309(a)(3), 33 U.S.C. § 1319(a)(3) (1994); SWDA § 3008(e), 42 U.S.C. § 6928(e) (1994); SWDA § 11005(c), 42 U.S.C. § 6992d (c).

137. The New York Petroleum Bulk Storage Act requires that "any person with knowledge of a spill, leak, or discharge of Petroleum" report the condition to the Department of Environmental Conservation within two hours of learning of the condition. N.Y. COMP. CODES R. & REGS. tit. 6, § 613.8 (1995) The New Jersey Underground Storage Tank Act has similar provisions. *See* N.J. STAT. ANN. § 58:10A-21 to -37 (West 1992). The New Jersey Administrative Code, which implements the Act, provides that "any person *including but not limited to the owner or operator* of an underground storage tank system" shall report the release after confirming its existence to the local health agency. N.J. ADMIN. CODE tit. 7, § 14B-7.3(a) (1990) (emphasis added); *see also* Harriett Jane Olson & Kathleen T. Kneis, *Reporting Releases From Clients' Underground Storage Tank Systems: Should Attorneys Have the Hot Line on Speed Dial?*, 21 SETON HALL L. REV. 1041, 1042 (1991).

138. Similarly, SEC Rule 10b-5 provides in part that:

scholars have argued that the duty of confidentiality should operate to exempt the attorney from reporting requirements that would require disclosure of client confidences.[139] As with other issues of statutory interpretation, however, the full context of the legislation[140] should be considered in interpreting the intent of the legislature. A court or administrative agency, such as the EPA, may also require disclosure in order to reveal information.[141]

Model Rule 1.6 does not consider the dangers of silence relating to potential environmental hazards or other dangers. Its refusal to acknowledge positive law and its outcome-based analysis fail to provide guidance to attorneys in balancing their legal and ethical responsibilities. By allowing silence in the face of danger, the Rule minimizes the importance of dangers clients may create. Environmental hazards dramatize the competing interest of public safety. Congress, state legislatures, and the courts recognize the danger of these hazards. The rules of attorney ethics should not ignore them.

> [i]t shall be unlawful for *any person*, directly or indirectly . . .
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1997). Courts have held attorneys liable for violating this provision. *See infra* notes 253-54.

139. *See* J. Randolph Evans & Ida Patterson Dorvee, *Attorney Liability For Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 805 (1994) (arguing that requiring attorneys to reveal securities frauds would destroy client trust in attorneys); Mosteller, *supra* note 79, at 211 (arguing that laws requiring reports of child abuse should not apply to attorneys because "[t]he minimal benefits to the cause of protecting children is outweighed by the damage to doctrines historically important in protecting individual autonomy, particularly by the dangers inherent in approving threatened criminal sanctions as a means of transforming lawyers into mandatory reporters of crime"). Whatever one may conclude on these difficult questions, the calculus changes somewhat when the competing interest at stake is prevention of a catastrophe on the scale of the Bhopal disaster.

140. For statutes on reporting requirements or other disclosure requirement, the analysis turns on the reason for the requirement.

141. The Clean Air Act provides penalties of up to $25,000 per day against "any person" who knowingly fails to comply with an order of the Administrator of EPA. *See* Clean Air Act § 113(b)(1), 42 U.S.C. § 7413(b)(1) (1994). It also provides for penalties of $10,000 against any person making a false statement or report. *See* Clean Air Act § 113(b)(2), 42 U.S.C. § 7413(b)(2). Similarly, CERCLA and the Clear Water Act provide penalties for failure to report discharges in some circumstances. *See* CERCLA § 103(b), 42 U.S.C. § 9603(b) (1994); Clean Water Act § 309, 33 U.S.C. § 1319.

V. The Common Law and Attorney Liability

In addition to the broad liability imposed by federal and state environmental statutes,[142] the common law imposes less-defined liability for environmental harms.[143] Unlike statutory duties, common-law duties accrue without clear notice or advance warning, growing out of general concepts of rights and obligations.[144] Generally, the major federal environmental statutes do not abrogate common-law actions.[145] Thus, one who suffers harm as a result of environmental hazards may have recourse via common law actions.[146]

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142. *See supra* notes 83-113. CERCLA liability may survive corporate dissolution. *See* Joel R. Burcat and Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273, 1285-92 (1995) (discussing cases that apply "dead and buried" rule to allow CERCLA suits against dissolved corporations). *But see* City of North Miami, Fla. v. Berger, 828 F. Supp. 401, 411-12 (E.D. Va. 1993) (finding attorney not liable under CERCLA as "operator" despite fact that he held 15% ownership interest in corporation and was corporate secretary because he merely provided legal advice to corporation rather than exercising decision-making authority over or actual control of operations).

143. For example, in *Houchens v. Rockwell Int'l Corp.*, a jury ordered Rockwell to pay $8 million in actual damages and $210 million in punitive damages for polluting the Mud River with polychlorinated biphenyls. *See* Houchens v. Rockwell Int'l Corp., No.93-CI-00158 (Ky. Cir. Ct. May 31, 1996), *discussed in Riparian Owners Awarded $218 Million in Kentucky Pollution Suit Against Rockwell*, 11 Toxics L. Rep. (BNA) 14, 14-15 (June 5, 1996). The court rendered the verdict in spite of an absence of proof on emotional damages. *See Riparian Owners Awarded $218 Million in Kentucky Pollution Suit Against Rockwell*, 11 Toxics L. Rep. (BNA) 14, 14 (June 5, 1996); *see also PG&E to Pay $333 Million to Settle Lawsuit over Environmental Exposures*, 11 Toxics L. Rep. (BNA) 173, 173-74 (July 10, 1996) (discussing case in which 650 plaintiffs alleged health problems due to chromium exposure from natural gas).

144. *See* RAY L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY § 3.02, at 12 (2d ed. 1984). "[G]iven the nature of the common law system, the lawyer cannot be sure when the courts will treat the breach of an ethical duty as the breach of a legal duty." *Id.*; *see also* Woodruff v. Tomlin, 616 F.2d 924, 938 (6th Cir. 1980) (noting that jury issue existed regarding whether attorneys committed malpractice in failing to advise plaintiffs fully); Gomez v. Hawkins Concrete Constr. Co., 623 F. Supp. 194, 198-200 (N.D. Fla. 1985) (concluding that attorney is liable to client for breach of fiduciary duty and negligence for failing to make full disclosure regarding company receiving loan from client when attorney had financial interest in borrower).

145. *See* Jan Erik Hasselman, Comment, *Alaska's Nuisance Statute Revisited: Federal Substantive Due Process Limits to Common Law Abrogation*, 24 B.C. ENVTL. AFF. L. REV. 347, 352 (1997) (noting that federal environmental statutes contemplate common law private actions as "necessary complement to environmental regulations"). An example of the exception exists in FIFRA, which preempts common law claims relating to labeling of pesticides. *See* FIFRA § 24(b), 7 U.S.C. § 136v(b) (1994); *see also* MacDonald v. Monsanto Co., 27 F.3d 1021, 1029 (5th Cir. 1994); Worm v. American Cyanamid Co., 5 F.3d 744, 746-48 (4th Cir. 1993); King v. E.I. DuPont de Nemours and Co., 996 F.2d 1346, 1349 (1st Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993); Papas v. Upjohn Co., 985 F.2d 516, 520 (11th Cir. 1993); Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir. 1993).

146. *See* Davis v. Sun Ref. & Mktg. Co., 671 N.E.2d 1049, 1056 (Ohio Ct. App. 1996)

The fundamental "gravitational force"[147] of tort law appears to move toward expanded liability.[148] Although scholars have noted recent trends favorable to defendants in tort law generally,[149] the danger of malpractice actions against attorneys has increased in recent years.[150] Furthermore, caution counsels against relying too heavily on trends or patterns in decisions when assessing the risk of personal liability.[151] Sound assessment of the risk of liability rests more on heeding examples set by precedent than on noting general patterns in judicial decisions. After all, mixed results can be expected in future cases.[152] A consequent increase in the risk of legal malpractice

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(concluding that fact that plaintiff had no right to bring action under Ohio Underground Storage Tank Act did not preclude common law action for petroleum contamination); *see also Appeals Court Allows Common-Law Recovery for UST Contamination at Former Gas Station*, 10 TOXICS L. REP. (BNA) 1032, 1032 (Feb. 14, 1996); Tom Kuhnle, Note, *The Rebirth of Common Law Actions for Redressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 210-14 (1996); Randall G. Vickery & Robert M. Baratta, Jr., *Back to the Legal Future: Environmental Claims Come Full Circle as Plaintiffs Return to the Common Law for Relief*, NAT'L L.J., June 10, 1996, at C1.

147. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 112-13 (1978).

148. Law professors analogize the expansion of legal concepts to new contexts by the phenomenon of the camel's nose. It is said that on cold nights in the desert if the camel can get his nose under the tent he can get his entire body under the tent. *See, e.g.*, Eric W. Orts, *The Complexity & Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565, 1612 (1993) (arguing that neither "[f]ear of slippery slopes or camel's noses in tents" should deter lawmakers from moving "corporate law toward more just results"); Ellyn S. Rosen, *Keeping the Camel's Nose Out of the Tent: The Constitutionality of N.L.R.B. Jurisdiction Over Employees of Religious Institutions*, 64 IND. L.J. 1015 (1989).

149. *See* James A. Henderson, Jr., & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480 (1990) (arguing that recent changes have moved "toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries"); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992) (stating that "expansion of modern tort law has essentially ended").

150. An explosion of law suits were filed against attorneys and other professionals as a result of the savings and loan scandal. *See* JAY M. FEINMAN, ECONOMIC NEGLIGENCE: LIABILITY OF PROFESSIONALS AND BUSINESSES TO THIRD PARTIES FOR ECONOMIC LOSS xxv (1995); *see also* Pamela A. Bresnaham, *Introductory Letter*, to A.B.A.: THE LAWYERS' PROFESSIONAL LIABILITY UPDATE (Patricia A. Korn ed., 1995) (on file with author).

> [W]hile no comprehensive national data exists, anecdotal evidence indicates that legal malpractice claims are on the rise. Even good lawyers can expect to be sued at some point during their careers. In addition, because of more sophisticated clients and the growing trend in society to "blame" someone for everything, there is potential for future increases in the number of legal malpractice suits and the amount of judgments.

Id.

151. The precautionary principle is well-known in environmental law. Application of this principle may have merit in the context of liability as well as physical safety.

152. *See* Schwartz, *supra* note 149 at 603 (noting that future cases "will involve a mix of

claims has resulted from expansion of the concept of what constitutes legally cognizable harm and, additionally, from the widening circle of who can be held responsible for harm. Moreover, attorneys in environmental practice may be at special risk to the scrutiny of courts.[153]

A developing American tradition of suing anyone closely connected to a dispute is adding to the number of tort actions[154] and the variety of theories asserted.[155] Both in the environmental field and generally, the possibility of common law liability has created legitimate concern among attorneys about potential tort liability to nonclients. Indeed, fear of tort liability to nonclients may be the only significant force – other than possibly the attorney's own conscience – that supports disclosure of client confidences.

Although Model Rule 1.6 generally prohibits the disclosure of client information (even to reveal dangers),[156] it is possible that a court may find an

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results," and that "the tendency to expand liability has by no means dried up"). Moreover, the general concept of attorney liability seems to be firmly established in the law. *See* Collins v. Reynard, 607 N.E.2d 1185, 1186 (Ill. 1992) (ruling that complaint against lawyer for professional malpractice may be couched in either contract or tort).

153. With the potential for great harm comes the additional potential for great liability. *See* Ruhl, *supra* note 7, at 173; James R. Arnold & Gerald J. Buchwald, *Superfund = Superliability: Are Lawyers the Next Deep Pocket?*, A.B.A. J., Sept. 1993, at 117 (stating that "[d]oomsayers predict that the next professional liability crisis may focus on environmental lawyers as the deep pocket").

154. *See* Evans & Dorvee, *supra* note 139, at 823.

> For example, the S & L crisis resulted in numerous government actions against attorneys.
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> > In November 1990 approximately fifty legal malpractice actions were pending against attorneys who had represented failed financial institutions. For the most part, the suits had been instigated either by the FDIC or by financial institutions which had later been taken over by the federal government. At that time, the RTC announced its intent to pursue approximately 140 additional professional liability claims against attorneys who had represented failed banks.

Id. (footnote omitted). The authors note that such cases may "represent a significant expansion of the bases of attorney liability for allegedly assisting their clients with wrongful conduct." *Id.* at 836.

155. *See* Don J. Benedictus, *Hazardous Advice: Lawyer, Firm Prosecuted for Telling Client Not to Clean Up Waste*, A.B.A. J., Sept. 1991, at 16 (discussing felony charges filed against eight people, including some attorneys, on theory that letter abandoning their client's laboratory constituted illegal disposal of hazardous wastes); *see also* Evans & Dorvee, *supra* note 139, at 827 (noting that in its actions against attorneys who represented failed savings and loan institutions, government argued that attorneys who represent financial institutions have fiduciary obligation to governmental regulatory authorities). Additionally, the modern expansion of legal concepts regarding what conduct constitutes fraud, what harm justifies compensation, and what interests are worthy of protection can also result in expansion of liability.

156. Many dangers remain within the textual prohibition of Rule 1.6. The Rule's literal meaning forbids disclosure except when client conduct is most culpable – a crime – and the

attorney liable for failing to disclose information in some circumstances.[157] The hypothetical situation posed at the beginning of this Article may be such a situation if the court finds that the environmental contamination creates clear peril to the nonclient.[158] The failure of a seller to reveal environmental contamination to the purchaser of property may create a basis for liability for the seller when the condition constitutes a material defect unknown to the buyer.[159] The question posed by the introductory hypothetical to this Article is whether the seller's attorney may also be liable to a purchaser when the attorney knows the purchaser is ignorant of a dangerous condition and that the seller will not reveal the condition.[160] This Part surveys three common law developments that enhance the likelihood of attorney liability: (1) the widening circle of liability, (2) abrogation of the bar of privity, and

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consequence of the crime is most severe – imminent death or substantial bodily harm. Additionally, the comments to the Rule counsel silence without regard to dangers. *See supra* notes 13-26 and accompanying text.

157. In another highly regulated area, banking and securities, attorneys have paid significant settlements to avoid litigating issues of attorney liability for client misconduct. The New York law firm of Kaye, Scholer, Fierman, Hays & Handler paid $41 million to settle an action brought by the Office of Thrift Supervision (OTS) in which the OTS alleged that the law firm knowingly misrepresented information about the failed Lincoln Savings and Loan Association to federal authorities. *See* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 848 (1996) (describing fraud practiced by client in OPM case and resulting settlement by attorneys representing OPM). The Jones, Day, Reavis & Pogue law firm settled with the Resolution Trust Corporation for $51 million as a result of the firm's representation of Lincoln Savings. *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 669-70 (1994) (giving evidence of lack of disciplinary responses to S&L failures and arguing that disciplinary process is incapacitated as it relates to regulating banking and corporate lawyers). In the environmental area, strict reporting requirements are set by numerous federal and state environmental statutes. *See* CERCLA § 103, 42 U.S.C. 9603 (1994) (addressing CERCLA reporting requirements). Environmental attorneys should have concern that they may be liable for failing to report client violations in this area. *See generally* Ruhl, *supra* note 157 (discussing dangers of liability in current "high-tech world of lawyering").

158. In one case, the EPA charged an attorney as a potentially responsible party under the CERCLA for advising a client to abandon a contaminated site. *See* Benedictus, *supra* note 155, at 16.

159. The vendor of land who knows that there is a latent defect, such as contamination of the property, has an "independent reason for producing information" relating to the contamination. Anthony T. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1, 25-26 (1978); *see also* RESTATEMENT (SECOND) OF TORTS §§ 353, 551 (1965). Additionally, the Model Rules require an attorney to correct misinformation that she had previously supplied to the court or another party. *See* MODEL RULES Rule 4.1.

160. *See* Hazard, *supra* note 8, at 283-84 (noting that liability of client does not relieve attorney of possible liability).

(3) recognition of a professional's duty to warn third parties of dangers created by a client.

A. The Widening Circle of Liability

Modern law generally has enlarged the concept of culpable conduct. For example, in some jurisdictions, a negligent or innocent misrepresentation as well as an intentional representation is now actionable.[161] Failure to disclose information can create a basis for liability even though the defendant made no affirmative representation.[162]

Expansion of liability is apparent in the area of environmental law. For example, courts have held that a plaintiff who has been exposed to a carcinogen can recover damages for his reasonable fear of cancer (cancerphobia) although he has not developed the disease.[163] Transactions involving environ-

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161. *See* Petrillo v. Bachenberg, 655 A.2d 1354, 1355 (N.J. 1995) (concluding that, in sale of real estate requiring percolation tests to determine suitability of soil for septic system, attorney for seller has duty not to provide misleading information to potential buyers whom attorney knows, or should know, will rely on information); *see also* Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1311 (1991); Susan L. Martin, *If Privity Is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649, 652-60 (1991); Andrew C.J. McCandless Kidd, Comment, *The Perimeters of Liability for Negligent Misrepresentation in Maryland*, 48 MD. L. REV. 384, 385-87 (1989).

162. *See* Binette v. Dyer Library Ass'n, 688 A.2d 898, 904 (Me. 1996); *Maine High Court Says Seller Of Property Had Absolute Duty To Disclose Leaky Tank*, 11 Toxics L. Rep. (BNA) 838, 838-39 (Jan. 10, 1997) (discussing case in which seller of land breached "absolute" statutory duty to inform buyers of 3,000-gallon underground oil storage tank on the property).

163. *See, e.g.*, Boughton v. Cotter Corp., 65 F.3d 823, 834 (10th Cir. 1995) (ruling that even though "cancerphobia" might be element in nuisance case under Colorado law, plaintiffs must produce evidence that fears of disease from contaminated land "are reasonable and have a sound foundation in medical, scientific or statistical evidence"); Dunn v. Hovic, 1 F.3d 1362, 1366 (3d Cir. 1993) (upholding jury award to plaintiff based on showing of physical impact of asbestos on plaintiff's lungs even assuming plaintiff did not contract asbestosis); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 (6th Cir. 1988) (noting that cancerphobia is basis of claims for mental anguish damages based on exposures to certain chemicals); Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986) (holding that under New Jersey law plaintiff need only demonstrate "slight impact and injury . . . to warrant recovery for emotional distress caused by fear"); Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319-21 (5th Cir. 1986) (reversing summary judgment against plaintiff and recognizing "cancerphobia" with proof of actual exposure); Devlin v. Johns-Manville Corp., 495 A.2d 495, 499 (N.J. 1985) (holding that fear of cancer and cancerphobia are distinct claims); *see also Pennsylvania Court OKs Cancer Fear Award; Ruling Denying Damages Not Retroactive*, 11 Toxics L. Rep. (BNA) 1196, 1196-97 (April 2, 1997) (discussing Cleveland v. Johns-Manville Corp., 690 A.2d 1146 (Pa. 1997)). The Pennsylvania Supreme Court upheld a trial court jury instruction which stated

mental risks present significant liability concerns because of the dramatic dangers posed by environmental hazards and the frequently high cost of remedying environmental problems.[164] Moreover, courts appear particularly willing to expand the concept of care in the environmental area.[165] Some courts have found a duty to persons at risk despite the absence of any contrac-

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that a plaintiff could recover damages for fear of cancer based on exposure to asbestos although he never developed the disease. *See* Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1151-52 (Pa. 1997).

164. *See* Kathryn A. Watson, *USX Case Sets State Enforcement Precedent*, 27 LOOKING AHEAD, July-Aug. 1996, at 3 (noting $106 million settlement between Indiana and USX Corp.). Courts and commentators often note that CERCLA liability is not only strict liability, it is also long lasting – virtually unending. *See* Stychno v. Ohio Edison Co., 806 F.Supp. 663, 676 (N.D. Ohio 1992) (ruling that dissolved corporation may be held liable under CERCLA so long as corporate assets exist); United States v. Moore, 698 F.Supp. 622 (E.D. Va. 1988) (concluding that CERCLA suit may be brought against corporation even after corporate dissolution); Ridgway M. Hall, Jr., *The Problem of Unending Liability for Hazardous Waste Management*, 38 BUS. LAW. 593, 595 (1983) (noting dangers and liabilities for handling and disposal of hazardous wastes). Some courts distinguish between corporations that are merely "dead" and those that are "dead and buried" in order to extend CERCLA liability beyond dissolution of the corporation. *See* Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1304 (W.D.N.Y. 1996); AM Properties Corp. v. GTE Products Corp., 844 F. Supp. 1007, 1012 (D.N.J. 1994); Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich. 1991); *see also* Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273, 1291 (1995).

165. While judicial trends are difficult to categorize, caution seems appropriate in the environmental context.

> Three judicial trends make it especially foolhardy to ignore environmental concerns in business or real estate transactions or practices. First, courts are increasingly willing to impose direct civil liability for environmental wrongdoing on corporate officers, directors, shareholders, and parent corporations. Second, judges are less reluctant to hold successor corporations liable for their predecessors' environmental sins. A third trend is the willingness of courts to hold lenders, contractors and sometimes even attorneys personally liable for environmental cleanup costs.

Thomas B. Dominick, *Avoid Personal Liability: Consider Environmental Issues in Business Transactions*, 38-SEP Advocate (Idaho) 10 Advocate September, 1995; *see also* Vitol Trading S.A., Inc. v. SGS Control Services, Inc., 680 F. Supp. 559 (S.D.N.Y. 1987), *rev'd on other grounds*, 874 F.2d 76 (2d Cir. 1989); Eva M. Fromm et al., *Allocating Environmental Liabilities in Acquisitions*, 22 J. CORP. L. 429, 463 (1997) (explaining willingness of courts to "extend a party's indemnification rights to include protection against environmental liability under CERCLA, even where the indemnity agreement was entered into years before CERCLA was enacted"); Lisa A. Jensen, *The Risk in Defining Risk: Potential Liability of Environmental Consultants and Engineers*, 23 Env't Rep. (BNA) No. 32, at 1954 (Dec. 4, 1992); Mark E. McKane, Comment, *Operator Liability for Parent Corporations under CERCLA: A Return to Basics*, 91 NW. U.L. REV. 1642, 1656 (1997) (noting willingness of courts to "interpret operator liability expansively under a capacity to control standard in order to expose parent corporations to CERCLA liability").

tual duty. In *Caldwell v. Bechtel*,[166] for example, a heavy equipment operator working on a Washington Metropolitan Area Transit Authority construction project sued Bechtel, alleging that Bechtel's negligence caused his lung disease.[167] Bechtel had contracted with the Transit Authority to provide "safety engineering services" on the project.[168] Although Bechtel had no direct contractual relationship with plaintiff or his employer, the court held Bechtel liable on the basis that Bechtel had a responsibility to inform plaintiff about known health risks. The court found that Bechtel had "placed itself in the position of assuming a duty" to the plaintiff.[169] Although the *Bechtel* case did not reach the issue of whether a member of the public could be a "foreseeable" third-party beneficiary of a consulting relationship, the analysis supports that idea when the public or an individual citizen injured is a foreseeable beneficiary of safety engineering services.[170]

B. Abrogation of the Bar of Privity

The doctrine of privity protects contracting parties – including professionals, such as attorneys – from suit by individuals who are not parties to the contract.[171] Traditionally, only clients could sue an attorney for damages resulting from the attorney's malpractice. The bar of privity precluded a nonclient from suing an attorney for acts or omissions taken in his professional capacity.[172] By insulating attorneys against malpractice claims of nonclients, this doctrine not only protected attorneys financially, it also enhanced the security of the relationship between attorneys and their clients.[173]

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166. 631 F.2d 989 (D.C. Cir. 1980).

167. *See* Caldwell v. Betchel, 631 F.2d 989, 993 (D.C. Cir. 1980).

168. *Id.* at 992.

169. *Id.* at 997.

170. John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 867 (1991) (concluding that courts should "impose upon defendants an obligation to act reasonably under the circumstances – the same duty prescribed in any negligence action").

171. There are early examples of judicial limits on the doctrine of privity. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (allowing negligent action by nonparty who had suffered bodily injury).

172. *See* Buckley v. Gray, 42 P. 900, 900 (Cal. 1895). The bar did not, however, immunize the attorney from claims of malicious acts, evil intent, or fraudulent purpose. *Id.* at 901.

173. *See* National Sav. Bank v. Ward, 100 U.S. 195, 200 (1880) (concluding that attorney owed no duty of care to non-client buyer of property); First Mun. Leasing Corp. v. Blankenship, 648 S.W.2d 410, 413 (Tex. App. 1983) (concluding that, in absence of privity of contract, nonclient buyer could not recover against attorneys hired by seller to issue opinion on transaction); Pelham v. Griesheimer, 417 N.E.2d 882, 887 (Ill. App. 1981) (finding that attorney owed

Today, in a trend away from the ancient requirement of privity,[174] most jurisdictions accept the principle that attorneys may be liable to a nonclient – at least in cases of clear-cut negligence such as negligently drafting a will.[175] Courts have also held professionals in other fields liable.[176] Significant scholarship explores the abrogation of the bar of privity.[177] Those who deal with environmental issues or hazards seem to be particularly susceptible to judicial scrutiny. Developers, real estate brokers and professionals involved with environmental issues have all incurred liability for environmental hazards.[178]

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no duty of care to minor children of client he represented in divorce action); *see also* Clagett v. Dacy, 420 A.2d 1285, 1287-89 (Md. Ct. Spec. App. 1980) (ruling that attorneys are not liable to high bidders at foreclosure sale for failure to follow required procedures because attorney's duty of diligence flows only to his direct client or employer); Victor v. Goldman, 344 N.Y.S.2d 672, 673-74 (N.Y. Sup. Ct. 1973) (deciding that privity barred action of beneficiary of will) *aff'd*, 351 N.Y.S.2d 956 (N.Y. App. Div. 1974).

174. *See* FEINMAN, *supra* note 150, at 286; Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1534 (1992).

175. *See* Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 695 (1994); Scott Peterson, *Extending Legal Malpractice Liability to Nonclients – The Washington Supreme Court Considers the Privity Requirement,* Bowman v. John Doe Two, *704 P.2d 140 (1985)*, 61 WASH. L. REV. 761, 765 (1986).

176. *See* Rozny v. Marnul, 250 N.E.2d 656, 663 (Ill. 1969) (finding surveyor liability to nonclients); *see also* RONALD E. MALLEN & VICTOR B. LEVIT, LEGAL MALPRACTICE § 79, at 152-54 (2d ed. 1981) ("[T]he vast majority of modern decisions favored expanding privity beyond the confines of the attorney-client relationship.").

177. Scholars have explored the abrogation of privity relating to other professions in depth. *See generally* John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992); Constance Frisby Fain, *Architect and Engineer Liability*, 35 WASHBURN L.J. 32 (1995); Anthony Granato, *Architect Liability for Injuries to Workers: Is There a Duty to Design a Building That Is Safe to Construct?*, 21 OHIO N.U. L. REV. 403 (1994); John E. McDonald, *Common Law Liability of Architects and Engineers for Negligence to Non-contractual Parties*, CONSTRUCTION LAW., Apr. 9, 1989, at 5; Samuel S. Paschall, *Liability to Non-Clients: The Accountant's Role and Responsibility*, 53 MO. L. REV. 693 (1988); Karen S. Precella, *Architect Liability: Should an Architect's Status Create a Duty To Protect Construction Workers From Job-Site Hazards?*, CONSTRUCTION LAW., Aug. 11, 1991, at 11.

178. *See* Easton v. Strassburger, 199 Cal. Rptr. 383, 391-92 (Cal. Ct. App. 1984) (finding realtor liable for failure to discover fact that property sold had been used as landfill); Haberstick v. Gordon A. Gundaker Real Estate Co., 921 S.W.2d 104, 108 (Mo. Ct. App. 1996) (finding developers liable for failure to disclose presence of nearby hazardous waste site); Strawn v. Canuso, 657 A.2d 420, 429 (N.J. 1995) (finding developer liable when it marketed housing development as "peaceful, bucolic setting with an abundance of fresh air and clean lake waters," and failed to disclose to buyers of single-family residences that their homes were located within one-half mile of toxic waste dump); *see also In re* TMI, 67 F.3d 1103, 1118 (3d Cir. 1995) (holding operators of Three Mile Island nuclear power plant liable for violating their duty of

Thus, modern tort law is beginning to describe limits to the concept that the role of the professional is "to prefer the interests of the client or patient over those of individuals generally."[179] To some degree, abrogation of the bar of privity challenges the professional's preference for his client by making attorneys and other professionals responsible for harm to nonclients.

While the contest between a nonclient and a professional presents difficult policy issues,[180] courts appear to be increasingly willing to scrutinize the role and conduct of professionals.[181] Courts have recognized liability of professionals to nonclients in a variety of circumstances,[182] based on a variety of approaches and standards.[183] Theories on which courts have held attorneys

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care); *In re* TMI, 67 F.3d 1119, 1128 (3d Cir. 1995) (ruling that punitive damages are available to plaintiffs injured by Three Mile Island operators' negligence); Gouveia v. Citicorp Person-to-Person Fin. Ctr., 686 P.2d 262, 266 (N.M. Ct. App.1984) (deciding that seller's broker who prepared property description for multiple listing service assumes duty to all those who subsequently rely on broker's characterizations of property by virtue of representations); Dennis J. Herman, *Legal Specialization or Legal Liability? Holding Attorneys Accountable for Their Advice on Environmental Laws*, STAN. ENVTL. L.J. Special Issue 243-276 (1995); Lisa A. Jensen, *supra* note 165, at 1954.

179. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 5 (1975); *see also* MODEL RULES Rule 4.4 cmt. 1. The comment states:

> Responsibility to a client requires a lawyer to subordinate the interest of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Id.

180. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444-48 (N.Y. 1931); Glanzer v. Shepard, 135 N.E. 275, 276-77 (N.Y. 1922); *see also* John G. Fleming and Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1026 (1974); Martin E. Goldman, *"Something There Is That Doesn't Love A Wall": The Need for a Conceptual Approach to Professional Responsibility*, 43 GEO. WASH. L. REV. 713, 721 (1975); Leonard E. Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach*, 75 KY. L.J. 793, 796 (1987).

181. *See* Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1310 (1991) (noting that "[u]nsympathetic court statements . . . may reflect a growing shift in the legal system's perception of the lawyer's professional role" and speculating that "a significant expansion of attorney liability may not be far off").

182. *See* Perreira v. State, 768 P.2d 1198, 1215 (Colo. 1989) (holding that psychiatrist has duty to exercise due care in determining whether involuntarily committed patient presents unreasonable risk of serious bodily harm to others upon release); Safer v. Estate of George T. Pack, 677 A.2d 1188, 1192 (N.J. Super. App. Div. 1996) (recognizing physician's duty to warn those known to be at risk of avoidable harm from genetic risk of cancer), *cert. denied*, 683 A.2d 1163 (N.J. 1996); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 761 (Fla. Dist. Ct. App. 1969) (recognizing that duty of confidentiality is developing into "qualified duty of nondisclosure"); *see also* Adler, *supra* note 170, at 869.

183. For instance, in *Biakanja v. Irving*, the court used a balancing test to determine

liable to nonclients include application of third party beneficiary analysis,[184] negligence,[185] fraud,[186] negligent misrepresentation,[187] and breach of fiduciary or agency duties,[188] including special duties imposed by statutes.[189] In some cases, the abrogation of privity has resulted in liability although the danger

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whether a professional should be held liable for damage to a non-client. *See* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (finding notary public liable for preparing will and failing to have it properly attested). The test included the following factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered harm; and (4) the policy of preventing future harm. *Id.*; *see* Heyer v. Flaig, 449 P.2d 161, 164 (Cal. 1969) (applying *Biakanja* factors to action against attorney); *see also* Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties – At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 1 (1989) (noting expansion of attorney liability to nonclients on both contract and tort theories).

184. *See Heyer*, 449 P.2d at 163; Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984); York v. Stiefel, 458 N.E.2d 488, 492 (Ill. 1983); Flaherty v. Weinberg, 492 A.2d 618, 625, 626 (Md. 1983) (allowing actions for negligent injury to third parties under third party beneficiary theory); *see also* Martin D. Begleiter, *Attorney Malpractice in Estate Planning – You've Got to Know When to Hold Up, Know When to Fold Up*, 38 KAN. L. REV. 193, 279-80 (1990) (predicting revolution in attorney malpractice will continue and advocating attorneys do "what is necessary to complete each estate plan competently and effectively"); Mary Elizabeth Phelan, *Unleashing the Limits on Lawyers' Liability?* Mieras v. DeBona*: Michigan Joins the Mainstream and Abrogates the Privity Requirement in Attorney-Malpractice Cases Involving Negligent Will Drafting*, 72 U. DET. MERCY L. REV. 327, 328 (1995) (noting that because losses are obvious, "title examination and will drafting are the two most fertile practice areas to generate third-party claims").

185. *See Heyer*, 449 P.2d at 163-65 (finding attorney liable for negligently failing to fulfill testamentary directions of client); *Glanzer*, 135 N.E. at 276-77 (reasoning that weigher of beans who certified incorrect weight knew purpose of his certificate was for buyer of beans and, thus, bean weigher owed duty of care to buyer despite lack of privity); Auric v. Continental Cas. Co., 331 N.W.2d 325, 327 (Wis. 1983) (finding attorney liable to nonclient beneficiary when attorney failed to have will properly executed).

186. *See In re* U.S. Oil & Gas Litig., No. 83-1702-A1-CIV, 1988 WL 28544, at *12 (S.D. Fla. Feb. 8, 1988) (stating that lack of fiduciary or formal relationship between knowing participant in fraud and injured party is not barrier to liability).

187. *See* Greycas, Inc. v. Proud, 826 F.2d 1560, 1565-66 (7th Cir. 1987) (holding attorney liable for negligently misrepresenting to bank that his client's farm equipment was not subject to prior security interests). *See generally* Lawson & Mattison, *supra* note 181.

188. *See* Stewart v. Sbarro, 362 A.2d 581, 588 (N.J. Super. Ct. App. Div. 1976) (stating that attorney has fiduciary duty to nonclients who reasonably rely on attorney's services); McEvoy v. Helikson, 562 P.2d 540, 543-44 (Or. 1977).

189. For example, Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 requires disclosure of information. *See* Securities Exchange Act of 1934, ch. 404, § 10(b), 15 U.S.C. §78j(b) (1994); 17 C.F.R. § 240.10b-5 (1997). "The Court does not refute . . . the proposition that lawyers who merely assist in drafting offering documents do not commit securities violations because of any misstatements or omissions in the offering document. However, further factual development on what the law firms knew and when they knew it is necessary." Walco Invs., Inc., v. Thenen, 881 F. Supp. 1576, 1583 (S.D. Fla. 1995).

created by a client did not involve a readily identifiable person.[190]

The effect of abrogation of the bar of privity is broader than situations of peril. For example, the abrogation allows a nonclient to sue an attorney for purely financial loss.[191] Courts have granted judgments in favor of plaintiffs when attorney negligence resulted in economic loss rather than physical injury.[192] In *Collins v. Binkley*,[193] for example, the Tennessee Supreme Court held an attorney liable for his failure to prepare a valid warranty deed.[194] The court found that the attorney knew that the nonclient-plaintiffs "would rely upon him and that it was his professional responsibility to prepare a valid warranty deed entitled to registration that would give notice to the world that plaintiffs were the owners of the described real property."[195] Courts have also imposed liability on the general principle that the balance of interests of the third party outweighs the interest of the attorney and client in confidentiality. In *Biakanja v. Irving*,[196] the California Supreme Court formulated a policy-based balancing of factors.[197]

> Under this policy-based approach, the court balances the following factors in determining whether to impose a duty on attorneys not in privity with third parties: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral

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190. *See generally* Susan Lorde Martin, *If Privity Is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649 (1991).

191. Numerous cases allow recovery for negligently drafted wills and other financial losses to third party beneficiaries. *See supra* notes 184-85. For a comprehensive discussion of economic loss in this area, see FEINMAN, *supra* note 150. *See also* Martin, *supra* note 190.

192. *See* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 110-11 (Cal. Ct. App. 1976) (finding that attorney who issued opinion letter to lender, stating that borrower was general partnership, was liable for costs to lender of proving individuals were general partners); Collins v. Binkley, 750 S.W.2d 737, 739 (Tenn. 1988) (concluding that attorney was liable for failure to prepare valid warranty deed when attorney knew nonclient-plaintiffs would rely on him to prepare deed that would give notice to world that plaintiffs were owners of described real property); Stinson v. Brand, 738 S.W.2d 186, 191 (Tenn. 1987) (finding attorney could be held liable to nonclient vendors for negligence in handling real estate transfer where secretary failed to advise vendors to record deed of trust).

193. 750 S.W.2d 737 (Tenn. 1988).

194. *See* Collins v. Binkley, 750 S.W.2d 737, 739 (Tenn. 1988).

195. *Id.*

196. 320 P.2d 16 (Cal. 1958).

197. *See* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (awarding damages against notary public who negligently prepared will); *see also* Lucas v. Hamm, 364 P.2d 685, 687-88 (Cal. 1961) (extending principle to attorney malpractice).

blame attached to the defendant's conduct; and (6) the policy of preventing future harm.[198]

Application of this balancing test to the introductory hypothetical suggests that the attorney who fails to warn a nonclient of significant environmental contamination may be held liable to a purchaser who is injured by the contamination. In most land sales, the attorney for the seller owes no duty to the third party purchaser because the transaction is at arms-length.[199] Nevertheless, the nonclient-purchaser may prevail against the attorney if he convinces the court of the following points: (1) the transaction was intended to affect the purchaser; [200] (2) the attorney knew or should have foreseen the risks to the farmer from the hazardous contamination;[201] (3) the contamination diminished the value of the property or created health risks for plaintiff;[202] (4) the attorney's conduct (silence) caused the injury;[203] (5) the defendant-attorney participated in the transfer knowing that plaintiff's use or habitation

198. Flaherty v. Weinberg, 492 A.2d 618, 622 (Md. 1985) (summarizing balancing approach developed by California and holding that negligent misrepresentation and negligence claims are available only to party in privity with defendant, not to third party beneficiary).

199. *See* Fox v. Pollack, 181 Cal. App. 3d 954, 961 (Cal. Ct. App. 1986). In *Easton v. Strassburger*, the California court held a real estate broker liable for failing to discover and disclose the fact that the house sold was constructed on a landfill. Easton v. Strassburger, 152 Cal. App. 3d 90, 97 (Cal. Ct. App. 1984). Subsidence in the landfill soil caused settling of the foundation of the house. *Id.* at 96; *cf.* Heliotis v. Schuman, 181 Cal. App. 3d 646, 650-52 (Cal. Ct. App. 1986) (ruling that attorney had no obligation to inform buyer that soil under house was unstable). The unstable soil caused a portion of the property to fall away suddenly. *Id.* at 649.

200. Although the primary intent of vendor and vendor's attorney is to rid vendor of an undesirable property, a part of the intent is to transfer the property to purchaser.

201. In this hypothetical setting of contaminated property, the defendant should foresee harm to the plaintiff. Circumstances may indicate that third parties are relying on statements by a seller's attorney negotiating with those third parties. *See* Bohn v. Cody, 832 P.2d 71, 76 (Wash. 1992) (concluding that it was "certainly foreseeable" that plaintiff would rely on attorney's statements and recognizing attorney liability to nonclients based on either negligence or multi-factor balancing test).

202. Certainly the land acquired is worth less than it would be in an uncontaminated state. The effects on a dairy farmer who unknowingly purchases contaminated land could include the loss of business, the loss of his cattle, and endangerment of the farmer and his family if they live on the farm. The effect may also include danger to the public, if it is likely consumers will be exposed to hazardous chemicals from consumption of the milk produced on the farm. That problem raises considerations dealt with in Part IV of this article.

203. A court could find this element if plaintiff establishes that it is more likely than not that the contamination was the cause of his injuries. Depending on the type of contamination, the effect could present a known danger to the purchaser's life and that of his family as well as to his livelihood. In *Norman v. Brown, Todd & Heyburn*, the court held that an attorney has the duty to any person who may foreseeably rely on a tax opinion letter. Norman v. Brown, Todd & Heyburn, 693 F. Supp. 1259, 1265 (D. Mass. 1988). The court noted that the attorney should know that such letters would be distributed to third parties. *Id.*

would place the plaintiff at risk of significant health effects;[204] and (6) a judgment against the attorney would prevent future harm by deterring attorney involvement in such transfers.

Other views of privity[205] and bases for professional liability are developing. For example, *Restatement (Second) of Torts* Section 552 would support imposition of liability against an attorney in some cases.[206] Section 552 recognizes a professional's duty to supply accurate information. It endorses liability for negligently supplied information and for breach of a duty to provide information.[207] The section speaks to one who "supplies false information for the guidance of others" if he "fails to exercise reasonable care" in "communicating the information."[208]

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204. If evidence reveals that the contamination includes a chemical that is a carcinogen, a court is more likely to extend the duty of care in the interest of public policy.

205. For example, Kentucky has rejected the privity doctrine entirely. *See* Sparks v. Craft, 75 F.3d 257, 261 (6th Cir. 1996) (declaring that "there is no privity requirement for legal malpractice actions in Kentucky"); *see also* Hill v. Willmott, 561 S.W.2d 331, 334 (Ky. Ct. App. 1978).

206. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1976). Section 552 provides as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id.

207. *See id.*; Tartera v. Palumbo, 453 S.W.2d 780, 784 (Tenn. 1970) (finding surveyor liable to nonclient for negligence); Cook Consultants, Inc. v. Larson, 700 S.W.2d 231, 234 (Tex. App. 1985, writ ref'd n.r.e.) (holding surveyor liable to third party); *see also* Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 413 (Tex. App. 1986, writ ref'd n.r.e.) (doubting "the wisdom of continuing to apply different standards for determining the liability of different professionals to third parties").

208. RESTATEMENT (SECOND) OF TORTS § 552 (1976). In *Stinson v. Brand*, the Tennessee Supreme Court held that attorneys who failed to fully advise a nonclient could be liable for the

At its heart, the issue of attorney liability presents a public policy judgment[209] based on the facts of each case.[210] The analysis of courts abrogating privity often focuses on the potential injury to the public if the conduct alleged were to go unchecked. For example, in *Auric v. Continental Casualty Co.*,[211] the court allowed a nonclient beneficiary to recover against an attorney who negligently drafted a will, noting that the public interest is served by the decision.[212] Arguably, the public interest is at least as strong in cases involving environmental hazards. In the hypothetical sale of contaminated property, the danger to the nonclient involves the potential for physical injury rather than merely the risk of financial loss. In order to prevent similar occurrences in the future, courts could require disclosure even in the absence of knowledge of intended use.[213]

C. Recognition of a Professional's Duty to Warn

Judicial recognition of a duty to warn others of dangers also enhances the risk of attorney liability.[214] Courts and commentators often cite the well-

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nonclient's losses. *See* Stinson v. Brand, 738 S.W.2d 186, 190-91 (Tenn. 1987). In *Stinson*, a purchaser hired attorneys to draw up the closing documents for a real estate transaction. *Id.* at 188. The sellers were not experienced in real estate transactions and were not represented by counsel. *Id.* at 187. The attorneys failed to advise sellers to record the deed of trust, leaving sellers without recourse when the purchaser resold the property and filed bankruptcy. *Id.* at 188-89. Noting that the entire transaction was inexpertly handled and, further, that the principles of Section 552 "could apply to attorneys as well as to land surveyors, accountants, or title companies," the court concluded that a jury could find that the attorneys breached a duty to the vendors despite the lack of privity. *Id.* at 190, 191.

209. *See* Krawczyk v. Stingle, 543 A.2d 733, 735 (Conn. 1988) (noting that "[d]etermining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy"); *see also* Maryland Cas. Co. v. Price, 231 F. 397, 401 (4th Cir. 1916) (applying tripartite test under which plaintiff must prove (1) attorney's employment; (2) neglect of reasonable duty; and (3) loss to client that was proximately caused by attorney's neglect).

210. *See* Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1043 (11th Cir. 1986).

211. 331 N.W.2d 325 (Wis. 1983).

212. *See* Auric v. Continental Cas. Co., 331 N.W.2d 325, 329 (Wis. 1983) (allowing will beneficiary to maintain suit against negligent attorney despite absence of privity).

213. *See also* W. Probert & R. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME L. REV. 708, 721 (1980).

214. Growing recognition of a duty to rescue in some circumstances is another dramatic expansion. In one article, Professor A.D. Woozley argues that the law should proscribe as a criminal offense the failure to assist persons in physical danger. *See generally* A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986) (exploring themes underlying omission/commission distinction in tort law and concluding that obligation on part of persons situated to effect easy rescue will continue to develop).

known[215] case of *Tarasoff v. Regents of University of California*[216] as the watershed decision recognizing the professional's duty to warn a nonclient of danger.[217] In *Tarasoff*, the parents of a murder victim sued a psychologist, Dr. Lawrence Moore, and others[218] for failing to warn their daughter, Tatiana Tarasoff, of a patient's stated intention to kill her.[219] The patient, Prosenjit Poddar, murdered Tarasoff a short time after he confided his intention to Dr. Moore.[220] Although psychiatrists, like attorneys, are bound by a duty of confidentiality to their clients,[221] the California Supreme Court held that the plaintiffs stated a cause of action by showing a psychologist's "failure to warn Tatiana or others likely to apprise her of the danger."[222] The court allowed the victim's parents to amend their complaint to allege that the therapist breached the duty to exercise reasonable care to protect Tarasoff by failing to warn her of the danger posed by Poddar.[223] "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[224]

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215. *See* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 97 (1994) (calling *Tarasoff* one of "most celebrated cases in the recent history of American tort law" and linking *Tarasoff* to "the growth and consolidation of the paradigm of reasonableness" in modern law).

216. 551 P.2d 334 (Cal. 1976).

217. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 346-47 (Cal. 1976) (concluding that health care professionals have duty to warn nonclient of threats of violence made by patient); *see also* People v. Poddar, 518 P.2d 342 (Cal. 1974) (involving criminal prosecution of patient in *Tarasoff*, Prosenjit Poddar); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of* Tarasoff *for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 290 (1982) (noting that Poddar went free after his conviction was reversed on appeal based on error in jury instructions).

218. Defendants also included the University of California, police officers, psychiatrists at Cowell Memorial Hospital, and the head of the department of psychiatry at the University of California. *See Tarasoff*, 551 P.2d at 339-40. The court held that plaintiff failed to state a claim against the police officers. *Id.* at 352-53.

219. *See id.* at 341.

220. *See id.* at 339; *see also Poddar*, 518 P.2d at 344-45.

221. All 50 states respect the confidential nature of psychotherapy by recognizing an evidentiary privilege for communications between patients and psychotherapists. *See Justices Consider Pros and Cons of Psychotherapist-Patient Privilege*, 64 U.S.L.W. 1136, 1136 (March 12, 1996); *Privileges: Psychotherapist-Patient Privilege*, 64 U.S.L.W. 3602, 3603 (March 12, 1996); *see also* Jaffee v. Redmond, 116 S. Ct. 1923, 1928-29 (1996).

222. *Tarasoff*, 551 P.2d at 340, 342. As a public employee, Dr. Moore was protected from liability for the failure to confine Poddar. *Id.* at 351-52.

223. *See id.* at 340-342.

224. *Id.* at 341.

While recognizing an important public policy in the privacy of mental health patients,[225] the California Supreme Court held that the duty of confidentiality must give way to the duty to warn in the circumstances of danger such as those presented in the case.[226] "We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."[227] The *Tarasoff* court did not discuss the issue of privity. Rather, it focused on the theory of duty to warn a stranger, a duty which naturally erodes the privity requirement. While the *Tarasoff* court noted the special relationship between a therapist and patient,[228] it also noted that the benefits of the confidential communications must be weighed against "the public interest in safety from violent assault,"[229] indicating that a duty to speak can arise from circumstances as well as from some pre-existing relationship.[230]

The case of *Durflinger v. Artiles*[231] recognized the duty of physicians to guard against their patients' dangerous mental conditions in circumstances less definite than those of the *Tarasoff* case.[232] Bradley Durflinger was released from the Larned State Hospital in April 1974. Shortly after his dis-

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225. *See id.* at 346. The United States Supreme Court recently noted the strong public interest in confidentiality of information revealed to mental health professionals. *See Jaffee*, 116 S. Ct. at 1928-29 (discussing confidentiality in context of psychotherapist privilege). The Court specifically noted that it did not address the scope of the privilege and made no suggestion that the privilege should prevent liability imposed in the *Tarasoff* case. *Id.* at 1932. "Because this is the first case in which this Court has recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that 'would govern all conceivable future questions in this area.'" *Id.* (citation omitted).

226. *See Tarasoff*, 551 P.2d at 347; *see also* Sherrie A. Wolfe, Note, *The Scope of a Psychiatrist's Duty to Third Persons: The Protective Privilege Ends Where the Public Peril Begins*, 59 NOTRE DAME L. REV. 770 (1984).

227. *Tarasoff*, 551 P.2d at 347. It should be noted that the peril at issue in this case was not "public peril" in the sense of dangers to the public at large. The "public" aspect of the peril came from the cumulative interest of all persons in receiving the benefit of a warning in such circumstances.

228. *See id.* at 343.

229. *Id.* at 346.

230. *See id.* at 343 (noting that because of facts of *Tarasoff*, court "need not here decide whether foreseeability alone is sufficient to create a duty to exercise reasonably care to protect a potential victim of another's conduct"); *see also* Hicks v. United States, 511 F.2d 407, 416 (D.C. Cir. 1975) (finding mental hospital's failure to inform court of patient's mental condition with greater detail amounted to negligence and such negligence was proximate cause of death of wife of mental patient at hands of the patient).

231. 563 F. Supp. 322 (D. Kan. 1981).

232. *See* Durflinger v. Artiles, 563 F. Supp. 322, 332-33 (D. Kan. 1981), *aff'd*, 727 F.2d 888 (10th Cir. 1984).

charge, he murdered his mother and one brother. Irvin Durflinger, Bradley's father, brought a wrongful death action against five physicians who participated in the decision to discharge his son from custody. Unlike the facts in *Tarasoff*, Bradley had articulated no definite intent to kill particular people. One physician admitted that he regarded the patient as dangerous. The court ruled that the physicians failed to exercise reasonable care in determining whether the patient should be discharged.[233]

No reported case has held an attorney liable to a third party in circumstances like those of *Tarasoff* or *Durflinger*. In recent cases, however, courts have begun to grapple with the difficult issue of the attorney's duty to warn third parties.

In *Hawkins v. King County*,[234] Hawkins sued his attorney, claiming damages for injuries he received when he "attempted suicide by jumping off a bridge" after assaulting his mother.[235] The Court of Appeals of Washington found that the attorney-defendant had no duty to warn the client's mother or sister in the circumstances presented by the case.[236] The court noted that the mother and sister knew the client had been released from custody and that he might be dangerous.[237] The mother "was already fully cognizant" of her son's dangerous nature.[238] The court also noted that the attorney had received no information of a planned assault by the client.[239] In denying liability against the attorney in *Hawkins*, the court nonetheless recognized an attorney's common law duty to warn third parties.[240] "The difficulty lies in framing a rule that will balance properly 'the public interest in safety from violent attack' against the public interest in securing proper resolution of legal disputes without compromising a defendant's right to a loyal and zealous defense."[241] The court enunciated the common-law duty of attorneys.

> We are persuaded by the position advanced by amicus "that the obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person."[242].

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233. *See Durflinger*, 563 F. Supp. at 332-35.

234. 602 P.2d 361 (Wash. Ct. App. 1979).

235. *See* Hawkins v. King County, 602 P.2d 361, 363, 365 (Wash. Ct. App. 1979).

236. *See id.* at 365.

237. *See id.*

238. *Id.*

239. *See id.* at 365-66.

240. *See id.*; *see also* Morgan v. Prudential Group, Inc., 527 F. Supp. 957, 960-61 (S.D.N.Y. 1981) (acknowledging attorney's duty to speak regarding tax opinion letter), *aff'd*, 729 F.2d 1443 (2d Cir. 1983).

241. *Hawkins*, 602 P.2d at 365.

242. *Id.*

In this statement, the court stated the duty in a manner that enlarges its scope beyond that of the exception stated in Model Rule 1.6. The court described the context as one in which "confidentiality would be compromised to the client's detriment,"[243] framing the issue of confidentiality more narrowly than the broad scope of client protection established by Rule 1.6. By accepting the test advanced by the amicus, the court adopted a general principle of confidentiality and an exception to the general rule created by the "unless" clause. The court stated that the obligation to warn "must be permissive" except when "the client has formed a firm intention to inflict serious personal injuries on an unknowing third person."[244] The plain implication is that when the stated elements are present (i.e., the client clearly has formed a firm intent to inflict serious harm on another), the step of warning a third party is not permissive, but is, rather, an obligation. Additionally, the court limited the scope of the "common law duty to volunteer information" to situations where counsel is convinced that "his client intends to commit a crime or inflict injury upon unknowing third persons."[245] Use of the disjunctive "or" in this statement indicates that the danger of injury to the third party is sufficient to establish the duty to warn without the element of criminal conduct.[246]

In *State v. Hansen*,[247] the Supreme Court of Washington held that an attorney had a duty to reveal threats of harm relating to a judge even though the defendant made the threat while attempting to retain the attorney as counsel.[248] A Washington statute makes it a crime to intimidate or threaten a judge because of a ruling or decision.[249] The court held that attorneys, as officers of the court, have a duty to warn members of the judiciary of real threats to their safety.[250] Although the court held that no attorney-client relationship was created during the phone conversation in which the defendant uttered threats against the judge and others, it reasoned, *arguendo*, that if an attorney-client relationship existed, the client's remarks would not be protected because they related to a future crime.[251] The court couched its holding in terms of the attorney-client privilege, but it relied on the language of Model Rule 1.6 to hold that "[a] lawyer may reveal . . . confidences or secrets to the

243. *Id.*

244. *Id.*

245. *Id.* at 366.

246. Arguably, the standard set by the Washington Supreme Court cures the problem created by the requirement in Rule 1.6 that the threatened conduct constitute a crime. Rather than limiting the cognizable interests to those protected by criminal sanctions, it allows disclosure when the danger of harm outweighs the client's interest in confidentiality.

247. 862 P.2d 117 (Wash. 1993).

248. *See* State v. Hansen, 862 P.2d 117, 118-19 (Wash. 1993).

249. *See id.* at 122.

250. *See id.* at 121-22.

251. *See id.*

extent the lawyer reasonably believes necessary . . . [t]o prevent the client from committing a crime."[252]

Additionally, some cases have imposed liability on attorneys under securities statutes.[253] In these cases, the attorney's conduct often has become so entangled with the client's wrongdoing that liability is imposed on the basis that the attorney joined the client's scheme as a fraud-feasor.[254] Moreover, the duty of confidentiality does not protect attorneys from liability based on misrepresentation.

D. Implications of Common Law Doctrines for Attorney Confidentiality

The scope of the attorney's duty to warn is uncertain. Courts seem reluctant to impose liability on attorneys as a general matter and particularly reluctant to favor a nonclient who makes a claim against an attorney.[255]

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252. *Id.* at 122; *see also* Marin v. United States, 814 F. Supp. 1468, 1485-86 (E.D. Wash. 1992) (finding that government agents had duty to warn known victim that she was target of informant whom they released from custody). *But see* Brooks v. Zebre, 792 P.2d 196, 197 (Wyo. 1990) (finding attorney not liable to prospective lessors of ranch for damages arising out of lease because of nonclient status of plaintiffs and failure to allege specific misrepresentations by attorney).

253. *See* Ruhl, *supra* note 157, at 207-08; *see also In re* American Continental Corp./ Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992) (denying motion for summary judgment on basis that evidence raises question of whether attorney violated rule 10(b) by tacitly consenting to removal of harmful document from corporate client files); *In re* Rospatch Securities Litigation, 760 F. Supp. 1239, 1250 (W.D. Mich. 1991) (recognizing fraud claim against the law firm because a "senior law partner's participation in misrepresentations and omissions may be imputed to the law firm."); Securities & Exchange Commission v. The Electronics Warehouse, Inc., 689 F. Supp. 53 (D. Conn. 1988) (attorney violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Securities & Exchange Commission Rule 10b-5 when he participated in scheme to extend offering beyond the period specified in the prospectus and to inflate the number of shares allegedly sold by obtaining short term loans).

254. *See* Trust Co. of La. v. N.N.P., Inc., 104 F.3d 1478 (5th Cir. 1997) (holding attorney liable for damages for drafting misleading documents and giving appearance of due diligence of law firm contrary to fact); GEOFFREY C. HAZARD, JR., & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 266-69 (1990); John Riley, *A Tainted Bond? Lincoln S&L Law Firm Accused of Helping Its Client Fleece Public*, NEWSDAY, Mar. 11, 1990, at 68 (quoting William Black, Office of Thrift Supervision lawyer, stating that attorneys "prostitute[d] themselves for these thrifts" by structuring "sham deals" and providing "legal opinions that regulations really were no barrier to whatever the fraudulent insiders wanted done"); *see also* Paul M. Barrett, *Silent Partners: When Lawyers See Fraud at a Company What Must They Do*, WALL ST. J., Aug. 22, 1997, at A1 (noting problem of attorney involvement in client misdeeds and settlements of law firms in S&L scandal).

255. *See, e.g.*, Rubin v. Schottenstein, Zot & Dunn, 110 F.3d 1247, 1255-56 (6th Cir. 1997) (attorney not liable to creditor for misrepresentation concerning client's finances); Abell v. Potomac Ins. Co., 858 F.2d 1104, 1125,1131-33 (5th Cir. 1988) (overturning jury verdict

Moreover, some jurisdictions have retreated from the general concept of liability by professionals to nonclients.[256] Although *Hawkins* and *Hansen* recognize an attorney's duty to warn in narrowly defined circumstances, neither of these cases (nor any other reported case) imposes liability on an attorney for the failure to warn in circumstances such as *Tarasoff* or the hypothetical sale of contaminated property.[257] Only speculation explains the absence of such a case. Is this absence a result of judicial protectiveness or empathy for lawyers ("There but for the grace of God . . . ")? Is it evidence of a philosophical aversion by judges to liability in this context? Or is it simply a result of the fact that no case that justifies such liability has been litigated or decided in a published opinion?

Authority for imposing a duty to warn on professionals seems strongest in the contexts of mental health professionals[258] and accountants.[259] Some commentators suggest that, in extreme circumstances, courts may be willing to impose such a duty on attorneys and other professionals.[260] Despite the

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against attorney and holding that third party suits for legal malpractice are allowed "only if the attorney prepares an opinion for the non-client on which he knows the nonclient will rely"); Bowman v. Two, 704 P.2d 140, 143 (Wash. 1985) (noting that attorney may have duty to nonclient but finding that defendant attorney in this case was not liable to his minor client's mother despite attorney's failure to follow state procedures relating to alternative residential placement of child).

256. *See* Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 119 (N.Y. 1985) (reaffirming standard set in *Ultramares*); Ultramares Corp. v. Touche, 174 N.E. 441, 444-48 (N.Y. 1931) (holding accountants should be liable to creditors and investors to whom employer exhibited certificate for reckless misstatement and fraud but not for negligent misstatement unless plaintiff was in privity with accountant or in a relationship approaching privity). The court required that the accountant must have been aware that the financial reports were to be used for a particular purpose, and that the accountant must have intended for a known party to rely on the reports. *Id.* at 442.

257. In December of 1995, December of 1996, and July of 1997 the following search requests revealed no reported cases in which an attorney reported a case of environmental contamination or incurred liability or a sanction for failing to report a hazardous release into the environment. The searches ran in the ALLFEDS and the ALLSTATES databases in WESTLAW. Search request (1): "ATTORNEY! /10 FAIL! & REPORT! & HAZARD! & RELEASE!" and "ATTORNEY! /10 PENAL! & REPORT! & HAZARD! & RELEASE!" Search request (2): "ATTORNEY! LAWYER! /S REPORT! /S HAZARDOUS! /2 WASTE! RELEASE!".

258. The Court in *Jaffee v. Redmond* noted that psychotherapy serves the public's interest in addition to the private individual's interest and thus recognized a privilege protecting confidential communications between a patient and a psychotherapist. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1929 (1996).

259. *See* Brumley v. Touche, Ross & Co., 463 N.E.2d 195, 199 (Ill. App. Ct. 1984).

260. *See* Jeffrey P. Kerrane, *Will* Tarasoff *Liability Be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 825, 830-33 (1995) (asserting that in creating new exception to attorney-client privileges California legislature rejected distinction between psychotherapist-patient and attorney-client privilege and thus left

absence of a reported case imposing liability, it may not be prudent to assume that attorneys are free of any duty to nonclients as a categorical matter.

Arguments against imposition of such a duty on attorneys are strong. The duty of the accountant to report client information to the public[261] contrasts with the general notion that attorneys serve their clients to the exclusion of all others. Additionally, attorneys do not receive the training or experience in predicting human behavior that mental health professionals gain in the normal course of their training and work. Because of their lack of expertise in this area, attorneys should not be expected to identify with confidence the mental status of their clients. Whether anyone can make such a judgment with complete confidence is open to question, but the point here is that attorneys should not be judged by the same standard applied to mental health professionals. Additionally, granting relief to third parties who suffer injury as a result of the attorney's conduct which is part of the attorney's representation of a client may diminish the zeal that advocates bring to their role.[262] Reasoning that attorney liability would dilute the ability of attorneys to provide full representation, some courts have held attorneys are not liable for injury to third partes even when it is foreseeable that the nonclients will rely on the attorney's representation.[263]

The differences between attorneys and professionals such as mental health professionals and accountants, while significant, do not necessarily mean that attorneys have a blanket exemption from the duty to warn. In other words, the distinctions between attorneys and psychiatrists, while real, may not justify a categorical exclusion for attorneys from liability in clear-cut

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opportunity to impose liability on attorneys); *see also* John R. Murphy III, Comment, *In the Wake of* Tarasoff: *Mediation and the Duty to Disclose*, 35 CATH. U. L. REV. 209, 213-18 (1985) (advocating passage of legislation to protect mediators from forced disclosure of information obtained during negotiations).

261. *See* Michael M. Neltner, Comment, *Government Scapegoating, Duty to Disclose, and the S&L Crisis: Can Lawyers and Accountants Avoid Liability in the Savings and Loan Wilderness*, 62 U. CIN. L. REV. 655, 680 (1993); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 235 (1996).

262. *See* Cifu, *supra* note 183, at 15.

263. *See* Clagett v. Dacy, 420 A.2d 1285, 1289-90 (Md. Ct. Spec. App. 1980) (providing that high bidders in foreclosure sale had no action for damages against seller's attorney because there existed no direct privity nor was bidder "intended to be the beneficiary of the attorney's undertaking"). To infer that a relationship existed would mean in effect that the attorney represented both the mortgagee and the bidder, whose interests likely would conflict. *See id.*; *see also* Friedman v. Dozorc, 312 N.W.2d 585, 588, 591-92 (Mich. 1981) (finding that physician who had successfully defended medical malpractice action brought by deceased patient's family had "no actionable claim on a theory of negligence [against family's attorneys] because an attorney owes no duty of care to an adverse party in litigation").

cases of danger to a third party. Moreover, because the common law operates without clear notice to the person who incurs liability, attorneys should be cautious.[264] To be sure, a court could apply the principle of liability today to any attorney who fails to warn a nonclient in circumstances that the court finds deserving of liability. The psychiatrist in the *Tarasoff* case had no prior judicial or statutory warning of the possibility of liability for a failure to warn.

Some of the changes in the law noted above are broader than the law of professional errors or omissions. They seem to be part of a movement in the law to recognize third party interests in contract and tort law and to take greater account of the public interest in legal doctrines.[265] In a recent book, Jay M. Feinman documents a developing pattern of protection of third parties by courts.[266] Feinman's thesis is that courts have granted awards to parties based on economic injury in a variety of circumstances and on the basis of varying legal doctrines, and thus, economic negligence should be analyzed and applied as a separate field of law.[267] Cases involving environmental hazards present a more pronounced need for protection than the ordinary case of economic negligence. In these cases, physical injury is the risk or cost of silence. The potential for harm in such cases is dramatic because it involves the potential for loss of life or other physical injury.[268]

The analysis of Model Rule 1.6 is driven by the requirement that the client intends to commit a crime.[269] While culpability undoubtedly informs the analysis of courts in formulating the principles discussed above, it is not the sole focus or driving force of the inquiry. Courts consider peril to a third party in deciding whether to hold a defendant liable for failing to warn a third party of a danger.[270] Although peril may arise from a threatened crime,

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264. *See supra* note 144. Similarly, caution can be found in the way lenders deal with potential environmental liabilities. For example, it took only one *Fleet Factors* case to awaken lenders to the dangers of CERCLA liability. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (concluding that lender with security interest in facility faces liability as potentially responsible party under CERCLA if lender had capacity to influence debtor facility's treatment of hazardous waste).

265. *See generally* FEINMAN, *supra* note 150 (noting relational approach to third party interests across topical areas).

266. *See generally id.*

267. *See id.* at 5-8.

268. The interest of the third party can outweigh that of the client. "A number of the cases in which an attorney is held to owe a duty of reasonable care to the third party to or for whom it issues a legal opinion rest on the dependence of the third party rather than on the intent of the attorney and the client." *Id.* at 325-26.

269. *See supra* note 25 and accompanying text; *see also* Russell, *supra* note 59, at 425-33.

270. *See* Green v. River Terminal Ry. Co., 763 F.2d 805, 808-09 (6th Cir. 1985) (ruling employer must inform employees of perils to which they will be exposed in course of employ-

negligence may also result in peril.[271] In *Tarasoff*, the California Supreme Court's analysis did not dwell on whether each element of the criminal offense was clear to the therapist. Speaking to confidentiality of patient-psychotherapist communication, the court declared that the "protective privilege ends where the public peril begins."[272] Similarly, the courts that have abrogated the bar of privity have not limited liability of attorneys to situations in which the client has threatened to commit "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[273] If the Rule seeks to avert significant peril, there seems to be no reason to limit the operation of the exception to peril that the legislature has foreseen and proscribed by statute.[274]

The argument in favor of an imperative of attorney silence is that the benefits of full representation and counseling compliance with the law justify the rule even though some people will suffer as a result of the rule. Accepting, arguendo, this view of the transcendent good of confidentiality, additional questions regarding the ultimate social good arise when situations place this value in competition with other values of society. In cases of environmental catastrophe, consideration should be given to the widespread nature of the harm that could result from attorney allegiance to the principle of confidentiality.[275] When only one person is imperiled by client conduct, how should this harm be weighed against the transcendent good of confidentiality? If the harm is grave and certain, does the transcendent social good require the sacrifice of the known victim?[276] This is the question *Tarasoff* and other duty to warn cases address. It is one that courts must decide when such cases arise in the attorney context.

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ment); Jobe v Smith, 764 P.2d 771, 771 (Az. Ct. App. 1988) (finding homeowner had duty to warn business visitor about possibility of assault from estranged "gentleman friend"); Keck v American Employment Agency, Inc., 652 S.W.2d 2, 6-7 (Ark. 1983) (concluding that when psychotherapist determined patient presented serious danger of violence to another, he incurred obligation to use reasonable care to protect intended victim); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 346-47 (Cal. 1976) (concluding that health care professionals had duty to warn nonclient of threats of violence made by patient).

271. Some environmental statutes criminalize negligent conduct. *See* Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1994).

272. *Tarasoff*, 551 P.2d at 347; *see also supra* note 200.

273. MODEL RULES Rule 1.6(b)(1); *see also supra* Part V.B.

274. Although some environmental statutes criminalize negligent conduct, there is no reason to believe that Congress intended to curtail the rights of injured parties to sue in tort for injuries occasioned by violation of environmental statutes.

275. *See* Russell, *supra* note 59, at 411-12.

276. Model Rule 1.6 states the test in terms of loss of life, but in future cases the threat may be a high risk of death, as in exposure to toxic substances.

Emerging concepts in the law indicate that personal liability is a risk of practicing law today. Moreover, there exists a genuine risk that nonclient injuries caused by attorney actions may result in attorney liability. Model Rule 1.6 ignores this risk of liability and the force of common law and statutory law affecting the obligations of attorneys. The point here is not that Model Rule 1.6 should be recrafted in order to reduce the likelihood of attorney liability.[277] Rather, it is that professional ethics, as an adjunct to positive law, must accommodate the precepts of positive law (both statutory and common law).

A basic logical premise of any legal system is that the law must permit what it requires. In constituting the standards for the professional life of attorneys, the ABA should be mindful of principles announced by courts as the arbiters of law. Courts will continue to evaluate the rights and the interests of individuals that come before them as litigants – despite the pronouncement of the ABA that courts should not reexamine an attorney's decision to hold client confidences secret.[278] Such an evaluation of rights is the primary role of courts – even when one interest in the balance is the central moral tradition of attorney confidentiality.

VI. The Need for Viable Exceptions to Model Rule 1.6

Model Rule 1.6 creates a disjunction between professional ethics and duties imposed by positive law. This disjunction exposes third parties to potential risks and exposes attorneys to potential liability for failing to address risks to nonclients. The failure of Rule 1.6 is highlighted by the fact that many states and the American Law Institute incorporate standards that achieve a more balanced approach to the contest of interests of clients and third parties.

A. State Modifications to Model Rule 1.6

As with model legislation generally, a strong appeal of the Model Rules is that all jurisdictions can achieve a uniform and fair approach to standards for attorney conduct. Uniformity is of particular importance in the area of confidentiality because the benefits of the rule of confidentiality (early representation and full disclosure of information to the attorney by the client) depend on an informed public.[279] Only if the duty is clear and known to

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277. Liability is often a strong motivator, encouraging people to refrain from putting others at risk.

278. "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination." LEGISLATIVE HISTORY, *supra* note 29, at 23.

279. The drafters of Model Rule 1.6 believed that a strong rule of confidentiality is needed

clients (the general public) will these benefits accrue. Thus, it is essential that clients understand that they can safely confide in attorneys. Additionally, there is danger that without uniformity on this important issue the bars will fragment and lose the benefits of a cohesive sense of community and of professionalism.[280]

The goal of a uniform, understandable rule has not been achieved by the Model Rule on confidentiality. Empirical data suggest that attorneys as well as clients lack a clear understanding of the duty of confidentiality.[281] Of the 39 jurisdictions that have adopted the Model Rules, only six jurisdictions have retained Model Rule 1.6 in the form endorsed by the ABA.[282] A significant number of states restored the exceptions deleted by the ABA House of Delegates from the Proposed Rule.[283] The rejection of Rule 1.6 by the states is even more dramatic when one considers that uniform rules come to the jurisdictions with the imprimatur of the ABA and carry an implication that they will be accepted as written by sister jurisdictions. The fact that so many jurisdictions departed from the language of the Model Rule is evidence of dissatisfaction with the formulation of the duty set forth in Model Rule 1.6.[284]

Without exception, the states that modified Rule 1.6 created greater protection for third parties and the public. Sixteen jurisdictions[285] include an

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to induce clients to seek legal counsel and to share important information with their attorneys. *See* MODEL RULES Rule 1.6 cmt. 2 (noting that duty of confidentiality "not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance"). Only if the duty is clear and known the general public will these benefits accrue. *See id.* at cmt. 3 ("lawyers know that almost all clients follow the advice given, and the law is upheld").

280. *See* R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 424-25 (1984).

281. *See* Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 102-06 (1994); Zacharias, *supra* note 17, at 396.

282. *See* ALA. RULES OF PROF'L CONDUCT Rule 1.6 (1996); DEL. RULES OF PROF'L CONDUCT Rule 1.6 (1997); LA. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MO. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MONT. RULES OF PROF'L CONDUCT Rule 1.6 (1997); R.I. RULES OF PROF'L CONDUCT Rule 1.6 (1996) (adding words "but is not obligated" to modify "may . . . reveal").

283. *See* 2 HAZARD & HODES, *supra* note 12, § AP4:103, at 1261.

284. Dissatisfaction with attorneys has also increased in recent times. Strong public sentiment against lawyers has grown due in part to a belief that lawyers are preoccupied with self-interest or the selfish interest of their clients. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 11-13 (1993).

285. *See* D.C. RULES OF PROF'L CONDUCT Rule 1.6(d)(2)(A) (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6(c)(6) (1997); ILL. RULES OF PROF'L CONDUCT Rule 1.6(c)(1) (Supp. 1997); KAN. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997); KY. RULES OF PROF'L CONDUCT Rule 1.6(b)(3) (1997); MD. RULES OF PROF'L CONDUCT Rule 1.6(b)(4) (1997); MICH. RULES OF

exception for disclosures to comply with other law. Thirteen jurisdictions[286]

PROF'L CONDUCT Rule 1.6(c)(2) (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997); MISS. RULES OF PROF'L CONDUCT Rule 1.6(c) (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6(c)(3) (1997); N.C. RULES OF PROF'L CONDUCT Rule 4(c)(3) (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6(g) (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(c) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(c)(4) (1997); UTAH RULES OF PROF'L CONDUCT Rule 1.6(b)(4) (1996); WASH. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997) (allowing disclosure pursuant to court order).

286. ARIZ. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); CONN. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); FLA. RULES OF PROF'L CONDUCT Rule 4-1.6(b) (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); ILL. RULES OF PROF'L CONDUCT Rule 1.6(b) (Supp. 1997); NEV. RULES OF PROF'L CONDUCT Rule 156 (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6 (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(c) (1997); PA. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(e), (f) (1997); WIS. RULES OF PROF'L CONDUCT Rule 20:1.6(b) (1997). Additionally, although Virginia currently follows the Model Code, it requires disclosure in specified circumstances. VA. CODE OF PROF'L RESPONSIBILITY DR 4-101 (1996). Virginia is currently in the process of adopting its own version of the Model Rules. Virginia's proposed Rule 1.6 continues to require disclosure in those specified circumstances. *See Proposed Model Rules of Professional Conduct*, *supra* note 51, at 46-49. The Virginia proposed rule provides a particularly well-balanced approach to disclosure of confidential client information. Virginia's proposed rule states:

> (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 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 paragraphs (b) and (c).
>
> (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
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> (1) such information to comply with law or a court order;
>
> (2) such information 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;
>
> (3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
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> . . . .
>
> (c) A lawyer shall promptly reveal:
>
> (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client,

made attorney disclosures of client information mandatory in some circumstances by substituting "shall reveal" or similar language in place of the Rule's permissive language "may reveal."[287] Six jurisdictions rejected the breadth of the Model Rules term "information" by substituting language reminiscent of the Model Code ("confidences and secrets") in their statement of prohibition.[288] Twenty-two jurisdictions broadened the exemption for future crimes by deleting the adjective "imminent" from "death."[289] In an even more important departure from the Model Rule, sixteen states allow disclosure to prevent a crime without a requirement that the crime be one that the attorney reasonably believes will result in death or bodily injury.[290] Of these, fifteen states

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> that the attorney shall seek to withdraw as counsel;
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> (2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; . . . .

Id. at 46-47.

287. The New Mexico Rule states that a lawyer "should reveal" client information when a client's crime is likely to result in imminent death or serious harm. N.M. RULES OF PROF'L CONDUCT Rule 16-106 (1997).

288. *See* D.C. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6 (1997); N.C. RULES OF PROF'L CONDUCT Rule 1.6 (1997) (prohibiting disclosure of "confidential information" except as permitted); TEX. RULES OF PROF'L CONDUCT Rule 1.05 (1997); WASH. RULES OF PROF'L CONDUCT Rule 1.6 (1997).

289. *See* ARIZ. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); ARK. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1996); COLO. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); FLA. RULES OF PROF'L CONDUCT Rule 4-1.6 (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6(c)(1) (1997); IDAHO RULES OF PROF'L CONDUCT Rule 1.6 (1996); ILL. RULES OF PROF'L CONDUCT Rule 1.6(b) (Supp. 1997); IND. RULES OF PROF'L CONDUCT Rule 1.6 (1996); KAN. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); MD. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6(c)(4) (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6(b)(3) (1997); MISS. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.H. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.C. RULES OF PROF'L CONDUCT Rule 4(c)(4) (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); S.C. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(c)(7) (1997); WASH. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); W. VA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); WIS. RULES OF PROF'L CONDUCT Rule 20:1.6(b) (1997); WYO. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1997).

290. *See* ARK. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1996); COLO. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); FLA. RULES OF PROF'L CONDUCT Rule 4-1.6 (1997); IDAHO RULES OF PROF'L CONDUCT Rule 1.6 (1996); IND. RULES OF PROF'L CONDUCT Rule 1.6 (1996); KAN. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6(c)(4) (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6(b)(3) (1997);

have further broadened the exception by deleting "substantial" as a qualifier on "bodily harm."[291] Eleven jurisdictions have added protection for the financial interest of third parties.[292] Eight jurisdictions include "fraudulent" as well as criminal acts within the exception for harm, extending greater protection to third parties.[293] Thirteen jurisdictions allow disclosures to "rectify fraud" when the attorney's services have been used to further a fraud.[294]

MISS. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.C. RULES OF PROF'L CONDUCT Rule 4(c)(4) (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); S.C. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(c)(7) (1997); WASH. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); W. VA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); WYO. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1997).

Florida unhooks the elements of the nature of the act and its results. It allows disclosure to prevent a crime, deleting any qualifying language to limit the category of "crime." It also allows disclosure "to prevent a death or substantial bodily harm to another." This separate category of disclosure achieves the protection of third parties advocated in Part VI.C. of this Article.

291. *See* ARK. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); COLO. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); IDAHO RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); ILL. RULES OF PROF'L CONDUCT Rule 1.6(b) (Supp. 1997) (substituting "serious bodily harm" for "substantial"); IND. RULES OF PROF'L CONDUCT Rule 1.6 (1996); KAN. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6(c)(4) (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6(b)(3) (1997); MISS. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.C. RULES OF PROF'L CONDUCT Rule 4(c)(4) (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); S.C. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); WASH. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); W. VA. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); WYO. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997). As noted above, sixteen states deleted reference to "bodily harm" as an element required to justify disclosure.

292. ALASKA RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1997-98); CONN. RULES OF PROF'L CONDUCT Rule 1.6(c)(1) (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); MD. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.H. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.M. RULES OF PROF'L CONDUCT Rule 16-106(c) (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6(d) (1997); PA. RULES OF PROF'L CONDUCT Rule 1.6(c)(1) (1997); UTAH RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1996); WIS. RULES OF PROF'L CONDUCT Rule 20:1.6(b) (1997).

293. ALASKA RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (Michie 1997-98); HAW. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); MD. RULES OF PROF'L CONDUCT Rule 1.6(b)(1) (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6(b) (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6(d) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(c) (1997); UTAH RULES OF PROF'L CONDUCT Rule 1.6(b) (1996); WIS. RULES OF PROF'L CONDUCT Rule 20:1.6(b) (1997).

294. CONN. RULES OF PROF'L CONDUCT Rule 1.6(c)(2) (1997); HAW. RULES OF PROF'L CONDUCT Rule 1.6 (1997); MD. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997); MICH. RULES OF PROF'L CONDUCT Rule 1.6(c)(3) (1997); MINN. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997); N.J. RULES OF PROF'L CONDUCT Rule 1.6(c)(1) (1997); N.C. RULES OF PROF'L CONDUCT Rule 4(d)(5) (1997); N.D. RULES OF PROF'L CONDUCT Rule 1.6(f) (1997); OKLA. RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1997); PA. RULES OF PROF'L CONDUCT

B. The Restatement *Rule*

The American Law Institute (ALI) is one of the most respected and influential legal institutions in this country. Founded in 1923 with the purpose of promoting "the clarification and simplification of the law,"[295] the ALI has participated in the development of substantive law – both common law and statutory law. It has published a series of restatements, clarifying the common law,[296] and it has drafted model acts and uniform laws, including the Uniform Commercial Code.[297] Through the *Restatement (Third) of the Law – The Law Governing Lawyers*, the ALI has articulated standards for judging lawyer conduct, including a standard on the attorney's duty of confidentiality.[298] The most recent statement of this duty by the ALI is found in Proposed Final Draft No. 1 of the *Restatement (Third) of the Law – The Law Governing Lawyers*.[299] While the *Restatement* treatment of confidentiality follows the same framework of general prohibition and limited exceptions found in the Model Rules, it differs from the Rules in significant ways.

The Proposed *Restatement* Rule (PRR) defines the scope of the duty of confidentiality by reference to the attorney-client relationship. Section 111 states the definition of confidential information: "Confidential client information consists of information relating to that client, acquired by a lawyer or agent of the lawyer in the course of or as the result of representing the client, other than information that is generally known."[300] This definition is sufficiently broad to protect the client's interests. It is narrower, however, than the reference to "information" of Model Rule 1.6 which declares that a "lawyer shall not reveal information relating to representation of a client,"[301] including essentially all conceivable data about a client regardless of its source.

The PRR states a general duty to safeguard client information and prohibits the use of client information when "there is a reasonable prospect

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Rule 1.6(c)(2) (1997); TEX. RULES OF PROF'L CONDUCT Rule 1.05(c)(8) (1997); UTAH RULES OF PROF'L CONDUCT Rule 1.6(b)(2) (1996); WIS. RULES OF PROF'L CONDUCT Rule 20:1.6(c) (1997).

295. American Law Institute Certificate of Incorporation, *quoted in* AMERICAN LAW INST., WHAT LAW STUDENTS SHOULD KNOW ABOUT THE AMERICAN LAW INSTITUTE (pamphlet).

296. Between 1923 and 1944, the ALI published the first set of restatements. Beginning in 1952, the ALI has published the second series of restatements relating to the common law. *Id.* The restatements have also encouraged greater uniformity among courts of the different jurisdictions.

297. *Id.*

298. RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 112 (Proposed Final Draft No. 1, 1996).

299. *Id.*

300. *Id.* § 111.

301. MODEL RULES Rule 1.6(a).

that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information."[302] The PRR presents exceptions to the prohibition against disclosure in Section 117A. This section provides as follows:

> (1) A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to prevent:
> (a) death or serious bodily injury from occurring as the result of a crime that the client has committed or intends to commit; or
> (b) substantial financial loss from occurring as the result of a crime or fraud that the client has committed or intends to commit [and in the commission of which the lawyer's services were or are being employed].
> (2) In a situation described in Subsection (1), if the client has acted at the time the lawyer learns of the threat of an injury or loss to a victim, use or disclosure is permissible only if the injury or loss has not yet occurred.
> (3) Before using or disclosing information pursuant to Subsection (1) or (2), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.[303]

The PRR makes several changes in the elements of the exception. These additions are similar to those instituted by many of the jurisdictions that changed the language of Model Rule 1.6.[304] The PRR does not require that death be "imminent" to allow disclosure,[305] and it allows disclosure of a future or past crime so long as the injury or loss has not yet occurred.[306] With respect to disclosures of fraud, the Rule adds substantial financial loss to the interests protected and allows disclosure of future or past fraud.

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302. RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 112 (Proposed Final Draft No. 1, 1996). Section 112 of the *Restatement* states as follows:

> Lawyer's Duty To Safeguard Confidential Client Information.
> (1) Except as provided in §§ 113-117A, during and after representation of a client:
> (a) the lawyer may not use or disclose confidential client information as defined in § 111 . . . .
> (b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

Id.

303. *Id.* § 117A.

304. *See supra* Part VI.B.

305. *See* RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 117A(1)(a) (Proposed Final Draft No. 1, 1996). Inclusion of the term "imminent" in the Model Rule is a make-weight intended to discourage any conceivable disclosure of client information.

306. *Id.* § 117A(1)-(2). Presumably, the timing provision is intended to allow disclosures when it is still possible to prevent the injury or loss.

Although the PRR statement of exceptions does not unlock the pairing of the dual requirements of criminal intent and ultimate harm presented in Rule 1.6, Section 117A seems to moot the problem as a practical matter. Like Rule 1.6, Section 117A allows disclosure based on the risk of "death or serious bodily injury" to a third person only when the harm occurs as a result of a crime.[307] The section does not include reference to fraud in conjunction with death or serious bodily injury. Thus, it does not include a basis for disclosure of a fraud that would result in death or bodily harm. It does, however, add a basis for disclosure for financial loss resulting from fraud. Thus, applying this section to the introductory hypothetical of a client seeking to transfer contaminated property by defrauding a purchaser, PRR does not empower the attorney to reveal the fraud based on the danger to personal safety, but it does empower the attorney to reveal information necessary to prevent a "substantial financial loss" resulting from such fraud. Such loss is, of course, also likely, and so the problem may be mooted by the *Restatement* rule. The possibility that fraud could result in personal injury or death does not appear to be within the contemplation of PRR 117A.

Like the old ABA Model Code,[308] the PRR expressly acknowledges the lawyer's right to disclose confidential client information "when required by law."[309] Exercise of this right is allowed under the *Restatement* Rule only after the lawyer has taken "reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure."[310] Section 115 provides as follows:

> § 115. Using or Disclosing Information When Required by Law.
>
> A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.[311]

This statement provides clear authority for an attorney to disclose information when necessary to comply with law. It achieves the protection for clients by its reference to the attorney's obligation to "take appropriate steps" to protect the information. The provision provides an independent basis for

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307. Under Section 117A, the crime may be either intended in the future or already committed so long as the harm from the crime has not yet occurred (and thus, presumably can be averted). *See id.* § 117A(1)(a).

308. The Code provides: "A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." MODEL CODE DR 4-101(C)(2).

309. *See* RESTATEMENT (THIRD) OF THE LAW – THE LAW GOVERNING LAWYERS § 115 (Proposed Final Draft No. 1, 1996).

310. *Id.*

311. *Id.*

disclosure, speaking to situations not covered by Section 117A. Thus, there is no need for a showing of serious harm to justify a disclosure under this section.

In contrast to the ABA representational slant, the ALI approaches the issue from a substantive angle. Like the straightforward legal advisor, the PRR views the issue of confidentiality within the context of law. It gives weight to the interests that can be injured by attorney silence. Positive law, both statutory and common law, represent these interests. The rules proposed by the ALI incorporate consideration of the interests that a court will balance when a third party challenges attorney silence.

The ABA Model Rules approach reflects the vision of lawyering that it adopts: that of a champion attorney sometimes referred to as the "hired gun." This view takes the client's interest as paramount and discounts other competing interests; it envisions the public good from the side of the attorney and client's interest and disregards the competing interest of third parties put at risk by client conduct. This approach takes an optimistic view of the attorney's potential liability. It unhinges the inquiry of attorney confidentiality from positive law, minimizing the force of law.

This is a dangerous approach by the institutional representative of attorneys. Like the attorney who soothes the client and omits bad news of potential liability, the ABA Rule assumes that a court will see a future controversy solely from its perspective, blinking at competing interests as negligible. Attorneys should know, however, that the other side of most contests has weight and that the court, as neutral arbiter, will see both interests and balance these interests dispassionately. Rarely is a controversy so one-sided that absolute rules serve the purpose of justice.[312] The attorney who simply refers to

312. The American system of justice is not monolithic. It applies general rules, with well-defined exceptions for cases in which application of the general rule would result in an unjust outcome. Even the First Amendment to the Constitution is not absolute; it allows for limitations on speech to respond to situations of peril. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965) (stating that free speech and assembly, "while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time"); Dennis v. United States, 341 U.S. 494, 503 (1951) (noting that right of free speech is "not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations"); American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950) (noting "clear and present danger" exception to First Amendment guarantee of free speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[T]he right of free speech is not absolute at all times and under all circumstances."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protections of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.").

Exceptions also qualify statutes and common law principles. *See, e.g*, Montana v. Egelhoff, 116 S. Ct. 2013, 2017 (1996) (finding no categorical right to offer incompetent evidence); Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995) (finding that statute's express preemption clause does not establish categorical rule that no implied preemption exists though

the reasons a court should favor her client's view fails to provide objective analysis of the potential outcomes of a controversy in court. Similarly, the ABA, as counselor for the community of lawyers, has opted for the optimistic outlook. It enunciates the interest in confidentiality as a transcendent benefit,[313] urges courts to refuse to reexamine the attorney's decision to maintain silence,[314] and discounts competing interests.[315]

Like the state modifications, the PRR provides a truer balance of the interests at stake in this area. These standards employ different formulations of the duty and exceptions, but each tempers the prohibition against disclosure with viable exceptions to protect nonclient interests. The ABA should heed the messages from the ALI and state legislatures in their rejection of the formulation of the duty of confidentiality set forth in Model Rule 1.6.

C. Recrafting Model Rule 1.6

The law adopted by legislatures in environmental laws and regulations and endorsed by courts through the common law of torts create special problems for attorneys in environmental practice. Close scrutiny of the interaction of substantive laws and the duties imposed by the applicable rules of ethics is necessary for attorneys who engage in environmental practice. Difficult balancing is, of course, required. Does a work practice create a significant risk of a Bhopal-type catastrophe? Or is it merely a regulatory violation creating an insignificant or cumulative risk? Some would argue that this indeterminacy makes any standard endorsing disclosure unworkable. Nevertheless, this is the balancing tort law requires of other professionals and, indeed, of every person via the general duty to refrain from creating an unreasonable risk of harm to another.

Rule 1.6 may come as close as any rule in our system to an absolute rule. Its flat prohibition, narrow exception for harm to others,[316] and cautionary comments[317] encourage silence without regard to the facts of the case. The

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it supports such inference); Taylor v. Illinois, 484 U.S. 400, 410 (1988) (concluding that accused has no "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

313. *See* MODEL RULES Rule 1.6 cmt. 9; *see also supra* notes 38-39 and accompanying text.

314. *See* LEGISLATIVE HISTORY, *supra* note 29, at 23; *see also supra* note 77 and accompanying text.

315. *See* MODEL RULES Rule 1.2 cmt. 1; *see also supra* note 31 and accompanying text.

316. Based on the assurance of Comment 9 of Rule 1.6 that nondisclosure is not a violation, one could argue that the exceptions presented in the Rule are illusory rather than merely constrained.

317. *See* Russell, *supra* note 59, at 409.

ABA may have adopted the categorical prohibition of Rule 1.6 in part because of the problem of indeterminacy. But indeterminacy may not justify a categorical prohibition when harm to another will result. Tort principles require that all professionals[318] (and all people) make difficult judgments in indeterminate circumstances.[319] Like the psychologist in *Tarasoff*, the attorney must make the determination to the best of her abilities, based on the facts known at the time.[320]

Because confidentiality is the central tradition[321] in the world of attorneys, it is unlikely that inclusion of a viable exception within the Rule will result in inappropriate disclosures. Moreover, attorneys must consider the concomitant potential liability for disclosing information in the mistaken belief that the disclosure was necessary. Thus, a real exception requiring attorneys to balance the need for disclosure against the need for secrecy is unlikely to result in unsystematic or unprincipled disclosures.

VI. Conclusion

Model Rule 1.6 creates a disjunction between positive law and the rules of ethics, preferring the risk of improvident silence to the risk of improvident disclosure. Based on this preference, the Rule encourages attorney silence in virtually all circumstances. It recognizes harm to others only in the rarest of circumstances; it permits permissive disclosure only when the attorney finds the confluence of two elements: (1) the most culpable conduct by the client (a criminal act), and (2) ultimate harm to a third party (imminent death or

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318. *See* Durflinger v. Artiles, 727 F.2d 888, 904-06 (10th Cir. 1984).

> The Court recognizes that it may be difficult for medical professionals to predict whether a particular mental patient may pose a danger to himself or others. This factor alone, however, does not justify barring recovery in all situations. The standard of care for health professionals adequately takes into account the difficult nature of the problem facing psychotherapists.

Id. at 904 (imposing duty on hospitals to guard against their patients' dangerous mental conditions when condition is discoverable by exercise of reasonable care); *see also* Foley v. Bishop Clarkson Mem. Hosp., 173 N.W.2d 881, 884-85 (Neb. 1970).

319. Arguably attorneys are better prepared to make such judgment calls than other professionals because of their legal training. *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 323-29 (1995) (concluding that core activities of lawyering are problem-solving and decision-making).

320. *See* Shelly Stucky Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123, 1132 (1992) (noting that neither psychotherapists' nor attorney's "inaccuracy in predicting violence" should preclude duty to warn in clear cases).

321. *See generally* Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990).

substantial bodily harm). But legislation makes clear that controlling environmental risks is a compelling governmental interest. Additionally, modern tort law has moved from status-based rules such as the bar of privity to case-by-case determination of the interests.

Rule 1.6 assumes that its transcendent benefits outweigh any harm third parties will suffer when attorneys remain silent. It further assumes that an attorney has no duty to protect nonclient interests. Environmental hazards challenge the first assumption because the gravity of harm they present makes silence particularly costly. Developments in positive law challenge the second assumption. Modern law has moved toward requiring broader protection of others. Positive law (created by both courts and legislatures) recognizes negligent conduct can be sufficiently culpable to deserve liability for harm. Additionally, positive law mandates disclosure in some cases.

To cure the disjunction between its statement of confidentiality and positive law, the ABA should recast Model Rule 1.6. As recast, the Rule should achieve a formulation like that of the ALI Proposed *Restatement* Rule, maintaining a strong prohibition against disclosure but creating viable exceptions. This reconceptualization of the duty of confidentiality does not mean the attorney should assume the role of watchdog of his clients. Rather, the pattern set by the ALI Proposed Rule and the rule advocated here empowers the attorney to respond to extreme circumstances to protect others and to maintain his own character as an upright person. These changes would promote an analysis of competing interests consistent with tort and statutory law, allowing attorneys to disclose client information to avert significant harm to others and to comply with the mandates of positive law.

LECTURE