

September 1984

Ethical Issues in the Practice of Environmental Law

John French III

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

John French III, *Ethical Issues in the Practice of Environmental Law*, 2 Pace Env'tl. L. Rev. 66 (1984)

Available at: <https://digitalcommons.pace.edu/pelr/vol2/iss1/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Ethical Issues in the Practice of Environmental Law

John French III*

I. Introduction

The practice of environmental law as a specialty¹ is a relatively recent phenomenon, dating from the mid-1960's with the *Scenic Hudson* cases² and the passage of the National Environmental Policy Act of 1969.³ The bulk of federal environmental law was enacted after 1970; yet no single body of law has had such an immediate and far-reaching effect on all phases of American life.⁴ This explosive growth of environmental law has come at a time when the American legal pro-

* Affiliated with Beveridge & Diamond, P.C., Suite 2506, 101 Park Avenue, NY, NY. J.D., Harvard Law School. Member of New York State Environmental Board. Member of Board of Directors of the Hudson River Foundation for Scientific Research.

1. In the context of this article, a specialty in environmental law refers to a practice limited to, concentrated in, or primarily focused on environmental law. Although a lawyer may indicate legal areas of his practice, professional ethics prohibit him from holding himself out publicly as a specialist unless he is certified in a particular field of law by the appropriate authority of the state in which he practices. Model Code Of Professional Responsibility DR2-105 (1980). As of 1983, five states have adopted some form of specialization plan for environmental law: Arkansas, Florida (adopted a designation plan but not a certification plan), Iowa, North Carolina, Texas. ABA/BNA Lawyer's Manual on Professional Conduct.

2. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

3. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970)(codified as amended at 42 U.S.C. §§ 4321-4370 (1982)).

4. The cost of our food, housing and transportation, our state of health, and even our life span are all influenced by environmental statutes. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7521 (1982)(emission standards for motor vehicles); Toxic Substance Control Act, 15 U.S.C. § 2605 (1982)(authority to regulate the manufacture and distribution of chemical substances or mixtures that present a risk to public health); Noise Control Act, 42 U.S.C. § 4916 (1982)(railroad noise emission standards); Safe Drinking Water Act, 42 U.S.C. § 300g (1982)(national drinking water regulations).

fession itself has undergone severe change. During the last twenty-five years, there has been a growth in the number of giant law firms with multiple offices and hundreds of attorneys, and a growth in both number and influence of "inside" lawyers in corporations and in all segments of federal, state and local governments.⁵ Such changes in the American legal profession, happening simultaneously with the development of environmental law, have created significant ethical problems for the environmental practitioner.⁶ The magnitude of these problems is becoming more evident as various states debate adoption of the new *Model Rules of Professional Conduct*.⁷

This article discusses some of the principle ethical conflicts faced by environmental lawyers today:

(1) effects of changes in the new codes of professional conduct, adopted or soon to be adopted by the various jurisdictions, on the practice of environmental law;

(2) attorney competence in the environmental field;

(3) conflict of interest problems in corporate and governmental situations and in cases involving multiple representation; and,

(4) attorney disclosure of client's wrongdoing.

The actions of an environmental lawyer in any one of these areas can have material and sometimes disastrous consequences to both his client and himself.

II. The Codes of Professional Conduct

In 1983 the American Bar Association (ABA) adopted the new *Model Rules*⁸ to replace the *Model Code of Professional*

5. Schwartz, *The Reorganization of the Legal Profession*, 58 Tex. L. Rev. 1269, 1274-75 (1980)(in 1959 only thirty-seven firms contained more than fifty lawyers; by 1979 there were 200 such firms, with a total of 22,000 lawyers, and 90 firms with over 100 lawyers).

6. See, e.g., *A Gentlemanly Profession Enters a Tough New Era*, N.Y. Times, Jan. 16, 1983, sec. 3, at 1.

7. Model Rules of Professional Conduct (1983)(hereinafter cited as Model Rules).

8. *Id.* The Model Rules were adopted by the House of Delegates of the ABA on August 2, 1983.

Responsibility.⁹ While this article will not attempt to duplicate the many commentaries on this subject, it is important to be aware of the controversy surrounding the adoption of the *Model Rules*. Disagreement over substantive issues like disclosure of client's wrongdoing, lawyer's direct solicitation of clients, and contingency fees in criminal and domestic-relations cases, have kept ABA committees struggling for seven long years.¹⁰ It is extremely important to note that the *Model Rules* are advisory only, and while the 1969 *Model Code* was adopted virtually intact by nearly all the states, continuing disagreement on issues such as those mentioned above raises the specter that this uniformity will not long endure.¹¹

Over the next several years lawyers may find an increasing balkanization of state codes of ethics, and may face situations where their conduct will violate codes of ethics in one state and not another. This will be particularly confusing for the multi-state firm, the governmental lawyer, and the inside lawyer in a multi-state corporation. "It may require years for a new consensus to develop with respect to certain issues. There is a very real danger of nonuniform amendments, with exceptionally wide variations among the jurisdictions that elect to adopt the *Model Rules*."¹² Pennsylvania recently adopted the *Model Rules* with only minor modifications, while in New York, the state bar committee is examining the *Model Rules* line by line and section by section. In states that have recently adopted their own ethical codes, such as Virginia, Illi-

9. Model Code of Professional Responsibility (1980)(hereinafter cited as Model Code). The Model Code was adopted by the House of Delegates of the ABA on August 12, 1969, and was amended in February 1970, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980 and August 1980. The ABA Commission on Evaluation of Professional Standards, chaired by Robert J. Kutak until his death in 1983, concluded that additional piecemeal amendment of the Model Code would not sufficiently clarify the ethical responsibilities of a lawyer in light of changed conditions of the legal profession. In 1980, therefore, the Commission presented its Discussion Draft of the proposed Model Rules of Professional Conduct. Model Rules of Professional Conduct Chairman's Introduction (1983).

10. Flaherty, *Ethics Fight: Round 2 - The Model Rules Face Rocky Road*, Nat'l. L.J., Jan. 16, 1984, at 1.

11. Flaherty, *Chaos ?*, Nat'l. L.J., Jan. 16, 1984, at 10.

12. Flaherty, *supra* note 11, at 10.

nois, and Maine, the *Model Rules* will probably not even be considered until the state has lived with its own code for a while.¹³

The most controversial issue is the confidentiality provision. Model Rule 1.6 allows a lawyer to reveal confidences only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death and substantial bodily harm."¹⁴ This provision narrowed the area of allowable disclosure that existed under the 1969 *Model Code*¹⁵ or under the provisions originally forwarded by the Kutak Commission (the ABA committee which drafted the *Model Rules*).¹⁶ Great opposition from the states is coming from a number of directions. In New Jersey, the state bar committee has labeled Rule 1.6 "totally unacceptable" in their report to the New Jersey Supreme Court. The committee recommends that "disclosure of serious crimes be mandatory and that disclosure be allowed in cases of financial and property crimes."¹⁷ California lawyers attack the rule from the opposite

13. Flaherty, *supra* note 10, at 1.

14. *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.

Model Rules, supra note 7, Rule 1.6.

15. The *Model Code* permitted a lawyer to disclose a client's intention to commit a crime regardless of the seriousness of the offense. See *Model Code, supra* note 9, DR 4-101(c)(3), DR 7-102(b).

16. The proposed *Model Rules* did not require a lawyer to make a disclosure when his client intended to commit a criminal act, but it provided protection in situations where the lawyer chose to make such disclosure if he "reasonably believes such action to be in the best interest of the organization." *Model Rules, supra* note 7, Rule 1.13(c) (Final draft 1982), reprinted in 68 A.B.A. J. 1411 (Nov. 1982).

17. See Flaherty, *supra* note 10, at 9.

direction. Although Rule 1.6 was amended by the House of Delegates to be stricter than the proposed Kutak rule, lawyers in California believe that the adopted rule still affords "too little protection to lawyer-client confidentiality."¹⁸ Florida, with its history of liberal disclosure rules, will probably follow the New Jersey approach. The District of Columbia, traditionally in line with the California view, will probably stay with stricter confidentiality rules.¹⁹ The ethics committee of the New York State Bar felt, at first, that the proposed disclosure rules were too broad, but now it objects to the adopted version from the opposite viewpoint. "If we complain about the present Model Rules 1.6 and [related confidentiality provision] 4.1, it is not because of the direction taken by the ABA's House, but because in our judgment it may have gone too far."²⁰

Even the format of the *Model Rules* troubles lawyers concerned with the uniformity of state codes. The *Model Code* contains disciplinary rules and ethical considerations. The disciplinary rules are rules that lawyers are required to follow; the ethical considerations are hortatory provisions that serve as guidelines and are not the basis for disciplinary actions. The *Model Rules* erase these divisions. It's the restatement format that makes the *Model Rules* clearer than the *Model Code*.²¹ However, some lawyers are concerned that the merging of mandatory and aspirational provisions by the *Model Rules* will provide many more bases for interstate conflicts in the disciplining of lawyers and will enlarge lawyers' liability for malpractice.²²

Although it is too early to tell what problems will face the environmental practitioner in a multi-state situation, it seems clear that such a practitioner must carefully review the states' codes of ethics or take the risk of disciplinary action.²³

18. Flaherty, *supra* note 10, at 9.

19. *Id.*

20. *Id.*

21. *Id.*

22. Flaherty, *supra* note 11, at 10.

23. The confusion and potential risk of disciplinary actions caused by non-uniform state codes of ethics are greater in those states adopting Model Rule 8.5: "[a]

III. Attorney Competence

Every code of conduct for attorneys contains a section which recites the obligation of attorneys to be competent in the fields in which they profess to specialize.²⁴ In the environmental field, however, it may be extremely difficult for an attorney to measure his own competence or for the client to measure the adequacy of his lawyer's services.

Since courses in environmental law only began to be taught in United States law schools in the early 1970's, many of the practitioners have never had formalized environmental training. Many practitioners were originally litigators focusing on relatively narrow issues such as standing to sue or the need for an environmental impact statement. But as the number and complexity of environmental laws increased, these practitioners and lawyers — trained in other fields — found it difficult to acquire the broad educational foundation needed to competently practice environmental law.

Nevertheless, as Professor Robinson states, "[a]n attorney should not practice environmental law narrowly."²⁵ In addition to legal training, considerable scientific knowledge may be required to adequately assess an environmental problem. In fact, many corporations have environmental compliance matters administered by a scientist or an engineer rather than a lawyer because of the need to understand the nature of the problem. The environmental lawyer makes a serious mistake if he does not give adequate consideration to the impact of a particular course of conduct on all areas of the environment. For example, air pollution from industrial sources can be abated by "scrubbing" a plant's gaseous discharges to remove particulate matter or by concentrating the particulate matter and trapping it in filters. The former method creates a water pollution problem; the latter creates a solid waste disposal

lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." Model Rules, *supra* note 7, Rule 8.5.

24. See, e.g., Model Code, *supra*, note 9, EC 6-1.

25. Robinson, *Environmental Law - Ethical Problems*, N.Y.L.J., April 29, 1983, at 1 & 4.

problem.²⁶ Ecologists have long understood the interrelationships of the various elements of the environment, and the practicing environmental lawyer should strive to develop a similar understanding.

The environmental practitioner must also have some familiarity with the requirements of related laws. An environmental problem can give rise to worker health problems under the Occupational Health and Safety Act²⁷ or disclosure problems under the Securities Act of 1933²⁸ or the Securities Exchange Act of 1934.²⁹ It is essential for any lawyer in the environmental field, as well as other disciplines, to maintain his or her competence when practicing environmental law.

A final note regarding attorney competence is the question of the lawyer's own personal ideology. Until recent years, environmental law was generally practiced by those who believed, most fervently, in the importance of a strong environmental legal system. Its most prominent and expert practitioners chose not to represent clients on the industrial side of an environmental issue. They restricted their practices to one side, the environmental side, unlike practitioners in other highly regulated areas, like anti-trust or securities, where lawyers routinely represent either side of an issue. The traditional position of the ABA is that all persons deserve adequate representation, and the function of the lawyer is to assist in fulfilling the public's need for legal services.³⁰ The *Model Rules* recognize that a lawyer's views may not always be consistent with those of his clients. Rule 1.2(b) states that a lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral

26. See generally *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (a lengthy discussion of wet and dry flue gas desulfurization technology with explanations and sketches of scrubbing units and baghouses). The semidry or dry throwaway processes create solid waste disposal problems that are less severe than the disposal problems associated with sludges or liquid wastes generated in the wet processes. *Id.* at 323-25 & nn.69-80.

27. Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651 - 678 (1982).

28. 15 U.S.C. § 77(h) (1982).

29. 15 U.S.C. § 78(w) (1982).

30. Model Code, *supra* note 9, EC 2-1; see generally, *id.* Cannon 2; Model Rules, *supra* note 7, Rule 1.2 commentary, Rule 6.1.

views or activities.³¹ The question still remains whether a lawyer can competently advocate a position contrary to his own personal beliefs. If not, he cannot accept representation of that client. The *Model Code* recommends that a "lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."³² The *Model Rules* retain this recommendation and suggest that a lawyer withdraw from representation if he considers the objectives of the client repugnant or imprudent.³³ Unfortunately, this situation has hindered the development of adequate and competent legal services to represent the industries which must comply with environmental regulations.

Recently the trend has been reversing. More environmental lawyers are willing to represent corporations in actions involving interpretations of environmental laws and regulations. True maturity, however, will not be reached until a practitioner generally feels competent representing either side of an issue.

In summary, the practitioner of environmental law should (a) be aware that his knowledge of the environmental field may be severely limited and, therefore, should be willing to seek expert legal or technical advise in any situation; (b) be aware at all times of the impact of any environmental solution on other areas of the environment; (c) be continually updating his or her knowledge of the field; and (d) have some working knowledge of related laws in other areas.

IV. Conflicts of Interest

In addition to the conflict of personal ideology just described, the environmental lawyer is likely to face problems relating to conflicts of interest because of the frequency with which he represents multiple (and sometimes adverse) parties. Environmental enforcement actions often affect substantial numbers of people and stimulate multiple plaintiff and multi-

31. Model Rules, *supra* note 7, Rule 1.2(b)

32. Model Code, *supra* note 9, EC 2-30.

33. Model Rules, *supra* note 7, Rule 1.16(b)(3), 6.2(c).

ple defendant situations. In such cases, a lawyer must be aware of those circumstances which can give rise to conflict of interest problems.

The recurring situation where the client is the named party but not the party actually paying the bill represents a potential conflict problem.³⁴ Under the *Model Rules*, a lawyer may not accept compensation from a party other than the client unless: (1) the client consents after full disclosure is made by the lawyer; (2) there is no interference with the lawyer's independence or with the attorney-client relationship; and (3) the confidentiality of information relating to the representation of the client is protected.³⁵

Similar concerns arise where the named party is a loose collection of individuals and associations who have joined forces for the specific purpose of reaching a "common" result. On such occasions, unanimity on details, or even the ultimate result, may be difficult to obtain. Furthermore, disagreement regarding tactics in court litigation or agency proceedings is likely to occur when one or more members of a group retain their own counsel. It may be advisable for the environmental lawyer in this situation to resign his representation of all or part of the group. In fact, a lawyer may have an ethical obligation to do so.³⁶

A lawyer must be careful not to pursue solely the objectives of the most vociferous or well-funded member of the group if such pursuit would be detrimental to the representation of the other members. The professional judgment of the lawyer should be exercised for the sole benefit of his client and be independent of compromising influences and loyalties.³⁷ Whether the interests of different factions of a group are sufficiently diverse so as to impair a lawyer's professional judgment is a question left to the discretion of the lawyer. All doubts concerning the propriety of representation should be

34. Model Code, *supra* note 9, DR 5-107(A).

35. Model Rules, *supra* note 7, Rule 1.8(f).

36. Model Code, *supra* note 9, EC 5-15.

37. *Id.* EC 5-1, EC 5-14, EC 5-515, DR 5-105.

resolved before accepting employment.³⁸

In the large law firm setting, conflicts can arise when a firm represents two clients with competing environmental interests. For example, a conflict can arise when a firm represents a paper company and an electric utility interested in filing for permits in the same Air Quality Control Region.³⁹ Although a lawyer may not represent a client if the representation is directly adverse to the interests of another client, he may represent clients whose interests are only generally adverse, like those of competing economic enterprises.⁴⁰ Relevant factors that should be considered when determining whether sufficient adversity exists include: "the duration and intimacy of the lawyer's relationship with the client or clients involved, the function being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise."⁴¹ Model Rule 2.2 lists prerequisites that must be met before a lawyer may represent two or more parties with potentially conflicting interests: the lawyer must consult with each client concerning the implications of common representation, he must reasonably believe that the matter can be resolved on terms compatible with the clients' best interests, and he must reasonably believe that common representation can be undertaken impartially.⁴² The lawyer should do his best to resolve potentially conflicting objectives by developing the parties' mutual interests since the alternative is that each party may have to obtain separate representation at additional expense.

The ethical problem of determining who is the actual client can occur frequently when a lawyer represents a corporate or governmental entity. In these situations, both inside and outside counsel must deal with directors, officers, employees, shareholders, or other constituents of the organization, but not with the actual legal entity. If the lawyer becomes aware

38. *Id.* EC 5-15.

39. Maupin, *Environmental Law, the Corporate Lawyer and the Model Rules of Professional Conduct*, 36 *Bus. Law.* 431, 458 (Jan. 1981).

40. Model Rules, *supra* note 7, Rule 1.7 and accompanying comment.

41. *Id.*

42. *Id.* Rule 2.2.

of an officer or employee who has committed or will be committing an illegal act, he must decide quickly whether this person is the actual client and, if not, whether he or she is entitled to attorney-client confidentiality. The *Model Code* states that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."⁴³ A lawyer's professional judgment should not be influenced by the personal desires of a constituent. The *Model Rules* retain this philosophy, but recognize that a corporation or organization can only act through its officers, directors, employees, etc. Therefore, communications between a lawyer and constituents of the organizational client are protected by attorney-client confidentiality.⁴⁴ In the situation where the lawyer is aware of illegal conduct by a constituent of the entity, the lawyer shall take only those measures designed to minimize the risk of revealing organizational information to persons outside the organization. The lawyer should refer the matter to a higher authority within the entity if the constituent will not reconsider his or her action.⁴⁵ If the highest authority insists upon action which is clearly a violation of law and not in the best interests of the organization, the lawyer may resign.⁴⁶

There is no real solution to these problems; a lawyer can only use his best judgment. Unfortunately, it is very possible that a lawyer's independent judgment as to whether or not a conflict exists could impact detrimentally on his reputation or his practice and may even subject him to disciplinary actions.⁴⁷ The best defense for a lawyer against any of these problems is to establish and maintain good communication with members of the multiple client and constituents of the organizational client. In particular, the lawyer should discuss

43. Model Code, *supra* note 9, EC 5-18.

44. Model Rules, *supra* note 7, Rule 1.13 commentary.

45. *Id.* Rule 1.13 (b)(3).

46. *Id.* Rule 1.13 (c). If the constituent's illegal act is likely to result in imminent death or substantial bodily harm, the lawyer may reveal information to the extent necessary to prevent such consequences. *Id.* Rule 1.6 and accompanying comment.

47. Model Code, *supra* note 9, DR 5-107 (A),(B).

the potential conflict problems as he or she sees them and indicate the limits of his or her representation.

V. Disclosure

The environmental attorney regularly faces ethical disclosure issues of greater magnitude than those faced by his brethren in other fields of law. The disclosure or non-disclosure of a client's criminal or harmful conduct can have consequences of enormous proportions. A single company can face civil liabilities amounting to millions of dollars under a single environmental law. In addition, a violator can face substantial fines, from \$10,000 to \$50,000 per day for each violation, and prison terms up to two years.⁴⁸ The financial impact of a violation to a corporation can be disastrous. On the other hand, the consequences of non-disclosure can be worse. The discharge of a toxic chemical can have a severely detrimental effect on the health and safety of millions of people. In fact, the discharge of almost any pollutant creates some risk of harm to the public since the resulting environmental effect is often cumulative and persistent. Hence, the environmental lawyer often must make a difficult choice between following the strict standard of client confidentiality and not disclosing a potentially harmful act, or following the best interests of the public (and possibly his client) and disclosing the harmful act.

Disclosure obligations of the client arise in several ways: under periodic reports required by the Securities and Exchange Commission,⁴⁹ the stock exchanges⁵⁰ and various environmental laws;⁵¹ or under reports which must be made upon the happening of material adverse events such as those re-

48. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1319 (c)(1) (1982) (repeat violators face fines "of not more than \$50,000 per day of violation or imprisonment for not more than two years or both").

49. 15 U.S.C. § 78m (1982).

50. *See, e.g.*, [2 Exchange Act] Fed. Sec. L. Rep.(CCH) para. 23,143 (Feb.11, 1981). Companies making application for the listing of their securities on an exchange enter into a listing agreement with the exchange by which they commit themselves to a code of performance. The citation refers to reporting requirements contained in the listing agreement outlined in the New York Stock Exchange Company Manual.

51. *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2607 (1982).

quired by the Occupational Health and Safety Act,⁵² the Consumer Products Safety Act,⁵³ or various provisions of securities or environmental regulations.⁵⁴ As discussed earlier, the environmental lawyer practices at his peril if he does not understand these interrelated obligations.⁵⁵ A detailed discussion of disclosure requirements under environmental or interrelated laws is beyond the scope of this article, but the issue remains the same regardless of which statute imposes the obligation. If a lawyer decides that disclosure of a particular act or event is required by the law and his client refuses to make such disclosure, what course of action is the lawyer permitted or obligated to pursue?

"Blowing the whistle" on a client whose conduct is in violation of the law and who has been advised of the illegality of such conduct, was the most controversial issue raised during the debates of the *Model Rules*. As stated by Robert Kutak, the head of the Kutak Commission, "[t]he shield of confidentiality, if you will, cannot become a sword by which the client accomplishes through a lawyer what the law would forbid the client himself. Nor must it be a shackle, hopelessly entwining a lawyer as co-conspirator in a seriously criminal scheme."⁵⁶ In balancing the competing duties a lawyer owes to his profession and the public, the Kutak Commission proposed rules which did not require disclosure of a client's unlawful behavior, but which protected the lawyer if disclosure was made with the reasonable belief that such action was in the best interests of the organization.⁵⁷ ABA rejected this provision and, instead, voted an almost absolute prohibition against disclosure.⁵⁸ The attorney was only given the option of resigning if

52. 29 U.S.C. §§ 651 - 678.

53. 15 U.S.C. §§ 2051 - 2083.

54. See, e.g., Interpretative Releases Relating to the Securities Exchange Act of 1934 and General Rules and Regulations Thereunder, 17 C.F.R. §§ 231, 241 (1984) (both sections refer to releases calling attention to requirements for disclosure of legal proceedings relating to material matters involving the environment).

55. See *supra* Attorney Competence section.

56. Kutak, *Model Rules: Law for Lawyers or Ethics for the Profession*, 38 Record of the Association of the Bar of the City of New York 140, 147 (March 1983).

57. See *supra* note 16 and accompanying text.

58. See *supra* note 14 (quoting Model Rule 1.6); see generally N.Y. Times, Aug.

he could not persuade his client to cease the unlawful conduct.⁵⁹

It is submitted that prohibiting an attorney from disclosing acts of the Board, or other insiders when the Board refuses to act, which are seriously detrimental to the interests of the stockholders is not in accordance with the modern trend of corporate and securities law. When the harm is clear, lawyers should have the ability to reveal it. "The obligation arises, not from some duty to third persons, but from the obligation of the lawyer to the organization itself when clearly at risk from the actions of one of its parts — even if that part be its board of directors."⁶⁰

This is a gray area, and the lawyer himself may realize that reasonable men could disagree with his conclusions. Several factors should be considered when determining whether an ethical problem is serious enough to warrant resignation of job or client:

1. Does the risk involve injury to persons or property?
2. Is there a clear risk of biological harm or violation of the law, or does the risk depend upon subjective definitions of words like "materiality" or "intent"? In other words, how sure is the lawyer that he or she is correct?

3, 1983, at 1; Wall St. J., Aug. 3, 1983, at 4; Wall St. J., Sept. 16, 1983, at 35 (public reaction to the adopted provision).

59. The accompanying comment to Rule 1.6 states that "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)." Model Rules, *supra* note 7, Rule 1.6. Rule 1.16 states:

Declining or Terminating Representation

(a) Except as stated in paragraph (c) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if:

(1) the representation will result in violation of the Rule of Professional Conduct or other law . . .

(b) except as stated in paragraph (c), a lawyer *may* withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud.

60. Kutak in speech before the Association of the Bar of the City of New York.

3. To what extent does the client's decision involve a business risk?
4. Is the lawyer in a position to know all the facts?
5. Does the risk involve harm to shareholders, management, or employees?
6. What has been the lawyer's level of participation?
7. What will be the effect on third parties or on society?

VI. Conclusion

The *Model Code* was entitled "Code of Professional Responsibility"; the new *Model Rules* are entitled "Model Rules of Professional Conduct" (emphasis supplied). This is a very meaningful change. "Conduct" expresses the new and broader function of lawyers as "officers of the law," responsible for their conduct wherever their professional responsibilities or activities take them. The *Model Rules* have recognized the evolution of the lawyer's non-adversarial role as advisor and counselor.⁶¹

In today's society, lawyers are indispensable to corporations and often exert powerful influence in promoting corporate ethical conduct. The law is perceived in the corporate world, and elsewhere, as an embodiment of society's ethical judgments. The senior inside lawyer is often viewed as the conscience of the corporation and his recommendations may have a critical impact on the future direction of the corporation and the public perception of the corporation. John J. Creedon, President and Chief Executive Officer of Metropolitan Life Insurance Company and a member of the New York State Bar stated: "[i]f there ever was a time when the general counsel could restrict himself to strictly legal matters, that time has long since passed When the general counsel formulates his advice, I expect that he will consider the impact of various alternative courses of action on the company, . . . government, and the public at large."⁶² Lawyers no longer have the luxury of giving purely legal advice; their impact goes

61. Model Rules, *supra* note 7, Rule 2.1.

62. Creedon, *Lawyer and Executive - the Role of General Counsel*, 39 Bus. Law. 25, 30 (Nov. 1983).

far beyond the law courts. The *Model Rules* recognize that a lawyer's advice can affect a great many persons other than his or her clients.

Developing rules of conduct, however, is an evolutionary process. The recognition of the current realities of the practice of law by the *Model Rules* is just a preliminary stage. The *Model Rules* must continue to change and adapt if they are to provide a set of guidelines which accurately reflect the practice of law in the 1980's. No doubt the present version will undergo many changes as states debate and modify it to accurately reflect the practice of law in their own jurisdiction.

Many issues were left on the floor at the ABA convention in San Francisco. The absence of any firm standard for a lawyer's pro bono obligation is appalling. The lack of any concrete program obligating the bar to provide legal services to the poor is shocking. The failure to define professional competence in any rational way can only lead to further litigation. Conflict of interest in the large law firm or corporate setting must be defined more realistically. Most importantly, ABA has failed once again to deal firmly and adequately with the critical issues of disclosure when a client intends to commit a future crime. Until ABA and the various states deal with this issue, individual practitioners must attempt to provide their own solutions. A recent issue of *Legal Times* reported the following solution by a distinguished member of the bar — Harry H. Lipsig: "When one of his clients 'lied like the blazes' on the stand during trial once, an angered Lipsig said in his summation 'I wouldn't believe my client on a stack of Bibles — but how could you fail to believe my two witnesses,' whose testimony corroborated the facts Lipsig had introduced."⁶³

Some guidelines to these problems may be helpful. "Sound legal advice should lead to a decision that is morally and ethically sound as well as legally acceptable. The advice should be textured to include the social purposes the law is intended to serve and the social expectations flowing therefrom."⁶⁴ Lawyers carry the standards of their profession into

63. *Legal Times* of N.Y., Sept. 19, 1983, at 26.

64. Williams, *The Role of Inside Counsel in Corporate Accountability*, [1979-

the marketplace and practice their trade for all to see. Their ethical standards are shared values which give authenticity and integrity to their profession. It is not enough that lawyers view these standards as lawyers; they must look at them through the eyes of the public. "The lawyer performing a vital role in the corporate world can no longer disclaim responsibility for the results of his actions on the pretext that he is merely executing the desires of his client."⁶⁵ The lawyer must suggest a course of action that is in the best interest of his client and society.

This is not to imply that a lawyer should have final say in any course of client conduct. Lawyers should certainly avoid replacing management as the locus of decisionmaking authority. Such a role would alienate a lawyer from his client and make clients or constituents reluctant to disclose their activities. Certainly a lawyer's solution in this area should not inhibit the flow of information between client and lawyer. An atmosphere of trust and confidence must be preserved.

Lawyers can only serve the public so long as the public has need for them. Alternatives to using lawyers are springing up with greater frequency as the public wearies of the high cost and interminable delays of the present legal process. Thus far, the broad public support for the preservation of the environment has preserved the public need for environmental lawyers, but public needs do change.

"We lawyers, as officers of the law, exist not for our own sakes, but for our potential and actual clients and for all non-lawyers. To say that we serve a public role means that the public has a use for us. We more than others should act to optimize that use."⁶⁶

1980 Decisions] Fed. Sec. L. Rep. (CCH) para. 82,318 (Oct.4, 1979).

65. Frank, *A Higher Duty: A New Look at the Ethics of the Corporate Lawyer*, 26 Clev. St. L. Rev. 337 (1977).

66. Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 Am. B. Found. Research J. 519, 535.