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**LOYALTY, INDEPENDENCE AND SOCIAL RESPONSIBILITY IN
THE PRACTICE OF ENVIRONMENTAL LAW**

DOUGLAS R. WILLIAMS*

INTRODUCTION

Lawyers have become the hard-edged warriors of modernity, displaying deep skepticism in the possibility of obtaining practical guidance from their publicly declared polestar, “justice.” “Doing the right thing” is radically indeterminate—“it all depends;” the “right thing” may simply reduce to whatever can be done to vanquish the enemy in particular battles. The objectives of such battles never seem subject to serious scrutiny. “The law” in this war—the rules of engagement—becomes something infinitely manipulable, and the more lawyers are paid, the more manipulable the law apparently becomes. A genuine effort to understand the practical concerns that gave rise to particular “rules” and “standards” is deliberately shunned in favor of whatever opportunistic meanings may be inserted into the capacious caverns of legal rhetoric. (Concern about statutory purpose is, after all, a highly political enterprise, a business carried forward by the other, split-off personalities of the legal world—*i.e.*, the “mere” theorists in the academy many of whom have chosen to distance themselves from the trenches where “real” legal work gets done.) Lawyers generally do not try earnestly and in good faith to conform their actions and advice to fit the trace of purpose that might dangle loosely from the crude symbols that constitute such rules and standards. Instead, lawyers seek to understand how the very crudity of those symbols can be exploited to avoid obligation and to secure relative advantage. In the process, lawyers themselves become “the law,” sustaining practices suffused with norms and expectations that, if accompanied with the right sized check, a convincing case can be assembled in defense of (nearly) any position. Is this description of lawyers plausible? Is this description fair? Is it “true”? Sadly, it is “real” in the consequential sense that it is the way lawyers are constituted in popular culture. Can we assign this public characterization to a simple misunderstanding of the lawyer’s role? Is this a communication problem not unlike the problems encountered in trying to provide useful

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information to the public about real or imagined environmental risks?¹ Does the “if-they-really-understood-what-lawyers-do-they-would-not-judge-us-so-harshly” response capture the heart of the bar’s public “identity crisis”?

The answer, of which one cannot be completely sure, depends not only on whether the public properly understands the lawyer’s role, but on two additional things: acceptance of the claims of need that lawyers offer to justify many practices that would otherwise stand as arbitrary; and respect for the values that lawyers embrace in articulating such claims. Stated more simply, the “misunderstood” defense cannot rely on the public’s relative lack of technical expertise; it must further show that the means (actual conduct) engaged by lawyers are reasonably related to a legitimate social end. Roles are, after all, not self-legitimizing; nor can they be legitimated on the part of those who use them by resort to claims of special privilege.

The target of this rather acerbic introduction is two ideas central to lawyer identity: independence and confidentiality. The public does, I believe, understand and accept the notion that the primary responsibility of a lawyer is to protect her client’s legitimate interests. But they may doubt whether such protection requires the kind of “hired gun” mentality that is sometimes encountered among lawyers. They may see as defensive the bar’s most basic mantra: “zealous advocacy.”

The defense of unrestrained advocacy usually emerges from a set of assumptions (or assertions) about the topography of the social landscape. First, despite numerous particular examples to the contrary, a general equilibrium obtains in matters legal, ensuring that all positions are competently and zealously urged upon authority. Second, that an appropriate and workable amount of “satisficing” of all legitimate interests is accommodated in the process. This is the “economic” view of our legal system and of lawyers’ role in it: if consistently and tirelessly observed by members of the bar, zealous advocacy will produce, through some invisible-hand-like mechanism, tolerably just social conditions.² But how can advocates of such a view respond to Sissela Bok’s observation that:

By their nature, such arguments are difficult to prove or disprove. In part, their elusiveness stems from an underlying . . . assumption that someone or some process, independent of the discordance among participants, will set

1. Baruch Fischhoff, *Valuation and Risk: Public Values in Risk Research*, 545 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 75 (1996).

2. See generally ABA General Practice Section, *Proposed Revisions of Model Rules of Professional Conduct*, 1 A.B.A. MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT, Item 519, at 5 (1982) (for the bar’s expression of this notion); PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, *reprinted in* 44 A.B.A. J. 1159, 1161 (1958). It is criticized by Professor William Simon, who describes this belief as the “ideology of advocacy.” William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, WIS. L. REV. 29, 34-39 (1978).

everything to rights. . . . According to such . . . assumptions, the system works best when individual members act as their role demands without worrying about the overall picture.³

Is faith in some mysterious equilibrating force a sufficient basis for our endorsement of the ethics of zealous advocacy?⁴ The public isn't buying this mysticism, and perhaps we should understand better the why's of that rejection. Are we merely obstructionists or experts in exploiting legal "loopholes" that ordinary, good citizens should choose not acknowledge? It is common to hear complaints that lawyers will employ any means at their disposal actively to shape the legal system and its requirements in ways that corrupt the public-regarding aspects of law?

It may be tempting to say that the public simply misunderstands what the law requires. I believe that an answer of this sort, while perhaps true to some extent, does not go to the heart of the problem, and in a perverse sort of way, validates the public concern. The public may understand the lawyerly point that laws can be interpreted in myriad ways, and thus, many different if not completely inconsistent (and sometimes surprising) practices can be described as "legal." The objection may be, instead, that lawyers seem to lack the integrity and good faith to provide interpretations that can reasonably be said to affirm a publicly defensible understanding of the purpose of particular laws.

The perversity of the "public doesn't understand the law" answer to public distrust of lawyers rests on its implicit claim of privilege. The argument suggests that "the law" is something that only lawyers are properly equipped to understand. If lawyers are privileged in this way, the public may be suggesting the privilege must be tempered with a responsibility that seeks to affirm the public-regarding nature of law; otherwise, lawyers' understanding of law lacks any legitimate claim to be binding. The public may believe that it is precisely this responsibility that lawyers have shunned. Lawyers' claims of privilege, as a consequence, stand naked as mere power.

This perception of lawyers is, of course, not a new one.⁵ Consider Justice Brandeis' remonstrances to the Harvard Ethical Society in 1905:

3. Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913, 928-9 (1990).

4. See Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595-605 (1985).

5. See Plato, *Theaetetus*, in THE DIALOGUES OF PLATO 143, 172-75 (B. Jowett trans., 1937):

But the lawyer is always in a hurry. . . . He has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous. His condition, which has been that of a slave from his youth upward, has deprived him of growth and uprightness and independence; dangers and fears, which were too much for his truth and honesty, came upon him in early years, when the tenderness of youth was unequal to them, and he has been driven into crooked ways; from the first he has practiced deception and retaliation, and has become stunted and warped.

It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. . . .

The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations. . . . They have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public, as it is in litigation between private individuals.⁶

Implicit in Brandeis' remarks is the assumption that lawyerly responsibilities are heterogeneous. He suggests that there may be ethical constraints on lawyers who practice in areas of public law that do not apply to lawyers whose fundamental role can fit within the kind of paradigm of the criminal defense attorney. Brandeis' remarks have resurfaced in recent legal debates.⁷ Importantly, concerns not unlike those expressed by Justice Brandeis have also been raised about the practice of environmental law. In fact, over the past few years, commentary makes the point that environmental practice is quite unlike areas of practice in which the unrestrained advocacy model seems appropriate and, accordingly, different ethical considerations and perhaps state regulation ought to be considered. Thus, in a 1994 issue of the *Harvard Law Review*, it was argued that the practice of environmental law is a likely target

6. LOUIS BRANDEIS, THE OPPORTUNITY IN THE LAW, IN BUSINESS—A PROFESSION 313, 321-23 (1914) quoted in Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 2-3 (1988). Justice Brandeis' concerns find more recent expression in the remarks of former Chairman of the Securities and Exchange Commission, Harold Williams:

There is . . . a disturbing trend among some corporate lawyers . . . to see themselves as value-neutral technicians. True, ethical dilemmas can be avoided if one's job is viewed as profit-maximizing or as uncritically representing—and not questioning or influencing—the corporate client's interests so long as they are not illegal. In many ways, eliminating these tensions and professional responsibilities would be a comfortable and less contentious alternative. But indifference to broader considerations would not be professional. . . . To correct this tendency, the bar must place greater emphasis on the lawyer's role as an independent professional—particularly, on his responsibility to uphold the integrity of his profession.

Harold M. Williams, *Professionalism and the Corporate Bar*, 36 BUS. LAW. 165-66 (1980) quoted in Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 4-5 (1988).

7. See, e.g., Geoffrey Hazard, *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395 (1993).

for state regulation, mirroring attempts to regulate the securities bar. Two reasons were offered in support of this claim:

First, compliance with environmental law implicates the classic “moral hazard” problem that arises when decision makers do not bear the full costs of their actions. As in the banking and securities context, the public often bears most of the cost of an environmental violation. Federal agency regulation of lawyers could decrease the likelihood of environmental disasters by encouraging lawyers to counsel strict compliance with environmental laws and to cooperate with regulators.

Second, environmental law . . . is among the most sophisticated areas of legal practice. Compliance with technical requirements of environmental law typically requires the advice of counsel. In preparing documents for their clients to submit to federal regulators, lawyers play a crucial role in the interaction between clients and federal regulators. [E]specially because they are situated between clients and their environmental consultant auditors, lawyers are likely to possess information about their clients that is difficult and costly for federal regulators to obtain independently. Thus, environmental law practice is particularly suited for gatekeeper and whistleblower enforcement strategies.⁸

Consider also the comments of William Futrell, President of the Environmental Law Institute:

Many aspects of environmental practice may [like securities practice] be . . . ill-suited to the adversary model of professional legal ethics, with its creed of zealous advocacy with little regard for the public interest or moral norms. In fact, the practice of environmental law demands even stronger regard for the public interest than does securities or banking practice. Environmental statutes are motivated by a broad need to protect the public, often from harms that may not be immediate but are far-reaching in their ability to disrupt and destroy. . . .

Environmental law cannot protect society unless environmental lawyers ensure that it does so. Guidance on how to resolve the conflicting demands of client advocacy and protection of the public interest in environmental protection will benefit not only the legal profession, but society as a whole.⁹

Against the backdrop of these statements and of the apparent public distrust (or disgust) with lawyers, it may be useful to ask whether the bar has failed in its efforts to provide appropriate and practical ethical guidance for those who practice public law generally and environmental law in particular. If that question seems a bit too ambitious (and for my purposes here it certainly is), we may at least examine some of the more controversial aspects of self

8. Note, *Developments—Lawyers’ Responsibilities*, 107 HARV. L. REV. 1547, 1627 (1994).

9. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825, 837-38 (1994).

regulation that might be contributing to the sense that some lawyers are not sufficiently regulated or constrained by ethical standards.

Let me state at the outset that questions concerning the proper scope of self regulation, on the one hand, and the desirability of state regulation of legal practice, on the other hand, are complex questions informed not only by perceptions of the ethical role of the lawyer but by a host of social, economic, and frankly political/ideological considerations.¹⁰ In this short essay, I will look at the Model Rules of Professional Conduct as they relate to two specific issues and attempt to discern what image of a lawyer the rules project and the ethical constraints they entail. The issues I will discuss relate to a lawyer's independence and the confidentiality of information relating to the representation of clients. Section I takes up the issue of independence. Section II then turns to issues of confidentiality and the circumstances in and means by which a lawyer may, on ethical grounds, choose to distance himself or herself from a client because of the social consequences of the client's behavior. I will then conclude with some suggestions for reforming the Model Rules' extreme limits on the lawyer's ability to "blow the whistle" on the environmental practices of clients that threaten harm to third parties.

I. THE ENVIRONMENTAL LAWYER AS TRUSTED AND LOYAL ADVOCATE AND AS AN AGENT OF INDEPENDENT JUDGMENT

The reigning ideal of legal practice is summed up in ideas of "professionalism" and the importance of recognizing special ethical rules that depart from "ordinary ethics" in differentiating the unique role of lawyers from that of others.¹¹ The idea of "professional ethics," then, suggests that there are courses of conduct for lawyers that are governed by different standards than those applicable to the same conduct engaged in by others. Or as, Richard Wasserstrom says, "it is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive."¹²

While agreement on what professionalism means or requires may be difficult to obtain, it has been suggested that at the very least the ideal "presupposes a substantial degree of public commitment and private autonomy."¹³ Despite the occasional argument that lawyers should

10. For an extensive exploration of these issues, see Gordon, *supra* note 6.

11. On "role-differentiated" ethics and the legal profession, see THE ETHICS OF LAWYERS xii-xiv (David Luban, ed. 1994); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). See also A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980) (dealing with role-differentiated ethics in general).

12. Wasserstrom, *supra* note 11.

13. Rhode, *supra* note 4, at 592.

hardheadedly treat their “business as a business” informed by the “morals of the marketplace,”¹⁴ most lawyers, at least in their more reflective moments, think of their work as aspiring to the requirements of justice and as a distinctly public spirited undertaking.¹⁵

Given the realities of today’s marketplace and the manner in which the practice of law often is structured, the “public spirited” aspects of professionalism may as a practical matter be very hard to live up to. There are, however, things that the bar can and has done to promote the objectives of professionalism. Among them is the development and enforcement of professional rules of conduct. These rules express the collective judgment of the bar concerning the ethical role of the lawyer and the limits within which a lawyer’s discretion may be exercised. Ethical rules, representing norms to which lawyers presumably are committed, might be viewed as setting forth the necessary, if not sufficient, conditions for promoting the ideal of the professional. The rules project into the community the aspirations that lawyers assign to their social roles and also alert clients to the kinds of services they can and cannot reasonably expect lawyers to perform on their behalf.¹⁶ Moreover, at least in some cases, the “law” articulated in the rules of professional conduct may strongly influence the “law” applied by courts and other state officials, most of whom are themselves lawyers.¹⁷

The Model Rules of Professional Conduct articulate the ethical dimensions of lawyering from the perspective of the American Bar Association. They explicitly endorse the idea of a lawyer as an independent moral agent. Thus, in Rule 1.2(b) “[a] lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or

14. King, *The Law Gets Down to Business*, BOSTON GLOBE, May 17, 1983, at 37, quoted in Rhode, *supra* note 4, at 593.

15. Morris Harrell, *Preserving Professionalism*, 69 A.B.A.J. 864 (1983).

16. For some provocative thoughts about the connection between the bar’s ethical codes and public perceptions of lawyers, see Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913 (1990).

17. For an exploration of ethical rules and state rules as competing systems of “law” and how these systems interrelate, see the marvelous article by Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992). Perhaps the most dramatic example of the manner in which codes of professional ethics may impact state law is *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), in which the California Supreme Court imposed a tort duty on psychotherapists to disclose a patient’s intention to cause harm to a third party, in part by noting that such disclosure is “not a breach of trust or a violation of professional ethics as stated in the PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (1957) section 9: ‘A physician may not reveal the confidence entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.’” *Id.* at 441-42 (emphasis added).

activities.”¹⁸ More pertinently, Rule 2.1 provides: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”¹⁹

The commentary to this rule expresses what all lawyers know to be largely true:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.²⁰

One of the interesting things about environmental lawyers that I have noticed personally is that they seem to align their conceptions of what morality or the public interest requires with the interests of their clients. There may be deep psychological reasons for this alignment,²¹ but it does suggest that there are real difficulties facing lawyers who do desire to bring some measure of *independent* judgment in the form of a sense of the community’s moral or political commitments earnestly to bear on the advice he or she imparts to clients. It seems obvious to me that independence requires considerable reflection and courage, and sometimes it may entail a willingness to say to your client things that he or she may frankly prefer not to hear or even think about. Independence may even be costly both in terms of relations with clients and peers and the lawyer’s ability to generate business. These thoughts are mere speculation, reflective only of my rather limited experience in environmental practice.

18. Consider also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.2(c) (1995): “A lawyer may limit the objectives of the representation if the client consents after consultation.”

19. *Id.* at Rule 2.1.

20. *Id.* at Rule 2.1 cmt.

21. See Deborah Rhode, *Institutionalizing Ethics*, 44 CASE. W. RES. L. REV. 665, 686 (1994):

Individuals are more likely to retain information that reflects favorably on themselves and to form positive impressions of someone on whom their own success partly depends. So too, the very act of advocating a particular position increases the likelihood that proponents will themselves come to adopt that position. In many practice settings, these cognitive biases, together with financial self-interest, collegial pressure, and diffusion of responsibility inevitably skew ethical judgment. Such distortions can affect lawyers’ sense of collective as well as personal responsibility. The more closely that individuals identify with their professional role, the less sensitive they may become to problems in its normative foundations or practical consequences.

To explore how independence may bear practically on environmental law, consider the following hypothetical: manufacturing concern XYZ has recently redesigned its production process to achieve greater efficiencies. Management informs you that the modifications are “minor” and may not even be noticeable to an otherwise informed observer (read: environmental enforcement agencies). One result of these design changes is the generation of a waste product, call it “strange stuff.” Management insists that strange stuff is “almost identical” to a waste product generated by the firm’s old processes and that nothing in the process changes should render the strange stuff any more harmful than the old waste.

The old waste product was not a “listed” hazardous waste under EPA regulations promulgated pursuant to Subtitle C of the Resource Conservation and Recovery Act (RCRA).²² Nor did the old waste display hazardous characteristics when it was subjected to extensive testing by XYZ.²³ Thus, the old waste was not subject to the stringent requirements of RCRA Subtitle C.²⁴ Management of XYZ asks you whether it is required to treat the strange stuff any differently than it treated the old waste.

The “narrowly legal response” may go something like this. You inform the client that if the waste is not listed as hazardous in EPA’s regulations, it is the responsibility of XYZ to determine whether the waste is subject to Subtitle C requirements.²⁵ (Suppose here that it is not a listed waste.) You then describe the approved methods for making that determination, one of which is to allow the client to rely on its “knowledge of the hazard characteristic of the waste in light of the materials or the processes used.”²⁶ The client then asks, “Well, because the new stuff is almost identical to the old stuff and because the process changes were minor, we can rely on our knowledge of the old stuff to conclude strange stuff isn’t hazardous, right?”

22. 42 U.S.C. §§ 6901 – 6992k (1994). Section 6921(b)(1) directs EPA to “promulgate regulations identifying the characteristics of hazardous wastes, and listing particular wastes . . . , which shall be subject” to regulation under RCRA. *Id.* at § 6921(b)(1) (1994). EPA’s regulations listing hazardous wastes are found at 40 C.F.R. Part 261, Subpart D (1999).

23. Characteristics of wastes that will be deemed to render the waste “hazardous” are set forth in 40 C.F.R. Part 261, Subpart C (1999). The characteristics include: ignitability, *id.* at § 261.21; corrosivity, *id.* § 261.22; reactivity, *id.* § 261.23; and toxicity, *id.* § 261.24. Under EPA regulations, for wastes that are not specifically listed as hazardous wastes in EPA regulations, the generator of that waste must determine if it is hazardous by virtue of its characteristics by either testing the waste according to EPA-approved testing procedures or “[a]pplying knowledge in light of the materials or the processes used.” *Id.* § 262.11(c)(2) (1999).

24. Subtitle C imposes a variety of requirements on persons who handle or otherwise manage hazardous wastes, including generators, *see* 42 U.S.C. § 6922 (1994); transporters, *see id.* § 6923; and those who store, treat, or dispose of hazardous wastes. *See id.* §§ 6924-6925.

25. *See* 40 C.F.R. § 262.11(c) (1999).

26. *Id.* § 262.11(c)(2).

What does independent judgment informed by political, economic, social and political factors require in this situation? Rule 1.2 forbids lawyers to

counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This Rule is not particularly helpful here, because you really don't "know" one way or the other whether the strange stuff is hazardous.

Should you advise your client to investigate and provide more details about the modifications? This example puts the "independence" issue under at least some pressure. If, as part of what it means to be a professional, a lawyer should think of himself not only as a "representative of clients," but also as "an officer of the legal system and a public citizen having special responsibility for the quality of justice,"²⁷ he may, in the course of providing advice to a client be inclined to engage in what Professor Robert Gordon calls "purposive lawyering."²⁸

A lawyer adopting the purposive perspective would strive to maintain the spirit of the laws both inside and outside the context of representation, to assist in carrying out their "essential purposes" or "social functions," or at least to refrain from acting so as to subvert and nullify the purposes of the rules.²⁹ Such an approach might emphasize the integral role played by regulated parties in achieving the objectives of environmental law in general and RCRA in particular. It might suggest that XYZ ought not try to use the "knowledge" test for hazardousness in a paradoxical way that shields itself of the knowledge of whether in fact strange stuff is hazardous. A "good faith" approach to the problem might argue powerfully in favor of advising XYZ to conduct the appropriate tests on the strange stuff and to manage the waste in accordance with the results of such testing.

On the other hand, the generations of lawyers weaned on legal realism and the advocacy model may view the idea of purposive lawyering as a lot of pious romanticism, completely at odds with the intense extant competition both in the business and legal worlds. Or they may insist that "purpose" is in the eye of the beholder and disclaim any special expertise in discovering the truly "public regarding" purposes of the rules. They may even seize upon the skeptical claim that the idea of a "public interest" behind most environmental laws is nothing but an illusion, and indeed, defensively add that most regulations make no sense and do nothing to really protect the environment or public health. They may recall Justice Holmes' admonition:

27. MODEL RULES OF PROFESSIONAL CONDUCT, *Preamble: A Lawyer's Responsibilities*.

28. Gordon, *supra* note 6, at 23.

29. *Id.* (citations omitted).

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . .

[I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms and deductions, but he does want to know what the . . . courts are likely to do.³⁰

On this view, and providing that the lawyer believes that the client can make at least a plausible claim that its experience with the old waste would support resort to the “knowledge” test for hazardousness, it may be well to advise the client that the less it *really* knows about strange stuff the better off they may be legally. Additionally, the suggestion in Rule 1.2 that “a lawyer may discuss the legal consequences of any proposed course of conduct”—a phrase curiously placed after an admonition forbidding the lawyer to counsel fraudulent or criminal conduct and introduced by the word “but”—would seem to permit lawyers to advise the client frankly of the possibility of getting caught even if the strange stuff were later determined to be hazardous—a kind of “risk assessment.” I suppose this would be advice that takes into account “social” and “political” factors, *i.e.*, the kind of advice the Rules encourage lawyers to provide. Would it be “ethical” to advise the client that he may basically do as he pleases with the waste, given his “knowledge” claim and the low risks of enforcement action?³¹ What exactly are the “legal aspects” of the conduct in the hypothetical? Your answer may depend critically on whether you see the world through the lenses of a purposive lawyer or a realist. Would it matter that your experience with the client convinces you that the client is ready, willing and, eager to exploit any and all “loopholes” in environmental enforcement? A slightly different question is this: as a zealous advocate of the client’s interests, are you ethically *required* to provide this advice? And if you don’t so advise the client, but instead urge it to “do the right thing” and test the waste, isn’t it likely that XYZ will seek a more “realistic” or “hardnosed” assessment of the actual consequences of alternative courses of action from your legal competition who, we may assume, is all too willing to supply it?

I raise these issues not because I can confidently provide “right” answers to them. Nor, as an academic, can I confidently suppose that issues like these

30. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-460 (1897).

31. Consider Model Rule 1.2, Comment 6:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

are commonly encountered in the environmental lawyer's everyday practice. But it might be important to take a somewhat larger, societal view of this sort of practice. In that respect, I would like to advance several reasons that favor the "purposive lawyering" approach.

First, it is not at all clear that clients want their attorneys to advise them solely of the ways in which they can exploit vagaries and loopholes in environmental law. Many clients are acutely concerned with their public image; they may be desirous of projecting an image of good corporate citizenship, particularly with respect to environmental compliance. Indeed, many clients may come to value their lawyer's "public-interested" political and moral judgments, seeking to cast the lawyer in the role of a kind of corporate conscience, who brings to the table a discussion of public values that might otherwise never make an appearance.³² Unless we are to believe the cynical view that industry is more interested in marketing a good citizenship image than it is in living up to what that image requires, purposive lawyering may be viewed as valuable corporate service.

Second, like many other areas of practice, the success of our environmental laws is radically dependent on clients' good faith efforts to comply with the myriad of reporting and disclosure requirements mandated by those laws, as well as candid disclosure of information that is largely unavailable to regulators from other sources.³³ Clients' willingness to engage in such good faith efforts to fulfill these responsibilities is, I suspect, a function of what might be called the reigning "compliance culture" and, of course, economic pressures. If lawyers are instrumental in creating the kind of compliance culture that obtains in the field—a supposition in which I can express no real confidence—the bar on the whole might well be advised to admonish lawyers consistently to use their skills to encourage clients to do the "right thing."

This amounts roughly to the claim that the kind of advice lawyers give to their clients becomes a kind of unofficial "law" that clients will come to understand and in accordance with they will conform their conduct. To the extent that this unofficial law departs markedly from the more visible, public understanding of environmental law, lawyers can justifiably be charged with subverting the public interest or arrogating to themselves and their clients the power to decide what good environmental management or the "law" entails. I see great dangers for the profession in the creation and promotion of this kind of underground law or "compliance culture," not the least of which is, as

32. See Gordon, *supra* note 6, at 25.

33. A persistent criticism of industry in the environmental law context is its apparent willingness to present exaggerated data to regulators in an effort to water down regulatory requirements. See, e.g., Rosenberg, *Clean Air Amendments*, 251 *SCIENCE* 1546, 1547 (1991) (describing grossly inflated industry estimates of the costs of compliance with EPA's phaseout of lead in gasoline). I suspect, but do not know, that lawyers play an important role in fashioning such exaggerations.

suggested in the introduction, greater public distrust and the possibility of state regulation. Moreover, the substantive effect on those clients who do desire to engage in good faith compliance efforts may be severe demoralization. Indeed, if candid advice consistently includes discussion of the ways in which loopholes can be exploited, and that advice is coupled with an ideology that regards regulation adversarially as nothing more than official oppression designed to curtail the client's "liberty," the result may be a kind of "prisoners' dilemma." Even those clients that earnestly desire to do the "right thing" may find themselves suffering significant economic disadvantages relative to competitors who choose to play "hardball." In these circumstances, good faith compliance may not only be economically irrational, but perhaps morally supererogatory as well.³⁴

Finally, a view of lawyering that seeks to advance the client's interests by exploiting "any gap, ambiguity, technicality, or loophole, any not-so-obviously-and-totally-implausible interpretation of the law or facts"³⁵ may not only sabotage the public-regarding functioning of our environmental laws and demoralize public spirited clients, but in a legal culture that tends toward this view of its professional role may ultimately frustrate the purposes of their clients and will surely erode lawyers' confidence that they are, in fact, participating in a "noble profession." With respect to clients' interests, an environmental regime that consistently fails to deliver on its explicit and implicit promises because of a culture of noncompliance among regulated parties is an open invitation for public demands for more draconian governmental responses.

II. PUTTING INDEPENDENCE TO THE TEST: "BLOWING THE WHISTLE ON CLIENT MISCONDUCT THAT THREATENS THIRD PARTIES"

Perhaps the most controversial aspect of legal ethics as currently practiced in many jurisdictions is the rather extreme restrictions placed on a lawyer's ability to disclose information relating to the representation of a client, regardless of the social consequences of nondisclosure. Confidentiality is a "constitutional norm" in the bar's normative world,

so central to [lawyer's conception of their role] that the [bar] perceives threats to the norm as threats against the [bar] itself—against the [bar's] very

34. Gordon, *supra* note 6, at 20-21:

If clients, including those who prefer to be law-abiding even when nobody is likely to know when they are not, habitually consult lawyers who *recommend* only the most literal forms of compliance and widen every loophole far enough to drive a truck through, the lawyers will end up effectively frustrating the purposes of their clients as well as legal rules. The lawyer under such an ethical regime is by vocation someone who helps clients find ways around the law.

35. *Id.* at 20.

existence; that the [bar] sees proposals to change the norm as proposals to change the essence/character/ function of the [bar] itself; and consequently the [bar] feels extreme action in defense of the norm is justified.³⁶

One example of what might arguably be regarded as “extreme action in defense of the norm”³⁷ is Model Rule 1.6. The rule 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 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.³⁸

How “extreme” do you think this rule is? Consider Sissela Bok’s reaction to it:

The . . . Rule was bound to add to existing distrust of lawyers. Arguably, the collective exemptions granted by the Rule put lawyers in league not only with countless disparate crimes, but with conspiracies of a magnitude that make bank robberies look like petty theft by comparison. Critics regard as bizarre the Rule’s delineation of only one circumstance under which lawyers may violate confidentiality about crimes planned by their clients: when disclosure is necessary to “prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. . . .” These critics saw as equally bizarre the phrasing of the Rule’s exception so as to merely permit, but not require, lawyers to disclose such plans of wrongdoing.

Confronted with such a narrow interpretation of a lawyer’s responsibility, commentators both inside and outside the legal profession might ask: what about a duty to report criminal plans in cases where the victims will not

36. Koniak, *supra* note 17, at 1427.

37. *Id.*

38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.6 (1995).

otherwise be warned in time? What about criminal conduct likely to result in deaths that are not “imminent”? . . .

Such questions will hardly be deflected by the unsubstantiated and counterintuitive claims made in the comment to Model Rule 1.6:

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. . . .

Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Rhetoric of this kind merely reinforces the critics’ distrust. They see it as further evidence that lawyers guard their prerogatives, not to uphold the noble goals they claim for their profession, but simply to protect themselves and camouflage abuses from which they benefit.³⁹

We might want to test the extremity of the Rule by applying it in an environmental practice setting. Let’s return to my hypothetical about the strange stuff waste. Suppose management has directed that the waste be dumped in a surface impoundment located on XYZ property. A year later, and after continuous dumping, management decides to sell off this parcel of property. It covers and re-seeds the impoundment before offering the parcel for sale. In negotiations with a prospective buyer your client is specifically asked by the buyer if any hazardous wastes have ever been disposed of on the parcel. Your client assures the buyer no such disposal has occurred. Are you obligated, or even permitted, to disclose the existence of the strange stuff?

Rule 4.1, titled “Truthfulness with Persons Other than Clients,” provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁴⁰

Can you relieve yourself of any compunctions about your client’s statement by assuring yourself that you don’t “know” if the client’s statement is, in fact, materially misleading because it fails to disclose a fact that you think the buyer might be interested in knowing? Of course, you don’t know whether the client’s dumping of the strange stuff will cause imminent death or substantial bodily harm. It seems clear that in this situation Rule 1.6 precludes disclosure.

39. Bok, *supra* note 16, at 915-16 (citations omitted).

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 4.1 (1995).

Nonetheless you begin to worry about the possibility of a claim of negligent misrepresentation (or worse)⁴¹ should the strange stuff later be discovered to be hazardous or cause some environmental problems.⁴² What should you do?

Suppose you conclude that due diligence requires that you ask an independent environmental analyst to examine some of the strange stuff, but you do not inform your client of your intention to do this. The analyst performs the appropriate tests and then confirms your worst fears: strange stuff is highly toxic and laced with heavy concentrations of a potent carcinogen. Are you now obligated to disclose this information to the buyer? Would Rule 4.1 be “trumped” by Rule 1.6 here, assuming that under Rule 1.6 you can come to no reasonable judgment about whether disclosure is necessary to prevent “imminent death or substantial bodily injury”? Suppose further that you had previously given the buyer a copy of an environmental audit of the parcel, which you personally supervised and signed, and which attested to the absence of any hazardous waste?

You are sufficiently concerned at this point that you attempt to confront the client with the information you have discovered. You open the conversation with the comment, “I had some toxicity tests performed on the strange stuff,” but you are interrupted by your client, who asks, “Who did the tests?” Upon learning that the tests were conducted by an independent analyst, your client responds with a wink, “I don’t know anything about any tests, right?” and insists that she must hurry off to a meeting.⁴³

Your options may be quite limited here. First, it is useful to clarify that Model Rule 1.6’s protection is not limited to client communications or even information learned in the course of the representation. There is simply no correspondence between Model Rule 1.6 and the attorney-client privilege.⁴⁴ The information you have obtained would be considered to be “relating to representation” and thus within the scope of Rule 1.6’s nondisclosure rule. Comment 5 to Rule 1.6 (ABA) states that “[t]he confidentiality rule applies not

41. See 42 U.S.C. § 9603(b) (1994) (imposing criminal liability for failure to notify appropriate authorities of the release of reportable quantities of hazardous substances).

42. See, e.g., *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964), *cert. denied*, 377 U.S. 953 (1964).

43. As suggested by the excerpt from Sissela Bok in the text, *supra* note 39 and text accompanying, much of the rationale for Model Rule 1.6 rests on the idea that lawyers have the power to persuade their clients to do the right thing. I have no way of knowing if this assumption can be empirically verified. Commentators have been fairly critical of the assumption. See, e.g., Rhode, *Ethical Perspectives*, *supra* note 4, at 615; Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1166-67 (1985). Moreover, it does not explain why it is appropriate to treat disclosure as misconduct in those cases in which, despite the lawyers advice, the client persists in conscious wrongdoing. *Id.* at 1167.

44. *Id.* at 1106-59.

merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”⁴⁵ Disclosure of this information would then be improper under Rule 1.6. ABA Formal Opinion 92-366 specifically concludes that a lawyer may not reveal a client’s fraud, even if that fraud is furthered by the client’s presentation of an attorney opinion letter that the attorney and the client later learn to be false. Opinion 92-366 states that “[a]ny argument that Rule 4.1(a) . . . applies in this situation fails in the face of the fact that the lawyer did not know at the time she [rendered the opinion] that [it was] false.”⁴⁶

Nonetheless, the possibility that this transaction will be completed on the existing terms troubles you. Here is one possible avenue for “disclosure.” Rule 1.16(a) requires an attorney to withdraw from the representation if it “will result in violation of the rules of professional conduct or other law.”⁴⁷ In Formal Opinion 92-366, the ABA concluded that in circumstances roughly analogous to those in my hypothetical, a lawyer is required to withdraw, because continued representation would violate Rule 1.2(d), *viz.* assisting a client in conduct that the lawyer knows to be fraudulent.⁴⁸ Moreover, relying on Model Rule 1.6, comment 16,⁴⁹ Formal Opinion 92-366 concluded that a lawyer “may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a ‘noisy’ withdrawal may have the collateral effect of inferentially revealing client confidences.”⁵⁰

The “noisy withdrawal” option seems to allow the lawyer to do what Rule 1.6 would otherwise forbid.⁵¹ As Professor Geoffrey Hazard has noted: “Giving a signal—going through a ritual that is intended to be a signal and is understood as a signal—is surely to ‘reveal’ the information that the signal denotes.”⁵² It is not at all clear why the bar chose this “nondisclosure” form of disclosure, except perhaps to emphasize the strength of the bar’s commitment to the confidentiality norm in form if not in fact. It may very well be that the noisy withdrawal option is designed for defensive purposes, to protect lawyers from civil and criminal exposure while at least preserving formal notions of

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.6 (1995).

46. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.16(a) (1995).

48. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

49. That comment provides:

After withdrawal the lawyer is required to refrain from making disclosure of the clients’ confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

50. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

51. Koniak, *supra* note 17, at 1446.

52. *Id.* (quoting Geoffrey Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 304 (1984)).

confidentiality.⁵³ Moreover, the fact that the “noisy withdrawal” option is relegated to a footnote may be a signal that it should be employed only sparingly.⁵⁴ “After all, the lawyer who acts upon a comment does so at some risk because, according to the Model Rules, ‘[c]omments are intended as guides to interpretation, but the text of each rule is authoritative.’”⁵⁵ But as Opinion 92-366 makes clear, even the “nondisclosure-disclosure” in the form of a noisy withdrawal is not mandatory.⁵⁶ Does this give some credence to the charge that Rule 1.6 allows exemptions that “put lawyers in league” with crooks? What aspects of the lawyer’s professional role demand such a restrictive disclosure policy?

Suppose that instead of hurrying off to a meeting, your client tells you that he has decided to have another firm handle the real estate transaction, and that you are relieved of any further responsibility in the matter. Can you disclose the test results to the new firm or may you expressly disavow the environmental audit? In Opinion 92-366, the ABA stated:

[T]he lawyer’s ability to disaffirm work product, and thus attempt to disassociate herself from further client fraud based upon that work product, cannot depend upon whether the client or the lawyer is the first to act in discontinuing the representation. The possibility of a noisy withdrawal cannot be preempted by a swift dismissal of the lawyer by the client.⁵⁷

Extending the hypothetical, suppose that you decide to withdraw but decline to do so “noisily.” (Remember that the “noisy” part of the withdrawal is subject to the lawyer’s discretion, even if the withdrawal itself is not, although on these facts it seems hard to justify not taking this course of action.) The client then refuses to pay you for the services you had rendered prior to withdrawal. May you disclose the circumstances surrounding your withdrawal in an effort to collect your fee? To the extent that such disclosures may assist you in defending the client’s purported justification for refusing to pay, Rule 1.6(b)(2) permits disclosure.⁵⁸ Does this strike you as a defensible set of rules—*i.e.*, rules that allow disclosure to protect your fees but not the financial interests of others? How is the public likely to perceive the difference in disclosure options available to a lawyer depending on whether it is the

53. This is the suggestion made in Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *LAWYERS’ IDEALS/ LAWYERS’ PRACTICES* 95, 132-33 (Robert Nelson et al., eds. 1992).

54. It is worth noting in this connection, that Opinion 92-366 expressly limits the option of a “noisy withdrawal” to circumstances in which withdrawal is mandatory under Rule 1.16.

55. Koniak, *supra* note 17, at 1446 (quoting MODEL RULES OF PROFESSIONAL CONDUCT, scope).

56. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

57. *Id.*

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.6(b)(2) (1995).

lawyer's or an innocent third party's interests that are at risk from nondisclosure?⁵⁹

Playing with the hypothetical a little more, assume that the deal goes through, then the buyer immediately announces its intention to develop the property for residential purposes. Part of the plan is to use the aquifer under the property to supply the residential community with drinking water. May you disclose under these circumstances? This is where the obligations of environmental lawyers as set forth in the Model Rules may become somewhat difficult to accept as a standard of "ethical" conduct. Suppose you are certain that the strange stuff will leach into the aquifer, even though current tests show no contamination. Would Rule 1.6(b)'s exception for conduct be likely to cause imminent death or substantial bodily injury permit disclosure? And to make things even more tricky, suppose that your parents have purchased a lot in this development and plan to construct their retirement dream home on it?

Rule 1.6 appears to prohibit disclosure. It is only in situations where harm is reasonably believed by the lawyer to be the likely result of a client's intention to *commit* a criminal act, rather than the effect of a past criminal act, that disclosure is permissible.⁶⁰ Comment 12 to Rule 1.6 makes clear that the exceptions provided in subsection (b) apply only to "prospective conduct" by the client, not to conduct on the part of others or to a client's past criminal acts.⁶¹ In the hypothetical, it is likely that the client's conduct will be viewed as completed, past conduct, and thus outside the permissive disclosure provision of 1.6(b). Similarly, the absence of any reason to believe that death will be "imminently" caused by the development activities would limit your disclosure options even if a case could be made that your client's conduct is both criminal and ongoing.

To complete the picture painted by the Model Rules' view of an attorney's obligation to disclose information in furtherance of the public interest, consider another variation on my hypothetical. Suppose that the place at which the strange stuff was disposed of is a permitted solid waste management facility under RCRA. XYZ has been in negotiations with the state concerning corrective action obligations at the site. Those obligations are then finalized, but do not include any reference to the strange stuff or the impoundment in which it has been disposed, largely because the state accepted the conclusions of the environmental audit that you were instrumental in fashioning. Only

59. Professor Harry Subin is quite critical of Rule 1.6 in this respect: "[I]t is ethically inappropriate for the *Model Rules* to protect attorneys from wrongful actions of the client while protecting no one else—except, of course, the prospective victims of that commonly encountered client, the homicidal maniac." Subin, *supra* note 43, at 1154.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.6 (1995).

61. *Id.* at cmt. 12.

after agreement with the state has been reached do you discover that strange stuff is, in fact, really hazardous stuff.

Rule 3.3, entitled “Candor Toward the Tribunal,” provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.⁶²

The comments to and the text of Rule 3.3 make clear that any conflict between the nondisclosure obligations of Rule 1.6 and the lawyer’s duty of candor to a tribunal are to be resolved in favor of the latter obligation. Nevertheless, there are some interesting questions that make this conclusion somewhat difficult on the facts here supposed. First, is the state a “tribunal” for purposes of Rule 3.3? Assuming that it is (a conclusion in which I can express no real confidence) would disclosure be required? To answer that question we would have to determine whether the “proceeding” has been completed. As subsection (b) of Rule 3.3 makes clear, Rule 3.3 trumps Rule 1.6 only in the context of an ongoing proceeding. If, after the conclusion of the proceeding, a lawyer learns that the information upon which a “tribunal” relied is false, the priority of the conflicting rules shifts and Rule 1.6 seems to forbid disclosure. Comment 13 (ABA) explains this somewhat counter-intuitive requirement by an appeal to the need to place some time limit on Rule 3.3’s disclosure obligation: “[a] practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.”⁶³

To the extent that the failure to disclose might be regarded as assisting a client in a continuing course of fraudulent or criminal conduct, Rule 1.2 and Rule 1.16, together with Formal Opinion 92-366, may require withdrawal and the possibility of making it a “noisy” one. This conclusion itself is, however,

62. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.3 (1995).

63. *Id.* at cmt. 13.

not without difficulty. In Opinion 92-366, as mentioned above, it was plainly stated that a noisy withdrawal is permissible only where withdrawal is otherwise mandatory under Rule 1.16.⁶⁴ The opinion also states “that disaffirmance is not allowed where the fraud is completed, and the client does not, so far as the lawyer knows or reasonably believes, intend to make *further fraudulent use of the lawyer’s services*” (emphasis added).⁶⁵ On the hypothetical facts, can the lawyer safely conclude that the client is making “further” fraudulent use of the lawyer’s services, even if there is no further affirmative use of the audit? Again, I have no real confidence on how this issue would be resolved.

CONCLUSION

I began this essay by drawing attention to some criticisms that have been leveled against lawyers and the apparent diminution in public trust of the profession. It would be a gross oversimplification to conclude that the bar’s official conception of a lawyer’s ethical responsibilities, as set forth in the Model Rules, were the primary cause of these problems. But, as I hope this essay makes clear, the espoused ideals of professional independence run into serious conflicts when the Model Rule’s rather extreme prohibitions on disclosing matters relating to the representation of a client are examined.

Part of the problem may not be that the ethics applicable to legal practice should not be differentiated from the requirements of “ordinary ethics” due to the role lawyers play in our community. It may be that the idea of a single role—and particular, the role of an “advocate”—is simply not discriminating enough to deal adequately with the varied responsibilities lawyers undertake in today’s legal system. It may, therefore, be appropriate for the bar to consider whether it makes sense to recognize a multiplicity of roles for lawyers and to do some critical thinking about whether the appropriate ethical requirements may vary depending upon the “role” in which the lawyer is actually engaged. There may indeed be appropriate circumstances in which the extreme confidentiality requirements of Rule 1.6 become not only ethically dubious but also counterproductive. Firm conclusions on this matter are difficult, given the relative paucity of information on how changes to Model Rule 1.6 would actually affect the practice of law.⁶⁶ One of the more interesting results of a

64. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

65. *Id.*

66. For a fairly recent empirical study of how a mandatory disclosure rule operates in practice, see Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994). The article examines lawyer’s responses to New Jersey Rule of Professional Conduct 1.6(b)(1), which provides:

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

survey of lawyers' responses was that 60.3% of the lawyers surveyed supported disclosure requirements to prevent crimes involving substantial harm to the environment.⁶⁷ Nonetheless, it may be time to drop the illusion of a single "role" for lawyers and to begin the hard work of determining whether our current ethical requirements accurately and appropriately project the kind of image we as lawyers want to impress onto the larger community.

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.

67. See Levin, *supra* note 66, at 134.