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I. Introduction

Whether an attorney should "blow the whistle" on a client's violation of environmental law is a question that is likely to confront attorneys with increasing frequency.[1] While the regulation of pollution is not new,[2] the government's criminalization of pollution violations is a relatively

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1. *See* Cheek Sacket, *Toxic Cases Pose Difficult Ethical Issues for Lawyers*, L.A. DAILY J., Mar. 28, 1988, at A-1; Geoff Mann, *Internal Environmental Audits and Professional Privilege*, 69 L. INST. J. 1170, 1171-72 (1990).

2. Environmental laws date to the time of the ancient Greeks and possibly before. Plato, for example, notes that

> [w]attar can be tampered with in [many] ways, and the law must accordingly come to the rescue. So we shall meet the case by enacting as follows: if one man intentionally tampers with another's supply, . . . the injured party shall put the amount of the damage on record, and proceed at law . . .; a party convicted of poisoning waters, shall, over and above the payment of the fine imposed, undertake the purification of the contaminated springs or reservoir . . . .

PLATO, THE LAWS OF PLATO, Law 845 (A.E. Taylor trans., J.M. Dent & Sons, Ltd. 1st ed. 1934).

new development.[3] Recognizing the impact of pollution on human health and the environment, Congress has passed a panoply of laws making certain unauthorized disposal[4] and emission practices,[5] and the failure to keep records of hazardous wastes[6] felony offenses.[7]

Increased sanctions against polluters mark a transition from the traditional view that environmental transgressions are violations *mala prohibitum*[8] to the modern view that they can be acts of moral turpitude - *mala in se*.[9] Indeed, in a

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3. *See* JOSEPH F. DIMENTO, ENVIRONMENTAL LAW AND AMERICAN BUSINESS 41-47 (1986) (describing the recent criminalization of environmental violations). Modern historical antecedents to these laws exist, however. Section 407 of the Refuse Act of 1899, which Congress passed as part of the Rivers and Harbors Appropriations Act, made it unlawful "to throw, discharge or deposit . . . from . . . [a] floating craft of any kind, or from the shore . . . into any navigable water of the United States, . . . [except] whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby . . . and whenever any permit is so granted . . . ." 33 U.S.C. § 407 (1994).
The Act further provides that dischargers emitting effluents without a permit are "guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment . . . ." 33 U.S.C. § 411. While Congress passed the Act to improve water transport, during the 1960s the United States Attorney's Office used the Act's strict liability provision to prosecute dischargers emitting effluents without a permit. *See* ZYGMUND J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE LAW AND SOCIETY 322-327 (1st ed. 1992).

4. *See* Resource Conservation and Recovery Act (RCRA) §§ 1002-11012, 42 U.S.C. §§ 6901-6992k (1994); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §§ 101-405, 42 U.S.C. §§ 9601-9675 (1994).

5. *See* Federal Water Pollution Control Act [Clean Water Act] (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994); Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

6. *See supra* note 5.

7. *See, e.g., infra* notes 54-63 and accompanying text.

8. Crimes *mala prohibita* are "[a]cts or omissions which are made criminal by statute but which, of themselves, are not criminal." BLACK'S LAW DICTIONARY 956 (6th ed. 1990). *See* Ilona Dotterrer, *Attorney-Client Confidentiality: The Ethics of Toxic Dumping Disclosure*, 35 WAYNE L. REV. 1157, 1160 (1987) (developing the view that environmental crimes may be crimes *mala in se* and therefore may be reported). *See also* Steven Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter As a Common Law Criminal*, 39 AM. U. L. REV. 311, nn.10, 83-86 and accompanying text (1990) (supporting the view that environmental crimes deserve the same punishment as traditional crimes).

9. Crimes *mala in se* are acts which are "[w]rongs in themselves . . . offenses against conscience." BLACK'S LAW DICTIONARY 956 (6th ed. 1990).

United States Department of Justice survey of 60,000 people, environmental crimes ranked seventh in magnitude, placing after murder, but ahead of skyjacking, armed robbery, and bribery of public officials.[10]

Despite increased penalties facing polluters, many corporations continue to violate environmental laws by either failing to disclose past wrongs or by continuing to release illegally pollutants into the environment from their facilities.[11] A company may fear either the penalties and liabilities resulting from the discovery of past violations[12] or the harm to its business reputation.[13] Alternatively, a company could make a simple business decision by balancing the cost and risk of getting caught with the cost of compliance.[14]

With over two hundred and seventy-five million tons of hazardous waste produced in the United States each year[15] and the costs of disposal escalating,[16] attorneys will increasingly have to decide whether or not to report a client's envi-

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10. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, THE SEVERITY OF CRIME 2 (Jan. 1984). Additionally, state courts are, with increasing frequency, returning convictions under common law criminal theories. *See* Humphreys, *supra* note 8, nn.12-13 and accompanying text. *See also* Irma S. Russell, *The Role of Public Opinion, Public Interest Groups, and Political Parties In Creating and Implementing Environmental Policy*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10665 (1993) (discussing change in public's view of the environment from that of a store of productive natural resources to an asset to be preserved as a non-usufruct resource). *See also* Colman McCarthy, *The Noah Movement*, WASHINGTON POST, Feb. 10, 1996, at A23 (discussing the changing relationship of conservation and religion).

11. *See infra* notes 12-16 and accompanying text.

12. Even if releases are relatively minor the cost of remediation can bankrupt a small corporation. *See* Lincoln Properties, Ltd. v. Higgins, No. S-91-760 DFL/GGH (E.D. Cal. Jan. 18, 1993), 23 Envtl. L. Rep. (Envtl. L. Inst.) 20665 (1993) (finding dry cleaners liable for $3,000,000 for initial response cost and undetermined future cost of remediation and monitoring as damages for failing to properly dispose of cleaning agents).

13. *See supra* note 8 and accompanying text.

14. *See* Dennis Epple & Michael Visscher, *Environmental Pollution: Modeling Occurrence, Detection and Deterrence*, 27 J. L. & ECON. 29, 57 (1984).

15. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, THE HAZARDOUS WASTE SYSTEM 1-1, 1-5 (1987).

16. The cost of disposing of one cubic yard of solid hazardous waste increased from $10 in 1976 to $2,500 in 1995. *See* Hugh J. Marbury, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. OF TRANSN'L L. 251, text accompanying n.29 (1995).

ronmental crimes when the client refuses to act responsibly. The following hypothetical encapsulates the ethical dilemma confronting an attorney when the client refuses to report an unlawful release.

Assume Anderson, an attorney, has handled the legal affairs of Cliff's dry cleaning business for several years. Recently, Cliff comes to see Anderson and explains that he discovered that the hauler hired to dispose of the company's leftover dry cleaning chemicals has regularly dumped them in an old gravel quarry[17] filled with water. He says that he does not know what to do and clearly needs legal advice.

While outside of his usual practice area, Anderson realizes that the dumping of hazardous materials undoubtedly implicates environmental laws.[18] Explaining his need to do some preliminary research, Anderson advises Cliff to hire a different hauler to remove any new chemical waste generated and that he will call back with further advice. Later that day, Anderson calls Cliff, and informs him that the dry cleaning company must notify state[19] and federal[20] hazardous

17. "Quarry: An open or surface working or excavation for the extraction of building stone, ore, coal, gravel, or minerals." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1621 (5th ed. 1994); "Gravel: A loose or unconsolidated deposit of rounded pebbles, cobbles, or boulders." *Id.* at 870.

18. In actual practice, the attorney having handled the client's legal affairs for many years should have been knowledgeable about the environmental laws implicated. Dry cleaners have long been the subject of environmental scrutiny. *See* Joel Makower, *Dry Cleaning Draws Environmentalists' Fire*, CHARLESTON DAILY MAIL, Apr. 1, 1994, at 2D. *See also* Tom Matrullo, *They Fear New Rules Will Take Them to the Cleaners*, NEWSDAY, Aug. 1, 1989, at 2 (discussing Environmental Protection Agency's (EPA) regulation of dry cleaning solvent). Dry cleaners use the EPA regulated chemical perchloroethylene (perc). Casual contact with perc can cause irritation of eyes, nose and throat, dry skin, and in concentrations about 100 parts per million, liver damage, dizziness, and loss of balance. *See id.* EPA's Office of Health and Environmental Assessment, listed the chemical as a probable human carcinogen. *See Risk Assessment: Perchloroethylene Should be Ranked as Possible Carcinogen, SAB Says*, 15 Chem. Reg. Rep. (BNA), at 543 (July 26, 1991). But an independent study of perc conducted by the Science Advisory Board found that the chemical was only a possible carcinogen. *See id.*

19. States retain authority to impose notification or other requirements more stringent and not inconsistent with RCRA. *See* RCRA § 3009, 42 U.S.C. § 6929. For contrasting views regarding the success of the relationship between federal and state government in the implementation of hazardous waste laws,

waste authorities. He also tells him that failure to report the dumping or failure to hire a licensed hauler could result in criminal prosecution.[21] He continues the bad news by telling his client that the environmental authorities could hold the dry cleaning service responsible for cleanup costs.[22]

Cliff tells Anderson, his attorney, that he stopped using the hauling service, as Anderson had counselled, but that he would need to think about any further action. A week later, after not hearing from his client, Anderson calls Cliff asking how he plans to handle the problem. Cliff replies that he "considers the problem resolved" and that he does not intend to take further action. Anderson, again, explains the seriousness of the problem, but Cliff remains resolute in his inaction.

The conversation leaves Anderson in a legal and moral quandary. In the course of his brief research, he learns that gravel quarries frequently puncture aquifers,[23] potentially allowing rapid migration of hazardous substances into ground water.[24] Therefore, not only is Cliff's action illegal, the dis-

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see Mark C. Schroeder et al., *ABA Standing Committee Environment Protection Standards: Can A National Policy Be Implemented Locally*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10001 (1992).

20. If a generator of hazardous substances discovers a release has, *inter alia*, reached surface water, the generator "must immediately notify the National Response Center (using their 24-hour toll free number 800/424-8802)." 40 C.F.R. 262.34(d)(5)(iv)(C) (1996). *See also* CERCLA § 103(b)(3), 42 U.S.C. § 9603(b)(3) (providing for criminal liability for failure to notify federal authorities of a release).

21. *See supra* note 20. *See also infra* Part II.

22. A plaintiff may bring an action against owners and operators of hazardous waste treatment, storage, and disposal facilities, and generators and transporters of such materials. *See* CERCLA § 107 (a)(3), 42 U.S.C. § 9607(a)(3). Moreover, joint and several liability applies to each of the Potentially Responsible Parties (PRPs). *See* United States v. Monsanto Co., 858 F.2d 160, 171-73 (4th Cir. 1988). PRPs are liable to the government for the cost of cleaning-up the hazardous waste site, costs borne by private individuals, and natural resource damages. *See* David A. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 653-58 (1986).

23. "Aquifer: A permeable body of rock capable of yielding quantities of groundwater to wells and springs. A subsurface zone that yields economically important amounts of water to wells." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 120 (5th ed. 1994).

24. For example, in Johnston, Rhode Island, a waste management company built a landfill which allegedly contaminated groundwater, causing health

charge is potentially affecting nearby wells, as well as other receptors, including humans.[25]

Should an attorney report a client's involvement in illegal discharges of toxic material, thereby placing the company in financial risk[26] and exposing the client to potential criminal sanctions? Could Anderson permissibly violate his client's confidence if he thought the matter was serious enough to merit disclosure?

This Article explores the ethics of disclosure within the context of environmental crimes.[27] Part II discusses how environmental problems are different from other regulatory issues by examining the following threshold questions: (1) what environmental laws are implicated by the client's actions, and (2) whether those actions reach criminal proportion. Part III explores the general conditions under which an attorney may breach an ethical duty of confidentiality and the policies supporting that duty.

Part IV advocates an interpretation of the Model Code of Professional Responsibility and Model Rules of Professional

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problems for local residents. *See* Ellen Liberman, *For Landfill Neighbors: "Something's Wrong"*, PROVIDENCE JOURNAL-BULLETIN, North West Ed., Sept. 11, 1995, at 1C. *See also* Jack Hitt, *Toxic Dreams: A California Town Finds Meaning in an Acid Pit*, 29 HARPER'S MAGAZINE July 1, 1995, at 57 (describing the experience of the Town of Avon, California, with a hazardous waste site located in a granite quarry); Ray Tuttle, *Talks Set on Dump Cleanup*, TULSA WORLD, June 16, 1995, at B1 (discussing $12 million cleanup settlement involving hazardous waste site built in quarry which is hydrologically connected to aquifer).

25. A receptor is a medium in which hazardous waste can accumulate (i.e., people using contaminated ground water, wetlands, streams, etc. . . .). *See, e.g.*, Timothy J. Covello, *Contracting for Environmental Services*, 717 Practicing L. Inst. (Corp.) 281 (1990).

26. Several manufacturers of perchloroethylene (perc), the prinicipal chemical used in dry cleaning, have filed for bankruptcy. *See, e.g.*, Employers Ins. of Wausa v. Duplan Corp., 899 F. Supp. 1112 (S.D.N.Y. 1995) (involving insurer's liability for injury to individuals' health and contamination of drinking wells by manufacturer of perc which disposed excess chemicals by dumping in municipal drain). *See also Agency Request for Data Linked to Suit*, 10 Toxics L. Rep. (BNA) 129 (1995) (discussing suit in which court found dry cleaning chemical distribution company liable for $1 million as a result of unintentional release).

27. This Article addresses the issue of attorney-client confidentiality only. It does not discuss issues of attorney withdrawal or disavowal of work product which have been the subject of recent Bar opinions.

Conduct that would permit, within certain parameters, reporting a client who is resolute in committing, or who actually commits, an environmental crime which would likely seriously harm people if timely action is not taken. The Article concludes by providing suggestions on how an attorney should analyze the issue of disclosure and then applies this analysis to the Anderson hypothetical.

II. Federal Environmental Statutes

Federal environmental statutes address some of the shortcomings of the common law in maintaining the health and safety of employees,[28] consumers,[29] and the general public, as well as maintaining the integrity of the environment.[30] While courts have applied the common law in novel ways[31] to address harm to human health and the environment caused by industrial pollution, the private, fact specific, and typically

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28. *See* Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1994). "The Act is intended to prevent the first injury which might result from unsafe conditions and the regulations are designed to compel the maintenance of safe working conditions, not just to assess penalties. . . . ." Kent Nowlin Constr. Co. v. Occupational Safety & Health Review Comm'n, 593 F.2d 368, 371 (10th Cir. 1979).

29. *See, e.g.*, Federal Hazardous Substance Act, 15 U.S.C. §§ 1261-1278 (1994) (granting concurrent jurisdiction over toxins, hazardous substances, corrosives, irritants, and other chemicals to the Consumer Protection Safety Commission). The Act provides the Commission with authority to issue regulations and to initiate enforcement actions for the introduction of such chemicals into interstate commerce in violation of law. *See id.* §§ 1264, 1269(a). *See also* Toxic Substance Control Act (TSCA) §§ 2-412, 15 U.S.C. §§ 2601-2692 (1994) (requiring chemical manufacturers to identify, test, and receive permits for the introduction of certain chemical substances into the market).

30. *See* PLATER ET AL., *supra* note 3, at 241-42.

31. *See, e.g.*, State of New York v. Schenectady Chems., Inc., 459 N.Y.S.2d 971 (Sup. Ct., Renssaeler County 1983) (upholding common law nuisance cause of action brought by State of New York for cleanup costs to prevent pollution of surface and ground water, notwithstanding defendant's numerous affirmative defenses); Branch v. Western Petroleum, Inc., 657 P.2d 267, 273 (Utah 1982) (applying strict liability to cause of action in which gravel pit used as disposal site contaminated farmer's ground water supply) (citing Rylands v. Fletcher, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1865), *aff'd*, L.R. 3 H.L. 330 (1868).

retrospective nature of tort and other common law remedies have proved inadequate.[32]

Civil common law remedies are particularly inadequate at addressing harm to human health caused by hazardous wastes.[33] As a general rule, prevention rather than redress should be the goal in this area. But "common law remedies may be too limited in character: they neither provide redress for widespread public harms, nor do they provide a mechanism that allows for insightful anticipatory intervention . . . ."[34] Moreover, the pervasiveness of toxic agents in the environment,[35] the latency period of their physical impact,[36] and the concomitant difficulty in tracing their exposure paths[37] all pose evidentiary problems, making causation difficult to prove.

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32. *See, e.g.*, Boomer et al. v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970) (granting only a temporary injunction against operation of a cement manufacturing facility which caused air pollution, vibrations, acid rain, and smoke, to be vacated upon payment of permanent damages because "[a] court should not try to [regulate] . . . on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution").

33. "[H]azardous waste is any solid waste designated by the EPA Administrator, based on its chemical characteristics, to be hazardous." 40 C.F.R. § 261.3 (1995). These compounds must be physically, chemically or biologically treated before being discarded. *See id.* § 261.2(1). The EPA evaluates the ignitability, corrosivity, reactivity and toxicity in determining the toxicity of a compound. *See id.* § 261.3. Unless excluded, all wastes found to have such characteristics are listed as "hazardous." *See, e.g., id.* § 261.3(a)(1) (providing general definition of hazardous waste). *See also* 40 C.F.R. § 261.21-24 (defining characteristics of ignitability, corrosivity, reactivity, and toxicity).

34. PLATER ET AL., *supra* note 3, at 241. *See also* H.R. Rep. No. 96-1016(I), at 1-23 (1980), *reprinted in* 1980 *U.S.C.C.A.N.* 6119, 6125 (House Committee Report on CERCLA seeking to amend the Solid Waste Disposal Act to "provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response" and explaining that the costs of proper waste disposal is far less expensive than later cleanup).

35. *See* Carl B. Meyer, *The Environmental Fate of Toxic Wastes, the Certainty of Harm, Toxic Torts, and Toxic Regulation*, 19 ENVTL. L. 323, 328 (1988).

36. Hazardous wastes in sufficient quantity can cause harm in one dose (acute toxicity), or harm may result from exposure to smaller quantities over an extended period of time (chronic toxicity). *See* G. TYLER MILLER, JR., RESOURCE CONSERVATION AND MANAGEMENT, 237-38 (1990).

37. *See* Meyer, *supra* note 35, at 334.

Even if damages were an appropriate remedy, the traditional common law measures of injury neither fully internalize costs caused by environmental harms because of lack of information and "large numbers" problems,[38] nor do they take into account non-economic values. This failure forces costs to be passed on to unknowing, and presumptively unwilling, people who may ultimately pay with their health, property, or degradation of the publics' natural resources. Thus, notwithstanding other problems, the common law would fail to reduce environmental harm to an economically efficient level.

Throughout the 1980s, the federal government enacted or amended environmental statutes controlling hazardous substance emissions,[39] discharges,[40] management,[41] transportation,[42] storage,[43] and cleanup.[44] Additionally, Congress expanded the array of available enforcement tools to include criminal penalties for non-compliance.[45] These penalties are meant, in part, to deter unlawful activity. Agencies and courts have aggressively applied these new tools in actions against polluters and have expanded the use of older common law criminal provisions.[46] The Environmental Protection

38. *See* Humphreys, *supra* note 8, at nn.88-109 and accompanying text (arguing that common law criminal liability for injury caused through illegal release of toxic chemicals would help internalize costs now passed on to the public). If impacts are distributed over a large number of people, high transactional costs (the cost of information gathering and transfer, testing, negotiation, litigation, etc.) will cause market inefficiency. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 233-36 (1988).

39. *See* National Emissions Standards for Hazardous Air Pollutants, CAA § 112(d), 42 U.S.C. § 7412(d).

40. *See* CWA § 307(a)(2), 42 U.S.C. § 1317(a)(2).

41. *See* TSCA § 2-412, 15 U.S.C. §§ 2601-2692 (1994); Emergency Planning and Community Right-To-Know Act (EPCRTKA) §§ 301-329, 42 U.S.C. §§ 11046-11050 (1994).

42. *See* RCRA §§ 1001-11012, 42 U.S.C. § 6901-6992k (1994).

43. *See supra* note 41.

44. *See* CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1994).

45. *See generally* John Cooney et al., *Criminal Enforcement of Environmental Laws: Part I*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10459 (1995) (presenting history of federal and state law enforcement programs).

46. *See generally*, Humphreys, *supra* note 8. For example, Steven O'Neil, president of Film Recovery Systems, Inc. and two directors, Charles Kirschbaum and Daniel Rodriguez, were found guilty on fourteen counts of murder

Agency (EPA), for example, has recently increased[47] its criminal enforcement activity by referring 220 criminal cases to the Department of Justice in 1994, passing the previous record set in 1993 by thirty-six percent.[48] Judges imposed ninety-nine year jail sentences and $36,800,000 in fines for criminal violations of environmental laws.[49]

A. Notification Requirements under RCRA

The Resource Conservation and Recovery Act (RCRA)[50] is the primary federal law aimed at preventing hazardous substances from entering the environment.[51] The "cradle to grave" documentation and monitoring of hazardous substances form a "paper trail" of the waste's movement from its first transport to its ultimate storage or disposal.[52] This paper trail creates accountability and the potential for early detection when waste is mismanaged.

Recognizing that the "disposal of wastes, especially hazardous wastes, is a worsening national problem,"[53] Congress specifically provided for criminal penalties under RCRA.[54] Criminal penalties may be assessed against anyone who:

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and reckless conduct for knowingly allowing employees to be exposed to lethal does of cyanide gas. *See* People v. O'Neil, 550 N.E.2d 1090 (Ill. App. Ct. 1990), *cert. denied*, 553 N.E.2d 400 (Ill. 1990).

47. Under the Reagan administration, Federal courts convicted more than three hundred and twenty-five individuals for violations of environmental laws on the basis of about 450 criminal indictments. *See* PLATER ET AL., *supra* note 3, at 334.

48. *See Enforcement: Record Number of Enforcement Actions Taken in Fiscal 1994, EPA Says in Report*, 26 Env't Rep. (BNA) 462 (June 23, 1995).

49. *See id.*

50. 42 U.S.C. §§ 6901-6992k (1994).

51. *See* WILLIAM H. RODGERS, ENVIRONMENTAL LAW 531-33 (2d ed. 1994).

52. *See* Old Bridge Chems., Inc. v. New Jersey Dep't Envtl. Protection, 965 F.2d 1287, 1289 (3d Cir. 1992), *cert. denied*, 506 U.S. 1000 (1992). Congress enacted RCRA to provide "nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 1491, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249.

53. S. Rep. No. 172, at 1, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5019.

54. *See* RCRA § 3008, 42 U.S.C. § 6928.

> knowingly transports or causes to be transported any hazardous waste identified or listed . . . to a facility which does not have a permit . . . ;[55]
>
> knowingly omits material information or makes any false material statement or manifest, record, report, permit, or other document filed, or maintained, or used for purposes of compliance with [RCRA] regulations . . . ;[56]
>
> knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste . . . and who knowingly destroys alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance . . . ;[57]
>
> knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste . . . ;[58]
>
> [or knowingly] places another in imminent danger of death or serious bodily injury [by dumping hazardous waste].[59]

Those convicted under RCRA's criminal provisions, except for the "knowing endangerment" provision[60] are subject to a fine of up to $50,000 for each day of violation, imprisonment from two to five years, or both.[61] Parties convicted of "knowingly endangering" another, may be subject to a fine of up to $250,000, fifteen years in jail, or both.[62] Where the convicted party is an organization, a court may impose criminal penalties of not more than $1,000,000.[63]

Under the "knowing endangerment" provision, actual knowledge is required.[64] Under the other penalty provisions, however, the statutory language creates some significant am-

55. RCRA § 3008(d)(1), 42 U.S.C. § 6928(d)(1).
56. RCRA § 3008(d)(3), 42 U.S.C. § 6928(d)(3).
57. RCRA § 3008(d)(4), 42 U.S.C. § 6928(d)(4).
58. RCRA § 3008(d)(5), 42 U.S.C. § 6928(d)(5).
59. RCRA § 3008(e), 42 U.S.C. § 6928(e). This is the "knowing endangerment" provision.
60. *Id.*
61. *See* RCRA § 3008(d)(7), 42 U.S.C. § 6928(d)(7).
62. *See* RCRA § 3008(e), 42 U.S.C. § 6928(e).
63. *See id.*
64. *See* RCRA § 3008(f)(2), 42 U.S.C. § 6928(f)(2).

biguity as to what the term "knowing" modifies.[65] Judicial history indicates a relatively narrow application of the term "knowing," requiring only that the responsible party knew that he or she disposed of a waste potentially harmful to persons or the environment.[66] Thus, courts have given the word a legal gloss.[67]

However, a tension exists between the general principle that crimes require knowing conduct - *mens rea*[68] - and the public welfare doctrine, which is applied where conduct threatens the public safety or welfare.[69] The scienter requirement, which is a prerequisite for most criminal convictions, can be satisfied without a showing of actual knowledge if the "conduct create[s] a substantial risk to the public at large."[70] Due in part to the inherent dangers associated with mass production,[71] the public welfare doctrine places the

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> The purpose of [the knowing endangerment] section is to provide enhanced felony penalties for certain life-threatening conduct. At the same time, the new offense is drafted in a way intended to assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter.
>
> . . . The knowledge necessary for culpability of a natural person is actual knowledge, which may be established by direct or circumstantial evidence, but not constructive or vicarious knowledge.

H.R. Rep. No. 1444, at 37, *reprinted in*, 1980 U.S.C.C.A.N 5036-37.

65. *See* Bruce Bryan, *The Battle Between Mens Rea and the Public Welfare: 'United States v. Laughlin' Finds a Middle Ground,* 6 FORDHAM ENVTL. LAW J. 157, 166 (1995) (suggesting that a court of first impression could have plausibly interpreted the term "knowing" as modifying the phrase "treats, stores, or disposes," "hazardous waste," "identified or listed," or "without a permit").

66. *See, e.g.*, United States v. Self, 2 F.3d 1071, 1091 (10th Cir. 1993) (providing an overview of circuit court decisions and analysis of the RCRA knowing requirement in the criminal enforcement context); United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989) (upholding a jury instruction regarding the substance involved that defendant need only know that the waste "was not an innocuous substance like water").

67. *See* Bryan, *supra* note 65, at 167-68.

68. *See id.* at nn.20-30 and accompanying text.

69. *See id.* at nn.31-49 and accompanying text.

70. *Id.* at 163.

71. *See id.*

"burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger."[72]

The Supreme Court first applied the public welfare doctrine in the criminal hazardous materials context in *United States v. International Minerals & Chemical Corp.*[73] In that case, the Court upheld the conviction of a defendant who violated an International Commerce Commission regulation by shipping sulfuric acid without proper labeling, notwithstanding the fact that the defendant was ignorant of the requirement.[74] The court reasoned that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them . . . *must be presumed* to be aware of the regulations."[75] Thus, the Court brought hazardous chemicals within the ambit of the public welfare doctrine, but left open the defense of factual mistake[76] and the related issue of unforeseen danger[77]

A majority of circuits apply the public welfare doctrine to RCRA's "knowingly" standard.[78] However, a few circuits[79] have expressed reservation as to the extent of its application to "innocent" defendants.[80] For example, the Ninth Circuit, first explicitly adopted the public welfare doctrine in the con-

72. United States v. Dotterweich, 320 U.S. 277, 281 (1943) (citing United States v. Balint, 258 U.S. 250 (1922)).

73. 402 U.S. 558 (1971).

74. *See id.* at 559.

75. *Id.* at 565 (emphasis added).

76. *See id.* at 563-64. The Court explained that this defense would provide a safe harbor for "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid . . . ." *Id.*

77. Similarly, if it were not reasonably clear that the material transported was dangerous and, thus likely to be regulated, the Court noted that the public welfare doctrine would not apply. *See id.* at 564.

78. *See generally*, John Cooney et al., *Criminal Enforcement of Environmental Laws: Part II— The Knowledge Element in Environmental Crimes*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10525 (1995) (reviewing significant decisions interpreting environmental statutes' *mens rea* requirement).

79. The Ninth Circuit, see, e.g., United States v. Speach, 968 F.2d 795 (9th Cir. 1992), and the Third Circuit, see, e.g., United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert denied, sub nom.* Angel v. United States, 469 U.S. 1208 (1985), have narrowed the application of the public welfare doctrine in the RCRA context.

80. *See Speach*, 968 F.2d at 796.

text of RCRA,[81] but then limited its application.[82] In *United States v. Hoflin*,[83] a municipality's director of public works instructed an employee to bury drums of excess paint in the city's unpermitted waste facility. Affirming the director's conviction,[84] the Ninth Circuit found that the policies underlying RCRA "like those of the Food and Drug Act, '. . . touch phases of the lives and health of people, which in the circumstances of modern industrialism, are largely beyond self-protection.'"[85] Thus, while the director did not cause the waste to be disposed with knowledge of the site's unsuitability, the pernicious nature of the chemicals and the public's lack of information caused the court to impute criminal intent.[86]

However, the Ninth Circuit later declined to remove the scienter requirement in circumstances where a defendant was ignorant of a third party's permit status. In *United States v. Speach*,[87] the court reversed the conviction of a transporter who delivered hazardous waste to a storage facility which did not have the required permit.[88] Without citing the public welfare doctrine, the divided panel distinguished the facts presented from those in *Hoflin*.[89] Significantly, the majority found that whereas, in *Hoflin*, the permittee was also the defendant and "was in the best position to know that the facility lacked a permit,"[90] in *Speach*, the defendant did not operate the facility and, therefore, should not be required to know the permit status of another's facility.[91]

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81. *See* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

82. *See Speach*, 968 F.2d at 797.

83. 880 F.2d 1033 (9th Cir. 1983), *cert. denied*, 493 U.S. 1083 (1990).

84. *See id.* at 1040.

85. *Id.* at 1038 (quoting United States v. Dotterweich, 320 U.S. 277, 280 (1943)).

86. *See* 880 F.2d at 1034. *See also supra* notes 34-37 and accompanying text.

87. 968 F.2d 795 (9th Cir. 1992).

88. *See id.* at 797.

89. *See id.*

90. *See id.*

91. *See* 68 F.2d at 797.

While a few courts have followed *Speach*,[92] the reach of the decision is in question. Indeed, a year after deciding *Speach*, the Ninth Circuit, in *United States v. Weitzenhoff*,[93] qualified the holding, stating that "*Speach* recognizes the general rule that public welfare offenses are not to be construed to require proof that the defendant knew that he was violating the law . . . and finds only a narrow exception . . . ."[94] While *Weitzenhoff* narrows, or clarifies, *Speach*, this "narrow exception" could provide sufficient room for a court to require the showing of *mens rea* to protect "innocent" defendants.

B. Notification under the CERCLA

While RCRA is prospective and preventative[95] in its approach to toxic substance control, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) is retrospective and remedial.[96] For example, the counterpart of the reporting and manifest system under RCRA is CERCLA's Section 103.[97] This section requires notification by both the facility and the "person(s) in charge"[98] when hazardous substances have been released.[99] Courts

92. *See, e.g.*, United States v. Heuer, 4 F.3d 723 (9th Cir. 1993).

93. 35 F.3d 1275 (9th Cir. 1993).

94. *Id.* at 1284 n.5.

95. *See* Westfarm Assocs. Ltd. v. Washington Suburban Sanitary Comm'n, 66 F.3d 667, 678-79 (4th Cir. 1995).

96. *See id.* at 679.

97. CERCLA § 103(c) provides:

> any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances . . . are or have been stored, treated or disposed of *shall* . . . notify the Administrator of the Environmental Protection Agency of the existence . . . . Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both.

42 U.S.C. § 9603(c) (emphasis added).

98. CERCLA § 103(a), 42 U.S.C. § 9603(a). Based on a fifty state search in the Lexis database, no corporate counsel has been found to be the "person in charge." The search, "hazardous waste and person in charge w/20 attorney or lawyer or counsel," in the states/courts and genfed/courts databases produced no relevant cases.

99. *See* CERCLA § 103(c), 42 U.S.C. § 9603(c).

have interpreted CERCLA as a public health and welfare statute,[100] reading its provisions so as to give effect to its purpose.[101] Analogous to RCRA, section 103 of CERCLA does not require the defendant to know that a release violated the law.[102] Rather, the statute "demands only that the defendant be aware of his acts."[103]

Because Congress sought to commence cleanup of hazardous waste quickly, CERCLA places an affirmative and continuing duty on responsible persons to report unauthorized releases as a "preventative" measure.[104] As with RCRA, the government may levy criminal penalties for failing to report releases.[105]

The sentencing action in *United States v. Liebman*[106] is instructive as to the importance of keeping accurate records.

In that case, a small mill owner pled guilty to violating a criminal enforcement provision under CERCLA,[107] and was sentenced to serve time in prison for failing to notify authorities of asbestos released into the environment.[108] The judge based the mill owner's sentence, in part, on the owner's failure to keep accurate records of the discharge in an effort to conceal the environmental offense.[109]

Specifically, the judge made the following finding of facts: while preparing to sell his business, the owner of the mill had

100. *See, e.g.*, United States v. Laughlin, 10 F.3d 961, 966 (2d Cir. 1993), *cert. denied, sub nom.* Goldman v. United States, 14 S.Ct. 1649 (1994).

101. *See id.* at 996 (recognizing the importance of CERCLA's reporting requirement to allow the government to "move quickly to check the spread of a hazardous release") (quoting United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989)).

102. *See id.* at 966-67.

103. *Id.* at 967. Similarly, nonfeasance will not exculpate a defendant, if "the government [can] establish [the person's] knowledge by showing that [the person] closed his eyes to obvious facts or failed to investigate when aware of facts which demand investigation." United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991).

104. *See* CERCLA § 103(a), 42 U.S.C. § 9603(a).

105. *See* Roger Colton et al., *Seven-Cum-Eleven: Rolling the Toxic Dice in the U.S. Supreme Court*, 14 B.C. ENV. AFF. L. REV. 345, 374 (1987).

106. 40 F.3d 544 (2d Cir. 1994).

107. *See id.* at 547.

108. *See id.*

109. *See id.* at 551-52.

an environmental audit conducted on his property.[110] The audit showed the presence of asbestos, a listed material,[111] surrounding the mill's boiler room.[112] The owner contracted with a salvager to remove the boiler, who in turn hired employees to remove the asbestos.[113] None of the participants in the asbestos removal were certified to handle hazardous waste.[114] Instead of properly disposing of the asbestos, the toxic material was dumped into a gravel pit in nearby woods.[115] While the owner did not initially know that asbestos was being removed, he later dismissed the contractor and supervised the job himself.[116] The court found that the owner "had to know that something highly improper was going on and he should have stopped it."[117]

The owner contended that because he had pled guilty only to a record-keeping offense, several sentencing level enhancements pertaining to substantive offenses under the United States Sentencing Guidelines were inappropriately considered.[118]

The court rejected the owner's argument on two grounds. First, the court found that while the failure to report did not *cause* the release, "the recordkeeping offense . . . should be regarded as conduct relevant thereto . . .,"[119] because the reporting violations overlapped with the ongoing release.

Second, relating to a challenge to the application of a specific sentencing guideline, the court determined the provision unambiguously related recordkeeping to the substantive crime, stating that "[i]f a recordkeeping offense reflected an effort to conceal a substantive environmental offense, [the court must] use the offense level for the substantive of-

110. *See id.* at 546.
111. 40 C.F.R. § 216.3 (1995).
112. *See Liebman*, 40 F.3d at 546-47.
113. *See id.*
114. *See id.* at 547.
115. *See id.*
116. *See id.*
117. 40 F.3d at 547.
118. *See id.* at 551.
119. *Id.* (quoting U.S. SENTENCING GUIDELINES, § 1B1.3(a)(1) (1995)).

fense."[120] Thus, the court recognized the centrality of CERCLA's reporting requirements, while simultaneously considering the defendant's state of mind when failing to report.

To summarize, RCRA creates duties to treat, store, and transport hazardous substances in accordance with both federal and state laws,[121] and CERCLA creates duties to report[122] and cleanup past releases.[123] Because the laws pertain to harmful substances which are difficult to detect and protect against, the element of knowledge is imputed in most cases to anyone who knowingly handles or possesses them.[124] Legislative history, court interpretation and sentencing strongly suggest that improper recordkeeping or disposal of hazardous substances can be *mala in se*, as well as an ordinary breach of government regulation - *mala prohibitum*.[125]

III. The Ethical Duty to Maintain Client Confidences

An attorney must not reveal information that would embarrass a client or adversely impact the client's interests, with limited exceptions.[126] This duty has been characterized

120. *Liebman*, 40 F.3d at 552 (quoting U.S. SENTENCING GUIDELINES § 2Q1.2(b)(5)).

121. *See* RCRA § 3005, 42 U.S.C. § 6925.

122. *See* CERCLA § 103, 42 U.S.C. § 9603.

123. *See* CERCLA § 104, 42 U.S.C. § 9604.

124. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (holding that defendants possessing dangerous substances must be presumed to know that such harmful materials are subject to regulation). *See also* United States v. Self, 2 F.3d at 1071, 1091 (10th Cir. 1993) (holding that because RCRA is a public welfare statute designed to protect human health, defendant's ignorance of the law is not a defense to criminal prosecution). For a thorough discussion of the scienter requirements under the criminal provisions of RCRA and CERCLA, see Lisa Ann Harig, *Ignorance is not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145 (1992).

125. *See supra* notes 8-10 and accompanying text.

126. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule [DR] 4-101 (1980) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES].

> Preservation of Confidences and Secrets of a Client . . .
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

as the "glory of our profession,"[127] and the "cornerstone of the adversarial system and effective assistance of counsel."[128] The Bar subjects an attorney who improperly violates the tenet of confidentiality to expulsion or other discipline.[129]

An attorney's duty of silence sometimes creates demanding and entangled allegiances among the confider, the attor-

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(1) Reveal a confidence or secret of his client.
(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct . . . .

MODEL CODE DR 4-101

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 form 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 Rule 1.6.

127. United States v. Costen, 38 F. 24 (C.C.D. Colo. 1899) (Brewer, J.).

128. Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., concurring) (quoting Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981)).

129. *See* MODEL RULES Rule 8.4; MODEL CODE DR 4-101.

"It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." MODEL RULES Rule 8.4(a).

ney's own conscience and legal obligations, and society.[130] In general, we base a moral duty not to betray confidences on four premises.[131] First, we recognize an individual's right to privacy and a right to make plans away from the glare of public inspection.[132] This most basic axiom forms our concept of individual autonomy.[133] Second, we generally accept an individual's right to share plans with other people out of respect for the intimates' need to plan for their collective and individual well-being, and to prevent the harm disclosure would cause.[134] Third, this general rule of preserving confidences is given weight and special meaning by the implicit or explicit pledge of allegiance given to the confider, and the confidant's promise to protect the secret.[135]

The fourth and final premise specifically addresses the professional's duty of confidentiality to the client.[136] "This premise assigns weight beyond ordinary loyalty to professional confidentiality, because of its utility to persons and to society."[137] A client will more likely seek assistance knowing that the attorney will not betray confidences.[138] Society benefits when an attorney counsels and encourages the legally troubled person to conform to legal standards of conduct.[139] The individual also gains by being able to act autonomously,

130. For representative contrasting arguments on this issue compare Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975) with Monroe Freedman *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

131. *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 119-121 (1982) [hereinafter BOK, SECRETS]. Bok's insights form the four premises which follow.

132. *See id.* at 120.

133. *See id.*

134. *See id.*

135. *See id.* at 120-21.

136. *See* BOK, SECRETS, *supra* note 131, at 121-23.

137. *Id.* at 122.

138. *See id.*

139. "[P]reserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." MODEL RULES Preamble.

with the full benefit of knowing legal consequences of plans, when the attorney keeps secrets.[140]

The presumption that an attorney should maintain confidences is heavy, based on either the societal or individual benefits flowing from the preservation of secrets.[141] The scope of the attorney's ethical duty, however, remains the subject of much debate,[142] and depends, in part, on whether the attorney practices in a jurisdiction governed by the Model Rules of Professional Conduct or the Model Code of Professional Responsibility.[143]

A. Approaches to Disclosure

There are two approaches that states have adopted in analyzing an attorney's duty to disclose a client's confidences: the "broad view" under the Model Rules of Professional Conduct (Model Rules) and the narrow view under the Model Code of Professional Responsibility (Model Code).[144] The Model Rules have been adopted by New Jersey, Connecticut,

140. *See* Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Difference, A Problem, And Some Possibilities*, 1986 AMER. BAR. FOUND. RES. J. 617 (1986) (noting that an attorney's amoral ethical role is premised on an individual's autonomy, equality and diversity).

141. Professor Wasserstrom advances an alternate position that a attorney should actively consult and act upon her own feelings about the desirability of the client's action. *See* Wasserstrom, *supra* note 130, at 6.

142. *Compare* Pepper, *supra* note 140 *with* David Luban, *The Lysistratian Prerogative, A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986).

143. *See supra* note 126.

144. The distinction between the broad and narrow view of disclosure in the environmental crimes context is based on the analysis by Ilona Dotterrer. *See* Dotterrer, *supra* note 8.

Pennsylvania and forty other states.[145] However, New York and nine other states have not adopted the Model Rules.[146]

The American Bar Association's Model Rule 1.6 permits an attorney to disclose confidential information only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or serious bodily harm."[147] This broad view of confidentiality[148] emphasizes the need for the client to feel secure knowing that her attorney will not disclose information simply because the attorney finds the client's choices objectionable.[149] Without this security, lay people would be beholden to an oligarchy of experts who understand the law and dispense their knowledge only when the client's cause comports with their particular sense of morality.[150] As a consequence, proponents of the broad view of confidentiality argue that a narrower disclosure rule would limit individual autonomy and that clients would

145. While few states have adopted the Model Rules in whole, as of December 15, 1993, attorneys must conform their professional conduct to standards based on the Model Rules in the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia Islands, Washington, West Virginia, Wisconsin, Wyoming. List compiled by American Bar Association, Center for Professional Responsibility.

146. New York and a handful of other jurisdictions, including Massachusetts, Ohio, Vermont, and Virginia, still use the Model Code. *See* Frank O. Bowman, III, *A Bludgeon by any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, n.502 (1996).

147. MODEL RULES Rule 1.6. Model Rule 1.6 also provides for revelation to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense . . . 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 Rule 1.6(b)(2). Thus, while a strict statutory construction would apply the "imminent" requirement only to "death," because of the use of the disjunctive "or", such a reading would not make sense in context and would largely eviscerate the limiting impact of the rule.

148. *See supra* note 144 and accompanying text.

149. *See* Pepper, *supra* note 140, at 625-35.

150. *See id.* at 626.

not seek the legal assistance they need, creating a social liability.[151]

The narrow view of confidentiality caters more to the attorney's sense of morality and to the costs to society that may arise from the non-disclosure.[152] Contrasting with the Model Rules, Model Code Disciplinary Rule 4-101 permits disclosure to prevent a crime even if it will not result in "imminent death or serious bodily harm."[153] Under the Model Code, an attorney "may reveal [t]he intention of his client to commit a crime and the information necessary to prevent the crime."[154] Thus, attorneys practicing in New York, Massachusetts, and a minority of other states[155] may, in determining whether to disclose a client's confidence, balance the values of: preserving confidentiality against the severity of the crime; the attorney's feelings on the morality of the client's plans; and the benefits of preventing the intended crime or mitigating the consequent harm.

B. Continuing Harms and Crimes

An attorney may not report wholly past crimes under either the Model Rules or the more permissive Model Code.[156] The Model Rules and Model Code, however, treat continuing crimes and crimes with continuing consequences with less clarity. Several authorities have interpreted the ethical duty of confidentiality as proscribing disclosure in such cases.[157] Professor Abramovsky, for example, advocates an inclusive

151. *See id.* at 634.

152. Professor Bok would likely find the "broad" view overly restrictive: "There is much truth in saying that one is responsible for what happens after one has done something wrong or questionable. But it is a very narrow view of responsibility which does not also take some blame for a disaster one could easily have averted, no matter how much others are also to blame." SISSELA BOK, LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE 41-42 (1978).

153. MODEL RULES Rule 1.6(b)(1). *See supra* note 126.

154. MODEL CODE DR 4-101(C)(3). *See supra* note 126.

155. *See supra* note 146.

156. *See* Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621, 1633 n.50 (1996).

157. *See* Timothy J. Miller, *Attorney's Duty to Reveal Future Criminal Conduct*, 1984 DUKE L. J. 582, 586-589 (1984); Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L. J., 11, 17-18 (1985).

definition that anchors the present or future harm to the past crime. He reasons that "disclosure of continuing crimes would necessitate disclosure of the past crime, which is prohibited . . . ."[158] The corollary argument, that disclosure would chill client trust in attorneys, adds weight to the otherwise largely technical analysis.

Several courts have expressed support for this inclusive definition of past crime in the context of a client's present fraudulent action. In *Schatz v. Rosenberg*,[159] the Fourth Circuit rejected a third party's claim that an attorney should have warned him of a client's fraud. Finding that the attorney owed no duty to the injured third party, the court held that any alternative finding would create "an incentive [for attorneys] not to press [their] clients for information [and] attorneys would more often be unwitting accomplices to the fraud as a result of being kept in the dark by their clients . . . ."[160] While the *Schatz* opinion stands for the proposition that *no duty* exists to disclose past crimes with ongoing consequences in the fraud context, the Court's reasoning that "the client is more likely to disclose damaging or problematic information, and the [attorney] will more likely to be able to counsel his client against misconduct"[161] when the attorney maintains secrets, supports a general proscription against reporting ongoing crimes.

On the other hand, Bar opinions have found that an attorney may disclose certain information related to criminal activity if that activity is present or ongoing.[162] For example, ABA Opinion 1470 states "the lawyer has a duty to inquire further into the circumstances surrounding the [client's conduct] in order to prepare properly and to avoid aiding the client in perpetrating further fraudulent or criminal conduct."[163] Further, "the lawyer still must be assured that

158. Abramovsky, *supra* note 157, at 18.
159. 943 F.2d 485, 490 (4th Cir. 1991).
160. *Id.* at 493.
161. *Id.*
162. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470 at 396 (1981).
163. *Id.* at 395.

the requested services will not be predicated upon the client's past fraud or other criminal conduct."[164]

Additionally, a number of ethics panels have concluded that a fugitive commits a crime in the past, present, and future by failing to turn herself in, by remaining a fugitive, and by making clear that she intends not to surrender in the future.[165]

Similarly, a narrow definition of past crime is used in the context of child abuse.[166] The Indianapolis Ethics Committee[167] held that an attorney may, but is not required to, comply with a state law compelling "any individual who has reason to believe that a child is a victim of child abuse" to notify proper authorities.[168] The Ethics Committee's position is supported by the unusual nature of the crime,[169] the victim,[170] and the unusually harmful impact.

Child abuse is shocking to the senses - *mala in se*. The abused child, however, is unlikely to report the perpetrator's actions because of the psychological impact of the harm[171]

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164. *Id. See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 93-375 (1993) (discussing an attorney's obligation to disclose information adverse to his client).

165. *See supra* note 159 and accompanying text. While the case of the fugitive appears settled, Monroe Freedman continues to enunciate his strong belief in the sanctity and preservation of confidentiality in the context of the fugitive client. *See* Monroe Freedman, *When Keeping Secrets Becomes A Crime,* LEGAL TIMES, Jan. 14, 1991, at 20.

166. *See* Maura Strassberg, *Taking Ethics Seriously Beyond Positivist Jurisprudence In Legal Ethics*, 80 IOWA L. REV. 901, 905 (1995).

167. *See* Bruce A. Boyer, *Ethical Issues in the Representation of Parents in Child Welfare Cases*, 64 FORDHAM L. REV. 1621, 1624 n.57 (1996) (citing Indianapolis Bar Ass'n, Legal Ethics Comm. Op. 1986-1 (1986)).

168. IND. CODE ANN. § 31-6-11-3 (Michie 1987). As of November 1992, twenty-two states required individuals, including attorneys, to report cases of child abuse to state authorities. *See* Robert P. Mosteller, *Child Abuse Reporting Laws*, 42 DUKE L. J. 203, 217 (1992). Four of these laws explicitly require attorneys to disclose a client's abusive behavior to authorities. *See id.*

169. *See infra* note 171 and 175 and accompanying text.

170. *See infra* note 171-73 and accompanying text.

171. *See* John R. v. Oakland Unified School Dist., 240 Cal. Rptr. 319, 323 (Ct. App., 1st Dist. 1987) (noting expert witnesses testimony on "child sexual abuse accommodation syndrome," wherein child delays disclosure because of fear parent will not be able to protect him or her).

and the fear of retaliation from the abuser or others.[172] Therefore, just as the fugitive is unlikely to reveal her whereabouts voluntarily, it is unlikely that the child abuser's harmful actions will end unless there is outside intervention.

Child abuse is unusual in at least one other respect that points towards disclosure: many perpetrators tend to be habitual in their conduct.[173] If the attorney has reason to believe that the conduct has occurred once, there is reason to believe it will happen again.[174] Although the crime occurred in the past and that crime may coincide with the harm, the past abuse foreshadows the potential for further abuse, continuation, and aggravation of the harm.

While continuing harm issues tend to be complicated and context specific, some trends can be traced. First, if the crime is *mala in se*, and the harm(s) is separated in time from the client's act, the attorney may report.[175] Professor Kaufman gives the example of a client who discloses that he has laced pain killers with cyanide and places it in harm's way, as the type of conduct which an attorney may report.[176]

Second, if the crime is continuing or repetitive in nature, as in the case of a fugitive who refuses to surrender or a child subject to habitual abuse, the attorney may disclose the crime.[177]

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172. *See, e.g., id* at 321, 325-26 (applying delayed discovery rule because teacher, perpetrator, was "able to achieve concealment of the sexual assault upon the minor student through abuse of the teacher's authority over the minor").

173. Professor Mosteller notes, for example, that where abuse is of a sexual nature the perpetrator is likely to act again. *See* Mosteller, *supra* note 168, at nn.143-47 and accompanying text.

174. *See id.*

175. Indeed, this may be the critical issue. While an attorney may be required to hold the knowledge of a client's fraudulent criminal activities inviolate, such crimes typically do not reach a level of severity that shock the moral senses, and are therefore less severe, crimes *mala prohibitia*.

176. *See* ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 214, 219-21 (3d ed. 1989).

177. *See supra* notes 173-74 and accompanying text.

Third, if disclosure of the future harm or crime also requires revelation of a past crime, the attorney must evaluate any disclosure with special caution.[178]

Fourth, if the attorney can mitigate or prevent the harm through disclosure and cessation of the crime or harm is otherwise unlikely because of the nature of the crime or nature of the victim, the attorney may contemplate disclosure.

Together, these general rules stand for the principle that if the client's act, or potential act, causes, or will likely cause, a person serious harm in the future and the act cannot readily be characterized as a single or one-time event, the attorney may break the client's confidence.[179] From a policy standpoint the opinions and cases make sense. As a whole, they suggest the intuitive principle that when the harm caused by the client is both unconscionable and preventable, the attorney may take steps to prevent injury from occurring. Because the particular injury occurs in a fact specific context, the attorney, depending on the ethical guidelines of the jurisdiction, may balance the benefits of preventing the injury against the harm of disclosure to the client, society, and the profession, and use her judgment to make a decision whether to disclose.

IV. Is Disclosure an Option?

The rules regarding the disclosure of client confidences are further complicated when the client is an organization. Under the Model Rules, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[180] Ordinarily, the attorney

178. *See supra* notes 155-64 and accompanying text.

179. A client's violent act, permanently maiming a person for example, causes ongoing harm to the victim. The attorney, however, could not report the client's action. While the impact on the victim's well being is ongoing, the harm is not preventable. The victim is not going to get better if the attorney were to report, and the harm is readily attributable to a single event. This example contrasts with the client who discloses that he or she has replaced aspirin with cyanide pills in stores.

180. MODEL RULES Rule 1.13(a). Similarly, the Code's ethical considerations provide that the attorney of a "corporate client owes allegiance to the corporation. . .[and] should hold paramount its interests." MODEL CODE EC 5-18.

should rely on the judgment of these "constituents" in the formulation and implementation of business decisions.[181] If the attorney finds the firm's choices lawful but repugnant or imprudent the attorney may ordinarily withdraw.[182] However, if the attorney wishes to keep the corporate client, when "an officer [or] employee [violates] a legal obligation to the organization [or violates] a law which reasonably might be imputed to the organization," the attorney must take steps to prevent injury to the company.[183]

Under both the Model Rules and the Model Code, the attorney must bring the contemplated or executed illegal action or omission to the attention of the firm's constituents and remonstrate against the action or non-action. "But there comes a point at which a reasonable attorney must conclude that his advice is not being followed .... At this critical juncture, ... [t]he lawyer is in the best position to choose his next step."[184]

When the corporate client, like Cliff's dry cleaning business, intends to dispose illegally hazardous substances or refuses to take corrective action after the fact, the attorney faces a difficult dilemma. On one hand, the unusual nature of hazardous waste carries with it the threat of pervasive, and potentially devastating, effects to human health and the envi-

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181. MODEL RULES Rule 1.13 cmt.4.

182. *See* MODEL RULES Rule 1.16(b)(3); MODEL CODE DR 2-110(C)(1)(d). "[A] lawyer may withdraw from representing a client ... if ... a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES Rule 1.16(b)(3).

"[A] lawyer may not ... withdraw ... unless ... withdrawal is because ... [h]is client ... renders it unreasonably difficult for the lawyer to carry out his employment effectively." MODEL CODE DR 2-110(C)(1)(d)

183. MODEL RULES Rule 1.13(b). When an attorney learns of a violation of law "his continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance." Checkosky v. Securities & Exchange Comm'n, 23 F.3d 452 (D.C. Cir. 1994) (citing *In re* Carter 1981 Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,167 (Feb. 28, 1981)).

184. *In re* Carter, 1981 Fed. Sec. L. Rep. at 84,172. The Model Rules provide similar advice: Where the attorney finds his advice is being ignored, "it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.... At some point it may be useful or essential to obtain an independent of legal opinion." MODEL RULES Rule 1.13 cmt. 4.

ronment.[185] Moreover, the long latency period[186] and adverse affects associated with improper disposal of hazardous substances, as well as the unlikelihood of reporting by employees,[187] impede early detection and prevention of harm.

On the other hand, if the attorney makes disclosure, the polluting corporation's fisc will almost certainly suffer due to the cost of cleanup,[188] and from the loss of goodwill and possible penalties.[189] Further, from a broader professional perspective, if corporations perceive a threat of attorney disclosure, many companies may simply cease discussing their serious environmental problems with their attorneys, thus limiting the chance that corrective action will be taken. Regardless of the attorney's ultimate action, the public, the corporation, and the legal profession may all be threatened in some way. The issues facing an attorney contemplating disclosure under either RCRA or CERCLA are substantially dissimilar, therefore, each must be analyzed separately.

A. Reporting under RCRA

1. The Model Code of Professional Responsibility

The Model Code permits an attorney broad latitude in deciding whether to disclose a client's confidence. If the client acts or makes clear that he or she will act in a criminal manner, the attorney may disclose.[190] Therefore, if Anderson, the attorney in the hypothetical, practices in a jurisdiction governed by the Model Code, he may disclose Cliff's illegal disposal of hazardous waste. Having explained the seriousness of the dry cleaning service's violation, and remonstrated against

185. *See supra* note 33 and accompanying text.

186. *See supra* note 36 and accompanying text.

187. *See* BOK, SECRETS, *supra* note 131, at 210-13.

188. *See supra* note 12 and accompanying text. Even if a parcel of land is proximate to a release, or the public merely perceives the to be affected, the threat of liability can place a financial cloud over the company. *See* Andrew N. Davis & Santo Longo, *Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 10345 (July 1995).

189. *See supra* notes 53-62 and accompanying text.

190. *See supra* note 126 and accompanying text.

nonreporting, and given Cliff's unwillingness to comply, the path of disclosure is available to Anderson.

The discretion afforded an attorney under the Model Code demands that the attorney apply her own judgment in determining whether to break a client's confidence once the client has made clear that she will engage in criminal conduct.[191] In making that difficult determination, the attorney should consider the effect of disclosure on all parties impacted by her decision: the client, the public, and the profession. Among other factors, the attorney ought to evaluate: (1) the client's resolve to illegally dispose of the hazardous waste; (2) likelihood that the client will not dump if prior notification is given; (3) the potential harm to society or individual people if the dumping does occur; (4) the potential damage to the client by breaking the confidence; and (5) the spill-over effect that notification may have on the attorney-client relationship relating to future dealings with the client at issue and other clients, generally.

2. The Model Rules and the Special Problem of "Imminence"

The Model Rules' more limited exception to the prohibition on disclosure proscribes revelation except when the client's action is likely to "result in imminent death or substantial bodily harm . . . ."[192] Because adverse effects of exposure to hazardous substances may take years to develop,[193] the "imminency" requirement, at first blush, is troubling.[194] It is especially problematic because, without early warning, the exposed person(s) can take no protective action.

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191. *See supra* note 126.

192. MODEL RULES Rule 1.6.

193. *See supra* note 36 and accompanying text.

194. "Imminent" means "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous. Something which is threatening to happen at once, something close at hand, something to happen upon the instant, close although not yet touching and on the point of happening." BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

Several courts have recognized this timing disconnect of cause and effect in the hazardous substance context, and resolved it by broadening the ordinary meaning of "imminence" to meet the needs of toxic substance exigencies.[195] In *Village of Wilsonville v. SCA Services, Inc.*,[196] the Supreme Court of Illinois granted injunctive relief to a municipality which had petitioned to close a hazardous waste disposal facility built on top of an abandoned mine[197] where the ground was subject to subsidence. The operators argued that, because the facility had caused no serious problems in its four years of operation, the court must find "a 'dangerous probability' that the threatened or potential injury will occur," and assess the likelihood of that harm occurring.[198]

Agreeing with the defendant's statement of the law,[199] the court found that the plaintiff could meet the burden of proof by showing that waste disposal at the site would result in substantial injury when exposure occurs, and that exposure is, in fact, likely to occur.[200] Describing the operation of a hazardous waste site in an unsuitable location as "seriously and *imminently* pos[ing] a threat to the public health,"[201] the court enjoined the facility from further operation and ordered restoration of the site. Thus, recognizing that the threat of occurrence leading to exposure is unpredictable in the short-run, but almost certain over the long-run, the *Wilsonville* court impliedly related the imminency requirement to the

195. Considering the meaning of "imminence" in RCRA's "imminent and substantial endangerment provision," RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), which provides for the availability of injunctive relief, courts have consistently interpreted the term broadly. *See* Dague v. City of Burlington, 935 F.2d 1343, 1356 (2d Cir. 1991); Lincoln Properties, Ltd. v. Higgins, No. S-91-760 DFL/GGH (E.D. Cal. Jan. 18, 1993), 23 Envtl. L. Rep. (Envtl. L. Inst.) 20665, 20671 (1993) (analyzing whether a dry cleaner's handling of hazardous waste posed an imminent threat and holding that "'imminence' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present").

196. 426 N.E.2d 824, 836-37 (Ill. 1981).

197. *See id.* at 841.

198. *Id.* at 836 (quoting RESTATEMENT (SECOND) OF TORTS § 933(1), cmt. b (1979)).

199. *See id.*

200. *See id.* at 837.

201. *Wilsonville*, 426 N.E.2d at 838 (emphasis added).

likelihood of injury upon release, rather than to the temporal proximity of actual release.

Similarly, the better view of the "imminence" requirement under the Model Rules would permit disclosure of (1) crimes committed by a client, (2) that are likely to cause harm, (3) of a serious nature, (4) to a person, and (5) that the harm is in fact likely to occur.[202] Under this view of the imminence requirement, the attorney could balance the competing factors discussed above[203] in determining whether to disclose when she is confident that the crime will likely cause serious bodily harm.

The position advanced here is analogous to that accepted in the child abuse context,[204] and parallels Kaufman's example of the client who laces pain killers with cyanide.[205] From a practical standpoint, in many cases of unlawful hazardous waste disposal, the threatened harm will almost certainly occur without notification. Because of the difficulty in discovering releases[206] and the unlikelihood of reporting,[207] in order for the imminence requirement to make sense, the requirement must relate to the likelihood that the harm will occur rather than the immediacy of the harm.

3. Criminal Liability for Failure to Report Past Dumping

Failure to report past dumping is a criminally sanctionable offense under RCRA.[208] RCRA's reporting provisions

202. A policy rationale for a contrary reading would be very troubling. For example, if a client were to announce to his or her attorney that he or she intended to kill a person over time by replacing salt with arsenic, the narrow reading would disallow disclosure. Because people can absorb a threshold amount of the toxic element before suddenly dying, it is difficult to know when, if ever, the narrow view would allow revelation under such circumstances. While the attorney in the hypothetical case might dissuade the client from continuing the plot, the client's potential change of mind does not seem like a compelling reason to risk the victim's life.

203. *See supra* notes 156-58 and accompanying text.

204. *See supra* notes 165-72 and accompanying text.

205. *See supra* note 176 and accompanying text.

206. *See supra* notes 35-37 and accompanying text.

207. *See supra* note 187 and accompanying text.

208. *See* RCRA § 3008(d)(4), 42 U.S.C. § 6928(d)(4).

makes clear that Congress intended the manifest system to track waste.[209] Failure to notify appropriate state and federal authorities frustrates the statute's objective - the safe disposal of toxic waste.[210] Without prompt notification, the probability of harm grows while the opportunity to prevent or to mitigate the harm diminishes. Thus, strong policy arguments favor the view that a company's failure to disclose toxic substance release constitutes a crime in the present and future, as well as in the past.

Congress, however, wrote RCRA's notification provisions in the present tense, and positioned RCRA to control toxic substances before release.[211] Thus, if the locus of the crime of unlawful hazardous waste disposal is found in the past, the client's crime may be analogized to the case of fraud in the securities regulation context.[212]

Unlike fraud in the securities regulation context, however, hazardous substance laws are health, safety and public welfare laws.[213] The laws protect people from physical harm, and depending on the circumstances, violation may be *mala in se*. Moreover, as in the case of child abuse or nuisance,[214] if a client refuses to disclose an unlawful discharge after legal counseling, the crime of not reporting and the dangers to individuals are likely to continue unabated. Therefore, the Bar should interpret the Model Rules to permit reporting in a few, but critical, fact specific situations.

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209. *See* RCRA § 3002(a)(5), 42 U.S.C. § 9622(a)(5).

210. *See* RCRA § 1003, 42 U.S.C. § 6902. *See* Dickerson, Inc. v. United States, 875 F.2d 1577, 1581 (11th Cir. 1989).

211. With regard to citizen suits under section 6972(a)(1)(B), 42 U.S.C. § 7002(a)(1)(B), RCRA reaches past conduct, "but only to the extent that such past conduct continues to produce a present endangerment." Murray v. Bath Iron Works, Corp., 867 F.Supp. 33, 41 (D. Me. 1994).

212. *See supra* notes 159-60 and accompanying text.

213. *See* United States v. Sellers, 926 F.2d 410, 416 n.2 (5th Cir. 1991) (citing United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984)).

214. A release of hazardous materials typically does not constitute a continuing trespass (i.e. failure to remove chattel from land) because the release "once [and] for all produce[s] a permanent injury to the land." Graham Oil Co. v. BP Oil Co., 885 F.Supp. 716, 726 (W.D. Penn. 1994)(quoting Restatement (Second) of Torts § 161, cmt. (e)). However, if "the nuisance continues unabated, a plaintiff may bring successive actions for damages throughout its continuance . . . since the tort is ongoing." *Murray*, 867 F.Supp at 48.

B. Reporting Under CERCLA

CERCLA's focus on remedial action differs from RCRA's prospective mandate and mediates toward allowing disclosure of a client's past dumping. CERCLA imposes an affirmative and ongoing duty on corporate or natural persons to report unauthorized releases of hazardous waste to appropriate government authorities.[215] Thus, a client's failure to disclose a release is a crime regardless of whether the crime is in the past or present. On the other hand, the attorney's may only disclose a client's crime if the effects of the crime are still being felt or the crime itself has not been completed.[216] There, the attorney may evaluate whether the release is serious enough to mandate disclosure in the face of the duty to maintain confidences.

C. Disclosure under CERCLA and the Special Problem of Commingled Waste

The Model Code permits disclosure of a client's intent to commit a crime, while the Model Rules allow disclosure only if the crime is likely to "result" in harm to a third party.[217] The distinction between the Model Code and the Model Rules becomes particularly important when the client's hazardous waste becomes commingled with that of others making identification difficult or impossible. Thus, the issue arises whether the attorney should have discretion to report under the Model Rules if a third party faces imminent death or serious bodily harm because of unlawful disposal that is *not* specifically attributable to the client corporation's waste. The common law doctrine of joint and several liability[218] and court interpretation of CERCLA[219] suggest that the answer may be yes.

In *Sindell v. Abbott Laboratories*,[220] the California Supreme Court adapted the classic joint and several liability

215. *See* RCRA § 103(a), 42 U.S.C. § 9603(a).
216. *See supra* notes 162-64 and accompanying text.
217. *See supra* note 126.
218. *See* Summers v. Tice, 199 P.2d 1 (Cal. 1948).
219. *See* United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988).
220. 607 P.2d 924, 931 (Cal. 1980), *cert. denied*, 499 U.S. 912 (1980).

case, *Summers v. Tice*,[221] to the pharmaceutical context. The *Sindell* court permitted women who had taken the birth control drug diethylstilbesterol (DES), which was subsequently shown to cause cancer, to collect compensation, in whole, from one of a substantial number of pharmaceutical corporations that had produced the drug.[222]

The court based its holding on a combination of equitable and policy principles. First, the court recognized the underlying equitable principle enunciated in *Summers*: "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[223] The court reasoned that while there may not be sufficient evidence to show that any one of the defendants directly caused the harm, the "[defendant's] conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof."[224] Thus, the court relaxed the evidentiary standard necessary to show causation where the harm has a long latency period and results from the possible combined action of independent parties.[225]

From a policy standpoint, Judge Calabresi has persuasively argued that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."[226] By making each tortfeasor liable for the total harm under the theory of joint and several liability, individual decisionmakers are less likely to perform unpermitted or tortious acts.[227] Hence, the *Sindell* court concluded

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221. 199 P.2d 1 (Cal. 1948).

222. *See Sindell*, 607 P.2d at 937.

223. *Id.* at 936.

224. *Id.*

225. Similarly, in rejecting the defendant's (generator's) argument for apportionment of damages based on volumetric contribution of hazardous waste, the *Monsanto* court found that "[c]ommon sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences." *Monsanto*, 858 F.2d at 172.

226. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) [hereinafter CALABRESI, COSTS].

227. It is worth noting that the expected costs and benefits from committing the injurious act are the same, on average, whether a rule of joint and several liability or that of proximate cause applies. However, as the 18th Century

that because "[t]he manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effect . . ., holding the [company] liable . . . will provide an incentive to product safety."[228] Recognizing the special vulnerability of lay consumers when dealing with pharmaceuticals, the court emphasized that these considerations are especially important when the harmed parties are not in a good position to protect themselves.[229]

Courts have similarly imported the joint and several liability common law theory in the context of CERCLA.[230] In *United States v. Monsanto*,[231] the Ninth Circuit interpreted section 107 of CERCLA[232] as imposing joint and several liability on any waste generator or transporter, among others, whose waste is similar in kind to that released or that could have been produced by the mixture of the defendant's waste with other waste present at the dump site.[233] While the costs of clean-up are apportionable, each identified responsible party is liable for the whole.[234] Reasoning in a manner analo-

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Swiss mathematician Bernoulli noted, people balancing decisions under conditions of uncertainty do not necessarily attempt to maximize expected quantifiable benefits. Instead, they may try to minimize unexpected large losses. This observation introduces the decisionmaker's aversion or indifference to risk into the equation. *See* COOTER, *supra* note 38, at 254.

228. *Sindell*, 607 P.2d at 936.

229. *See generally*, Jeffery Trauberman, *Statutory Reform of Toxic Torts: Relieving Legal, Scientific and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177, 260-261 (1983) (noting that in order to protect the harmed party, the courts hold each defendant liable for a share of the damages).

230. *See* PLATER ET AL., *supra* note 3, at 287-300.

231. The *Monsanto* court imported joint and several liability theory from the common law. The court reasoned that "Congress knew of the synergistic and migratory capabilities of leaking chemical waste, and the technological infeasibility of tracing improperly disposed of wasted to its source . . . [W]e will not frustrate the statute's goals by engrafting a 'proof of ownership requirement . . . .'" *Monsanto*, 858 F.2d at 170.

232. In the pertinent part, CERCLA §§ 107(a)(3),(4) impose liability on offsite waste generators who "arranged for disposal . . . of hazardous substances . . . at any facility . . . containing such hazardous substances . . . " and any transporter who "accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release . . . ." 42 U.S.C. §§ 9607(a)(3), (4).

233. *See Monsanto*, 858 F.2d at 171.

234. *See id.* at 172-73.

gous to *Sindell*,[235] the *Monsanto* court found that because it is impossible to "'finger print' waste," imposing a "proof of ownership requirement" would "eviscerate the statute."[236]

The analysis applied by the *Monsanto* court comports with Judge Calabresi's tort policy rule: administrative costs are minimized because expensive analysis required to apportion costs need not be undertaken,[237] and because both individuals and corporations are typically averse to sudden accrual of liability,[238] they are likely to take steps to ensure proper treatment of their waste.

For similar reasons, the attorney for the client that has unlawfully disposed of hazardous waste, but who will not report, may have no way of knowing whether his client's chemicals are those which will likely result in imminent death or serious bodily harm. To hold the attorney to a level of certainty based on actual causation would, in all but the most limited cases, prohibit disclosure and permit the harm to occur.

However, there are those who would find highly restrictive disclosure acceptable.[239] At least two basic arguments support a restrictive view of causation under Model Rule 1.6. First, from a societal stand-point, the client who has unlawfully disposed of hazardous waste needs legal assistance. Without open discussion free from the potential threat of disclosure, the polluting client will not be able to come into compliance and the public may well suffer the full weight of the release's harm.[240]

The second, and, perhaps, the more interesting argument is based upon the policy that supports individual autonomy.[241] In the administrative and judicial determination of liability, Judge Calabresi's tort policy argument may favor

235. *See Sindell*, 607 P.2d at 929.

236. *Monsanto*, 858 F.2d at 170 (quoting United States v. Wade, 577 F.Supp. 1326, 1332 (E.D. Pa. 1983)).

237. CALABRESI, COSTS, *supra* note 226, at 135-73.

238. *See supra* note 227. *See also* COOTER, *supra* note 38, at 57-58.

239. *See generally* Freedman, *supra* note 130.

240. This is simply an application of the argument discussed *supra* notes 136-40 and accompanying text.

241. *See* Pepper, *supra* note 140, at 616-17.

joint and several liability.[242] However, many values supporting attorney-client confidentiality are somewhat different. Judge Calabresi's rule does not consider the inherent value of allowing an individual client to make his or her own decision, a policy which, in part, underpins Model Rule 1.6.[243] Moreover, to allow an attorney to report a *de minimis* responsible party whose waste happens to have ended up in a large release site might seem unfair.

Nevertheless, Model Rule 1.6's causation requirement suggests an interpretation consistent with the common law theory of joint and several liability. First, just as the proximate cause standard does not make sense in the context of the toxic tort,[244] it would fail in the context of Model Rule 1.6. The possible long latency period, the near impossibility of accurate tracing, and the great potential for widespread, irreparable harm to human health and the environment, suggest that society may suffer gravely if notification is prohibited by application of the proximate cause requirement.

While it is probably correct that if many attorneys disclose their clients' involvement with a site that posed imminent death or substantial harm to the public, clients will not seek legal assistance in the first place. On the other hand, if the client has no intention of reporting, an attorney's continued remonstrations are unlikely to persuade the client anyway. Moreover, the attorney who has reached the difficult conclusion that disclosure is necessary will have balanced the competing factors discussed above and determined that remonstration is useless and death or serious bodily harm will likely result unless disclosure is made.

The second argument supporting the restrictive view of disclosure has more superficial appeal than real merit. While Calabresi's tort policy rule is less concerned with the individual's right to break the law, the acceptance of professional-client confidentiality is a rule based on policy and not consti-

242. *See generally*, CALABRESI, COSTS, *supra* note 226.

243. *See supra* notes 132-35 and accompanying text.

244. *See supra* note 225 and accompanying text.

tutional principle.[245] Moreover, far from being unconcerned with individual autonomy, Judge Calabresi, a former Professor of Law and Economics, holds free choice in high regard.[246] While his tort policy is compatible with the general rule against disclosure, in its pure utilitarian form (to which Calabresi would likely not subscribe) it does not extend so far as to diminish the public's utility more than it would serve to increase the client's.[247]

V. Conclusion

This Article has generally argued for broad but conditioned attorney discretion in reporting a client's improper disposal of hazardous waste when harm to human health is likely. The unusual properties of toxic substances, the threat of widespread harm to human health, and the potential for prevention or mitigation offered by early disclosure are the principle factors forming the argument. Moreover, the perception of criminal environmental violation as a crime *mala in se* further mediates toward permission to report.

The fact that an attorney may disclose, however, does not imply that the attorney must disclose. Indeed, because attorney-client confidentiality is vital to our system of law, the at-

245. *See* MODEL RULES Rule 1.6 cmt. 4. The purpose of the Rule 1.6 is to encourage clients "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.*

246. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 11 (1985) [hereinafter CALABRESI, IDEALS].

247. Two points deserve additional attention. First, as discussed in the text accompanying note 230, *supra*, on average, joint and several liability does not change the expected value of the amount that the individual will have to pay. Rather, the recovery theory will affect the timing of the payment. Second, Calabresi's rule, as applied in the context of Rule 1.6, mediates towards maximizing total individual autonomy, not just the autonomy of the client. Because departure from Calabresi's maximization rule would imply an economic inefficiency (i.e. precautionary resources would be under-allocated by the polluter, and the toxic impacted public would be forced to bear the costs, in effect subsidizing the polluter) the autonomy of the total community of individuals would be diminished. Calabresi, however, would likely arrive at a slightly different answer, as his calculus would factor in the value of society's belief in the ability of people to make autonomous decisions. *See* CALABRESI, IDEALS, *supra* note 246, at 87-114.

torney must use substantial discretion in making the choice to disclose.

To restate the hypothetical: In spite of attorney remonstrations, a small, closely-held dry cleaning corporation refuses to report to authorities that its waste hauling company has been dumping the firm's hazardous waste into a gravel quarry. While the volume contributed by the firm is small in comparison to the total amount dumped, gravel beds frequently drain directly into aquifers, indicating possible threat of serious and widespread harm to human health.

The Model Code would permit disclosure on the basis of CERCLA's affirmative and ongoing requirement that generators report releases. Under the Model Rules, however, the attorney, Anderson, would need more information before determining whether he could permissibly disclose the release.

Recognizing that the Model Rules require both that the lawyer believe the harm "likely,"[248] and that the disclosure is "necessary" to prevent the harm,[249] the lawyer must have a strong understanding of the factual circumstances. Further, given the importance of the ethical obligation, not only to the dry cleaning business, but to the practice of law and the public, generally, Anderson should seek more information before making disclosure.

Like any attorney contemplating disclosure, at a minimum, Anderson must satisfy himself that the exigency of the circumstances meets the Model Rules' "likely" standard of certainty. Without some kind of risk assessment, at least a limited one, it is unclear how Anderson could disclose the release. The more serious the release, for example, highly toxic waste released in proximity to a vulnerable human population, the less detailed the study would need to be in order to satisfy the certainty standard. Before disclosing, the attorney should consider: (1) what vectors would lead people into contact with the waste; (2) the type(s) of population(s) that would likely encounter the waste; (3) the volume, toxicity,

248. *See* MODEL RULES Rule 1.6 (b)(1).
249. *See id.*

persistence, and likely synergistic interactions of the waste with other substances; (4) the circumstances under which the waste was released; (5) the date of the release; (6) the location where the waste was released; and (7) whether any other wastes were or are present at the site. These factors would allow the attorney to make a reasoned, informed decision whether to disclose.

Anderson, in the case at hand, or an experienced environmental attorney, generally, should not have difficulty gathering or analyzing the needed information. Indeed, in counseling his client, Anderson should have obtained and considered most of the above mentioned information anyway. While cases undoubtedly exist in which releases occurred without any record having been kept, if the volume and toxicity of the waste can be determined, as well as the date of release, the attorney may be able to make some determination. However, if little evidence exists of a release's severity, then the circumstances are likely inappropriate for disclosure.