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The Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Evaluation of Confidentiality for the Environmental Attorney

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THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT (CERCLA) AND THE EVALUATION OF CONFIDENTIALITY FOR THE ENVIRONMENTAL ATTORNEY

Vincent G. Tsushima*

INTRODUCTION

No other ethical dilemma is as vexing as the conflict between the duty to keep client confidentiality and the duty to prevent a client from committing a crime or perpetrating a fraud.¹ According to the *Model Rules of Professional Conduct*, "[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"² It adds, however, that "a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to pre-

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1. See Sanders M. Chatman & Deborah S. Kinburn, *Ethical Dilemmas Confronted By Environmental Attorneys: When the Duty To Keep A Client's Confidence Is Not Absolute*, 322 PLI/REAL 425, 427 (1988).

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) [hereinafter MODEL RULES].

Rule 1.6, Confidentiality of Information, reads as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal 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.

vent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”³ The lawyer must face the ethical dilemma inherent in balancing the maintenance of confidentiality against the disclosure of confidential information.⁴ The ethical issues faced by environmental lawyers may be more complicated due to (1) the public and political nature of most environmental law litigation, and (2) the relative “youth” of the settled body of environmental law and the continuing creation of new legal and doctrinal principles.⁵

In environmental law, the attorney may face a conflict between maintaining confidential information and disclosing information in order to protect innocent third parties from environmental hazards. Federal laws reflect the seriousness of environmental pollution by imposing criminal sanctions for certain environmental crimes.⁶ Exacerbating the dilemma for attorneys is the growing risk of tort liability for professionals who fail to warn non-clients of dangers and the ambiguity of many environmental

3. *Id.*

4. See Ilona L. Dotterrer, *Attorney-Client Confidentiality: The Ethics of Toxic Dumping Disclosure*, 35 WAYNE L. REV. 1157, 1158 (1989). See generally MODEL RULES, pmb. Subsection [1] states:

A lawyer is representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

Subsection [8] states:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

5. See James R. Arnold et al., *Disclosure of Environmental Liabilities to Government Agencies and Third Parties*, CA47 A.L.I.-A.B.A. 381, 458 (1995).

6. See Dotterrer, *supra* note 4, at 1160-61.

laws.⁷ Furthermore, the *Model Rules* assume that harm resulting from any client has limited impact.⁸

There may also be a conflict between federal laws and the ethical rules, as illustrated in CERCLA's emphasis on remedial action reinforcing disclosure of a client's past violation.⁹ Here, a client's failure to disclose a release is a crime, whether the violation occurred in the present or past.¹⁰ On the other hand, the attorney may only disclose a client's crime if the effects of the crime are still being felt or the crime itself is not complete.¹¹ In order to properly address the mandates of CERCLA, the environmental attorney needs to consider various factors (e.g., agency, past v. current crime) in determining disclosure of client confidences.

Part I of this Note discusses CERCLA and confidentiality issues related to CERCLA. Part II presents an overview of relevant principles regarding confidentiality issues in environmental law. The relevant principles include: (1) Model Rule 1.6 and its interaction with other rules (Model Rules 4.1 and 3.3); (2) broad versus narrow conceptualizations of confidentiality; (3) continuing versus past crime; (4) ethical rules and possible conflict with other laws; (5) agency; and (6) prosecutorial considerations. Part III presents a model, organizing these issues for the environmental attorney's examination of specific cases of confidentiality. Some of the relevant factors in this model include consideration of administrative agencies and regulations, potential or actual third party victims, and prosecutorial considerations. Finally, the model will be applied to three fact patterns, focusing on issues raised by CERCLA.

7. See Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 414 (1997).

8. See *id.* at 454.

9. See Nicholas Targ, *Attorney Client Confidentiality in the Criminal Environmental Law Context: Blowing the Whistle on the Toxic Client*, 14 PACE ENVTL. L. REV. 227, 260 (1996).

10. See *id.*

11. See *id.* (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470, at 396 (1981)).

I. CERCLA AND ISSUES OF CONFIDENTIALITY RELEVANT TO
ENVIRONMENTAL LAW

The courts have applied the common law in novel ways to address harm to human health and the environment caused by industrial pollution. However, the private, fact-specific and generally retrospective nature of tort and other common law remedies have been inadequate.¹² Civil common law remedies have been particularly inadequate to the task of addressing harm to human health caused by hazardous wastes, providing neither redress for widespread public harms nor a mechanism for insightful anticipatory intervention.¹³ Even if damages were an appropriate remedy, the traditional common law measures of injury do not fully internalize costs caused by environmental violations, because of lack of information and "large numbers" problems.¹⁴ Furthermore, they do not take into account non-economic values.¹⁵ In order to address environmental violations, agencies and courts have aggressively applied federal environmental statutes in actions against polluters and have expanded the use of older common law criminal provisions.¹⁶

Among the acts utilized by agencies and courts is the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).¹⁷ This act requires notification by the "person(s) in charge"¹⁸ about the release of hazardous substances.¹⁹ Section

12. *See id.* at 233-34.

13. *See id.* (citing ZYGMUND J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE LAW AND SOCIETY* 241 (1st ed. 1992).

14. *See id.* at 235.

15. *See id.*

16. *See id.*

17. 42 U.S.C. §§ 9601-9675 (1996).

18. 42 U.S.C. § 9603(a) reads as follows:

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center

established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

19. CERCLA, 42 U.S.C. § 9603(c), reads as follows:

(a) Notice to Administrator of EPA of existence of storage, etc. facility by owner or operator; exceptions; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case.

Within one hundred and eighty days after December 11, 1980, 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 (as defined in section 9601(14)(C) of this title) or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator of the existence of any such facility shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. 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. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: Provided however, that notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prose-

101(20)(A)²⁰ identifies parties liable under CERCLA as "persons" owning or operating a hazardous waste facility. Under section 101(21) of CERCLA, a "person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, municipality, commission, political subdivisions of a State, or any interstate body."²¹ While these two sections may stipulate who may be a responsible "person" under the Act, section 107(a) defines four classes of individuals who would be liable as "owners and operators" of waste facility sites under CERCLA.²² These parties include current owners and operators of waste site facilities, past owners and operators of waste site facilities, generators of hazardous waste, and those who accept waste for purposes of transporting it to disposal facilities.²³

The requirement of a "release" or a "threatened release" has not been difficult for the government to meet.²⁴ CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment," including the abandonment or discarding of barrels of containers of hazardous substances.²⁵ The statute exempts the following types of releases: (1) any release which results in exposure to persons solely within a workplace; (2) emissions from the engine exhaust of motor vehicles, rolling stock, aircraft, vessels, or pipeline pumping stations; (3) release of source, byproduct or special nuclear material from a nuclear incident or from any processing site pursuant to the Atomic Energy Act; and (4) the normal application of fertilizer.²⁶

cution for perjury or for giving a false statement.

20. See John P. Dragani, *Apportioning Liability for the Cleanup of Hazardous Waste Sites Under The Comprehensive Environmental Response, Compensation and Liability Act*, 1 *VILL. ENVTL. L.J.* 537, 541 (1990) (citing 42 U.S.C. § 9601(20)(A)).

21. See *id.* (citing 42 U.S.C. § 9601(21)).

22. See *id.* at 541-42 (citing 42 U.S.C. § 9607(a)).

23. See *id.*

24. See Theodore L. Garrett, *Superfund Liability and Defenses: A 1992 Primer*, 6 *NAT. RESOURCES & ENV'T* 3 (1992).

25. *Id.* (citing 42 U.S.C. § 9601(22)).

26. See *id.*

CERCLA specifically authorizes the Environmental Protection Agency (EPA) to take "response" actions to decrease any actual or threatened release of a hazardous substance.²⁷ It enables EPA to exercise Presidential authority in identifying active and abandoned hazardous waste sites across the country.²⁸ Further, the EPA also enlists the assistance of the Justice Department in bringing action against potentially responsible parties, to reimburse Superfund for its cleanup costs.²⁹ In addition to authorizing cleanup actions by the EPA, CERCLA provides funds via the Hazardous Substance Superfund to pay for federal response actions.³⁰

CERCLA does not require the alleged violator to know that a release violated the law.³¹ The statute "demands only that the defendant be aware of his acts."³² CERCLA places an affirmative and continuing duty upon responsible persons, for preventive purposes, to report unauthorized releases. Further, responsible parties are strictly liable.³³ Finally, the government may levy criminal penalties for violations of CERCLA.³⁴

The CERCLA defendant must prove the availability of one of three categories of affirmative defenses found in section 107(b)

27. See Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA*, 42 CASE W. RES. L. REV. 65, 69 (1992) (citing 42 U.S.C. § 9604(a)(1)). Response actions fall into either of two categories: "removal" actions, 42 U.S.C. § 9601(23), which are short-term actions to prevent or mitigate damage to human health or the environment as a result of the release or threatened release of a hazardous substance, and "remedial" action, 42 U.S.C. § 9601(24), which may include a variety of cleanup acts focused on long-term, permanent remedy at a site.

28. See Dragani, *supra* note 20, at 540 (citing Exec. Order No. 12,286, 46 Fed. Reg. 9901 (1981)).

29. See *id.* at 541 (citing 42 U.S.C. §§ 9601-9675).

30. See Healy, *supra* note 27, at 69-70.

31. See Targ, *supra* note 9, at 242 (citing *United States v. Laughlin*, 10 F.3d 961, 966-67 (2d Cir. 1993)).

32. *Id.*

33. See Healy, *supra* note 27, at 72.

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

of CERCLA.³⁵ If he cannot, he will then be forced to take responsibility for the cleanup of a hazardous waste site.³⁶ Section 107(a) of CERCLA establishes the basic elements of liability.³⁷ The statute sets forth that when there is a release or threatened release of a hazardous substance from a facility that causes the incurrence of response costs, responsible parties are liable *inter alia* for:

(A) all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources"³⁸

CERCLA's emphasis on remedial action reinforces disclosure of a client's past dumping.³⁹ Thus, a client's failure to disclose a

35. See Dragani, *supra* note 20, at 542 (citing 42 U.S.C. § 9607(b)). CERCLA section 107(b) provides:

There shall be no liability under subsection (a) of this section for a person who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

- (1) an act of God;
- (2) an act or war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with a defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omission of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs).

36. See Dragani, *supra* note 20, at 542-43 (citing 42 U.S.C. § 9613(f)(1)).

37. See Garrett, *supra* note 24, at 3 (citing 42 U.S.C. § 9607(a)).

38. 42 U.S.C. § 9607(a)(4); *see also* Garrett, *supra* note 24, at 3.

39. See Targ, *supra* note 9, at 260.

release is a crime, whether the violation occurred in the present or past.⁴⁰ On the other hand, the attorney may only disclose a client's crime if the effects of the crime are still being felt or the crime itself is not complete.⁴¹

In order to properly address this conflict, the environmental attorney needs to consider various factors (e.g., agency, past versus current crime) to make the proper determination regarding disclosure of client confidences.

II. RELEVANT PRINCIPLES REGARDING CONFIDENTIALITY AND ENVIRONMENTAL LAW

There appears to be no single standard for determining how much information an attorney should disclose to a regulatory agency.⁴² Rather, different circumstances require different duties.⁴³ At present, several issues have been regularly discussed in the literature, including: (1) Model Rule 1.6 and its interaction with other rules (Model Rules 4.1 and 3.3); (2) broad versus narrow conceptualizations of confidentiality; (3) continuing versus past crime; (4) ethical rules and possible conflict with other laws; (5) agencies; and (6) prosecutorial considerations. Although many of these issues are also relevant to non-environmental confidentiality issues, they take on a particular significance and relevance in environmental law.

A. *Model Rule 1.6*

As noted, Model Rule 1.6 maintains that a lawyer is not to reveal information related to his/her representation of a client. The exception is when s/he reasonably believes it is necessary to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily harm.⁴⁴ The principle of confidentiality is embodied in two related principles: (1) the attorney-client privilege (and the corresponding work-

40. *See id.*

41. *See id.* (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470 at 396 (1981)).

42. *See* Michelle D. Jordan, *Counsel's Duty to Disclose and Liability for Environmental Risks and Audits*, 445 PLI/LITIG. 857, 869 (1990).

43. *See id.*

44. MODEL RULES Rule 1.6(b)(1).

product doctrine) in the law of evidence; and (2) the rule of confidentiality established in professional ethics.⁴⁵ They apply not merely to matters communicated in confidence by the client, but also to all information relating to the representation, regardless of the source.⁴⁶ Further, the duty of confidentiality continues even after termination of the attorney-client relationship.⁴⁷

As broad and encompassing as Model Rule 1.6 may be, its application becomes further complicated when circumstances invoke other Model Rules.⁴⁸ In particular, an American Bar Association Committee on Ethics and Professional Responsibility elucidated the possible interaction of Model Rule 1.6 with Model Rules 3.3 ("Candor Toward the Tribunal"),⁴⁹ 3.9 ("Advocate in

45. See *id.* cmt. 5; see also Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, An Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 *LOY. L.A. L. REV.* 1611, 1613 (1996).

46. See MODEL RULES Rule 1.6(b)(1), cmt. 5.

47. See *id.* cmt. 22.

48. See ABA Comm. on Ethics and Professional Responsibility, *Formal Op.* 93-375 (1993).

49. MODEL RULES Rule 3.3. Rule 3.3 (Candor Toward the Tribunal) reads as follows:

(a) A lawyer shall not knowingly:

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

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

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

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

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tri-

Nonadjudicative Proceedings”),⁵⁰ and 4.1 (“Truthfulness in Statements to Others”).⁵¹ Under all of these provisions, a lawyer may not tell a lie, regardless of whether it may be necessary to protect client confidences.⁵² However, it is unclear whether and to what extent a lawyer in a regulatory proceeding has an ethical obligation to disclose information that would be against the client’s interests or would otherwise breach confidentiality.⁵³ While Rules 3.3, 3.9 and 4.1 all impose a duty to disclose information when such disclosure is “necessary to avoid assisting a criminal or fraudulent act by a client,” this duty overrides the duty to protect client confidences only under Rules 3.3 and 3.9.⁵⁴

As these rules allow for various interpretations, the issues may be further elucidated by consideration of broad versus narrow conceptualizations of confidentiality.

B. *Broad Versus Narrow Conceptualizations of Confidentiality*

The legal profession has long debated the scope of the confi-

bunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

50. *Id.* Rule 3.9. Rule 3.9 (Advocate in Nonadjudicative Proceedings) reads as follows:

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

51. *Id.* Rule 4.1. Rule 4.1 (Truthfulness in Statements to Others) reads as follows:

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

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

52. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-375 (1993).

53. *See id.*

54. *See id.*

dentiality duty.⁵⁵ Under a broad view of confidentiality, the attorney can make the client's values primary and remain silent, thereby allowing any harm from the client's conduct to occur.⁵⁶ On the other hand, a narrow view permits the attorney to disclose a client's confidences to prevent harm, thereby giving preference to the interests of third parties who may be harmed by the client's conduct.⁵⁷

There are two justifications for a broad duty of confidentiality: (1) social utility and (2) vicarious responsibility.⁵⁸ Social utility provides that an attorney better serves society when s/he can offer clients "professional refuge," even though withholding important information from the public.⁵⁹ It suggests that the client, with the understanding of confidentiality, will disclose more information to the attorney; thus, allowing the attorney to modify the client's conduct in a way that benefits society.⁶⁰ Vicarious responsibility minimizes the attorney's moral role in the attorney-client relationship by limiting it to his/her choice of clients, which is entirely within the attorney's control.⁶¹ Thus, the attorney may exercise his/her moral beliefs concerning the selection of clients. However, once the attorney makes his/her choice, s/he must suspend moral evaluation in client representation.

The narrow view of confidentiality maintains that an attorney should serve the client in a manner consistent with his/her own morals.⁶² The potential impact of environmental hazards, which may affect enormous numbers of individuals over an undeterminable period of time makes this issue unusually important.

55. See Dotterrer, *supra* note 4, at 1158.

56. See *id.* at 1172-73.

57. See *id.* at 1173.

58. See *id.*

59. See *id.* (citing SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 122 (1983)).

60. See *id.* at 1173-74 (citing MODEL RULES, pmb., Rules 1.0 cmt., 1.6 cmt.).

61. See *id.* at 1174 (citing Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204-05 (1978)).

62. See *id.*

A consideration of broad versus narrow conceptualizations of confidentiality elucidates the breadth of the issues. However, the attorney clearly also needs to evaluate the breadth of the facts.

C. *Continuing Versus Past Crime*

If a client's conduct poses a significant risk and appears to be a continuing, rather than a past, crime the attorney may disclose the relevant information⁶³ necessary to prevent a crime which s/he reasonably believes the client intends and is likely to result in imminent death or substantial bodily harm.⁶⁴ However, the lawyer may not disclose confidential information regarding the past act of a client, no matter how clearly illegal and serious, if all of the harmful consequences of the act have already occurred.⁶⁵ The lawyer may take preventive measures, even though some act has already occurred, if some material, harmful consequence of the act has not yet been inflicted on a victim.⁶⁶ This adds a twist to the dilemma as environmental offenses are often ongoing, causing difficulty in determining whether a crime is one in the past or future.⁶⁷

After consideration of the ethical rules and the facts, the attorney obviously must consider the interaction of other laws.

63. See Chattman & Kinburn, *supra* note 1, at 439.

64. MODEL RULES Rule 1.6, cmt. 14 reads as follows:

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

65. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 117A, cmt. (a) (1996).

66. See *id.* cmt. (d).

67. See George W. Van Cleve, *Environmental Law in the 1990s and Its Principal Implications for Professional Responsibility*, C534 A.L.I.-A.B.A. 405, 417-18 (1990).

D. *Model Rules Versus Jurisdictional Rules*

Under the Model Rules, an attorney may keep almost all information obtained in the course of representation confidential, as the duty to disclose is discretionary.⁶⁸ However, the laws of client confidentiality differ in many particulars from one jurisdiction to another.⁶⁹ Several jurisdictions require the attorney to make a far more careful examination of the facts at hand and the potential consequences of nondisclosure.⁷⁰ This examination may lead to a less permissive and more mandatory obligation to disclose client information.⁷¹ Thus, the environmental attorney needs to understand the governing ethics rules and case law of the jurisdiction in which the representation occurs. Furthermore, the attorney must consider agency enforcement in environmental laws.

E. *Agency*

Between 1984 and early 1989, the firm Kaye, Scholer represented Charles Keating Jr.'s Lincoln Savings & Loan Association (Lincoln).⁷² Lincoln later collapsed, costing taxpayers \$2 billion and the court sentenced Keating to ten years in prison for duping Lincoln depositors into buying high risk junk bonds which later became worthless.⁷³ In 1992, the Office of Thrift Supervision (OTS) brought a \$275 million lawsuit against Kaye, Scholer.⁷⁴ The OTS maintained that the firm had a duty to disclose material facts involving risky underwriting practices and the overstated financial position of Lincoln.⁷⁵ In pursuing the firm, the OTS was able to rely on a Federal Home Loan Bank Board (FHLBB) regulation.⁷⁶ The OTS argued that the firm played an active role during an examination process, functioning as an

68. See Chattman & Kinburn, *supra* note 1, at 443-44.

69. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, ch. 5 (1990) (Introductory Note).

70. See Chattman & Kinburn, *supra* note 1, at 443-44.

71. See *id.*

72. See Jordan, *supra* note 42, at 860.

73. See *id.*

74. See *id.*

75. See *id.* at 861.

76. See *id.*

agent for Lincoln.⁷⁷

Six days after the lawsuit, the firm, without admitting liability, settled the suit for an astounding \$41,000,000 fine.⁷⁸ Many commentators maintained that the case against Kaye, Scholer was especially strong, because the government inherited the thrift's attorney-client privilege when it seized Lincoln.⁷⁹ That meant the government had access to documents that Kaye, Scholer prepared for Lincoln.⁸⁰ Thus, the government could waive the privilege and use the materials against the law firm.⁸¹

To the extent that federal statutes have similar provisions in environmental law, an environmental attorney may run the risk, under the *Kaye, Scholer* rationale, of having reporting obligations imposed directly upon him/her.⁸² According to the Restatement (Third) of Law Governing Lawyers, a lawyer may use or disclose confidential client information when required by law after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.⁸³ Environmental attorneys must realize that they cannot make ethical determinations based on state ethical codes alone.⁸⁴ Increasingly, they must consider the constraints imposed by agency rules, which regulate clients' conduct.⁸⁵ This issue may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or *administrative agency*,⁸⁶ as occurred to Kaye, Scholer through the OTS. Finally, the attorney must consider how the environmental laws are enforced.

77. *See id.*

78. *See id.* at 862.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 868.

83. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 115 (1996).

84. *See* Jordan, *supra* note 42, at 875.

85. *See id.*

86. *See id.* at 868.

F. *Prosecutorial Considerations*

An environmental attorney, when determining whether to disclose a client's confidence, may need to account for the factors considered in a federal prosecutor's decision to indict a polluter.⁸⁷ The prosecutor's decision to bring criminal charges is largely subjective and discretionary.⁸⁸ Generally, federal agencies charged with the enforcement of environmental laws recognize two types of noncompliance offenses:⁸⁹ (1) "foot-dragging" or "bumbling ignorance"⁹⁰; and (2) the more serious intentional, substantial violation of environmental laws.⁹¹ Regarding factors in consideration of prosecution, the prosecutor examines: (1) the severity of the public and environmental harm;⁹² (2) the degree of knowledge, willfulness and recalcitrance on the part of alleged violators; (3) past illegal conduct; (4) the duration of the offense; (5) the ability of the suspect to comply with pollution control laws; and (6) the deterrent effect of a civil penalty.⁹³ Depending on the attorney's control or knowledge of the client's intended conduct, federal environmental laws may impose special obligations to disclose a client's environmental violations.⁹⁴ The Justice Department, for example, will investigate the extent of a lawyer's involvement in willful, illegal environmental activity.⁹⁵

87. See Dotterrer, *supra* note 4, at 1161.

88. See *id.* at 1170 (citing Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133 (1986), reprinted in 18 LAND USE & ENVTL. REV. 427, 455 (1987)).

89. See *id.* at 1168 (citing James W. Moorman, *Criminal Enforcement of the Pollution Control Laws*, in ENVIRONMENTAL ENFORCEMENT 26, 29 (ABA Standing Comm. on Env'tl. L. 1978)).

90. *Id.*

91. *Id.* at 1169 (citing Christopher Harris et al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988)).

92. See *id.* at 1170 (citing Moorman, *supra* note 89, at 27).

93. See *id.* at 1171 (citing McMurry & Ramsey, *supra* note 88, at 455-56).

94. See *id.* (citing McMurry & Ramsey, *supra* note 88, at 455).

95. See Dotterrer, *supra* note 4, at 1171-72 (citing Norton F. Tennille, Jr., *Criminal Prosecution of Individuals: A New Trend in Federal Envi-*

III. SYNTHESIS OF LITERATURE INTO COMPREHENSIVE MODEL

This Note proposes a larger comprehensive model of confidentiality-based consideration and integration of the following factors: (1) Model Rule 1.6 and its interaction with other rules (Model Rules 4.1 and 3.3); (2) broad versus narrow conceptualizations of confidentiality; (3) continuing versus past crime; (4) ethical rules and possible conflict with other laws; (5) agencies; and (6) prosecutorial considerations. The environmental attorney, when confronted with the issue of confidentiality, examines these various factors in making a determination of whether or not to disclose client information. This Note submits a model, based on the current literature, by which the environmental attorney may systematically analyze each relevant factor and the interaction of the factors to a particular environmental issue. In particular, the model may be utilized when the environmental attorney confronts federal statutes (e.g., CERCLA), imposing the disclosure of client information.

In order to demonstrate the possible utility of this model, this Note presents three confidentiality hypotheticals and applications of the proposed model to evaluate issues of confidentiality. Furthermore, the analysis will incorporate some general considerations that CERCLA invokes in the confidentiality analysis.

Hypothetical Case 1

The client, a public utility, is operating a coal-fired facility whose electrostatic precipitator does not function properly. Operation of the facility would violate its air permits and/or applicable emission standards. The client's facility manager informs the lawyer that the client used the malfunctioning precipitator in the past to meet load requirements without the lawyer's knowledge. It is not being used presently, but the lawyer has discovered that the facility will be utilized for a discrete time period in the immediate future. It apparently will be used to meet load requirements because of a developing heat wave. This conduct would constitute a criminal offense.⁹⁶

ronmental Enforcement?, in ENVIRONMENTAL ENFORCEMENT 20 (ABA Standing Comm. on Env'tl. L. 1978)).

96. See NEW YORK STATE BAR ASSOCIATION (NYSBA), ETHICS AND EN-

Analysis of Hypothetical Case 1

First, according to Model Rule 1.6, the attorney would not have an obligation to disclose confidential information about the past crime. However, the attorney has discovered the intent to commit a crime when he learned that the facility will be used for a discrete period of time in the immediate future to meet load requirements. Nevertheless, the lawyer may decide that the crime is unlikely to result in imminent death or substantial bodily harm. The determination of whether to reveal information, which may prevent the client from committing a crime likely to result in substantial bodily harm, if not imminent death, may require the attorney to form a belief as to matters concerning whether there is a diversity of opinion among scientific experts.⁹⁷ Furthermore, even if the crime was likely to result in such harm, Model Rule 1.6 makes the decision to disclose discretionary.

Second, the attorney also needs to consider whether to take a broad versus a narrow view of confidentiality. As discussed, the duty of confidentiality in the context of environmental crimes should not be absolute, but it should be balanced against the harm caused by nondisclosure.⁹⁸ The attorney needs to evaluate the competing rationales and bases underlying a broad and narrow view of confidentiality. In the present case, the attorney may consider the benefit of vicarious responsibility (the minimization of the attorney's moral role in the attorney-client relationship by limiting it to his/her choice of clients),⁹⁹ and weigh this against the potential harm from using a faulty electrostatic precipitator for a discrete period of time. The attorney may also want to weigh the potential harm from using this faulty precipitator against the benefit (i.e. to meet electricity demands because of a developing heatwave). It appears that the utility's motive and desired outcome are for a societal benefit rather than mere personal gain.¹⁰⁰ Hence, this may not threaten a narrow view of con-

ENVIRONMENTAL LAW: CASE STUDIES 15 (1991).

97. See David Sive et al., *Particular Ethical Problems in Environmental Litigation*, SB64 A.L.I.-A.B.A. 229, 242 (1997).

98. See Dotterrer, *supra* note 4, at 1161.

99. See *id.* at 1174 (citing Freedman, *supra* note 61, at 204-05).

100. MODEL RULES Rule 1.13(b) reads as follows:

If a lawyer for an organization knows that an officer, em-

fidentiality where the attorney's conscience and sense of morality come into play. As illustrated, inclusion of this factor in the analysis facilitates consideration of the potential costs and benefits of different approaches to confidentiality. It also facilitates consideration of the attorney's moral position on these issues.

Third, as discussed, the attorney additionally needs to consider whether there is continuing versus past crime. This adds a twist to the dilemma, as environmental offenses are often ongoing, causing difficulty in determining whether a crime is one in the past or future.¹⁰¹ It appears that the utility's past use may not have continuing effects, which may argue against disclosure of information. However, if the attorney determines that the client's conduct met a high level of danger and is a continuing crime, the ABA Model Rules permit the attorney to disclose the relevant information.¹⁰² The analysis requires the consideration of this factor because exclusion may result in the disregard of the nature of a given hazardous element and the range of potential consequences. Reliance upon only the first two factors could lead the environmental attorney to neglect the potential long-term effects of a hazardous element.

Fourth, as argued, states may require the attorney to make a far more careful examination of the facts at hand and the poten-

ployee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.

101. See Van Cleve, *supra* note 67, at 417-18.

102. See Chattman & Kinburn, *supra* note 1, at 439.

tial consequences of nondisclosure.¹⁰³ Hence, the attorney cannot rely primarily on his/her interpretation of only the Model Rules. In the present case, facts indicate that the client's conduct would constitute a crime.

Fifth, in the present case there is no mention of any agency regulations. However, at this juncture, the attorney must also consider the possible impact of CERCLA. As noted, this act requires notification by both the facility and the "person(s) in charge"¹⁰⁴ when hazardous substances have been released.¹⁰⁵ CERCLA places an affirmative and continuing duty upon responsible persons, for "preventive" purposes, to report unauthorized releases.¹⁰⁶ Hence, CERCLA indicates that the client is responsible for reporting both the past and the intended unauthorized releases.¹⁰⁷ On the other hand, the attorney may only disclose a client's crime if the effects of the crime are still being felt or the crime itself is not complete.¹⁰⁸ Again, the attorney would need to make some determination about the nature of the violation and the degree of hazard it poses for the public.

This aspect of the problem illustrates the potential conflict between agency-enforced laws and ethical principles. Although there is no clear and simple resolution, consideration of the prior factors (e.g., ethical rules, broad versus narrow conceptualization of confidentiality, continuing versus past crime) may provide the attorney with further arguments toward one position or the other regarding disclosure of confidential information. In particular, the interaction of agency-enforced laws and ethical principles may be balanced by considering potential harmful effects, which may be accounted for when considering whether the act is a continuous or past crime.

Sixth, the attorney must further account for prosecutorial considerations. The attorney, for example, may determine that the

103. *See id.* at 443-44.

104. 42 U.S.C. § 9603(a).

105. *Id.* § 9603(c).

106. *Id.* § 9603(a).

107. *See Targ, supra* note 9, at 260 (client's failure to disclose a release is a crime whether the violation occurred in the present or past).

108. *See id.* (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470 at 396 (1981)).

client is committing an act of "foot-dragging" by not fixing its electrostatic precipitator. However, its intent to continue the use of the precipitator may be a willful, substantial violation of environmental laws. The prosecutor may view this violation as not particularly harmful to the public welfare and the duration of the act as relatively minimal. However, the client may be viewed as maintaining a high degree of knowledge, willfulness, and recalcitrance. The prosecutor may also take into account the fact that the client has a history of committing this same act. Further, the client arguably could have readily fixed the malfunctioning precipitator, avoiding any possible harmful effects, and the deterrent effects of any civil penalty may be somewhat ineffective. Thus, the present conduct would appear to be a significant prosecutorial issue. As noted, the prosecutor's decision to bring criminal charges is largely subjective and discretionary.¹⁰⁹ Exclusion of this factor in the analysis would ignore the potential criminal liability which environmental violators may face. Inclusion of this factor is necessary to facilitate consideration of the client's intent with the act(s). The prior factors (e.g., ethical rules, broad versus narrow conceptualizations of confidentiality, agency) may not have led to a consideration of intent.

Finally, the damage sought to be prevented is not easily compensable economic damage, but potentially irreparable harm to health and ecology.¹¹⁰ As argued, among the factors to be considered when deciding whether to disclose confidential information are the severity of the public and environmental harm (including the type of waste and the location of the site).¹¹¹ In the present case, the release from the electrostatic precipitator may not be one leading to potentially irreparable harm. Further, the attorney would need to know the location of the precipitator and weather conditions that may influence the potential harm from the release.

In summation, the facts of the present case may lead the environmental attorney to maintain confidentiality. Despite the fact

109. See Dotterrer, *supra* note 4, at 1170 (citing McMurry & Ramsey, *supra* note 88, at 455).

110. See Lucia Ann Silecchia, *Ethical Dilemmas for the Environmental Lawyer as Policy Maker*, SB52 A.L.I.-A.B.A. 717, 719 (1997).

111. See Van Cleve, *supra* note 67, at 416.

that a crime was committed, the lawyer may balance the wrong with the potential benefits of the act. Further, it is not clear whether there are any continued effects of the crime. As illustrated, several principles must be considered by the environmental attorney before coming to this conclusion. Exclusion of one of the factors (e.g., prosecutorial considerations) may lead the attorney to neglect critical issues (e.g., the intent of the client) necessary for consideration of breach of confidentiality.

CERCLA indicates that this client has an obligation to report the act; whereas not reporting results in the commission of a crime. Thus, despite consideration of several principles, the environmental attorney still faces the conflict between the ethical principles and federal statute. Nevertheless, consideration of all of the factors provides more information to facilitate the balancing between the agency-enforced laws and the ethical principles.

Hypothetical Case 2

The client is an industrial organization that spills a large amount of hazardous materials, constituting a "release" under several federal, state, and local environmental laws. The organization chooses to contain the spill privately and remove the materials without reporting to any environmental agency.¹¹²

Analysis of Hypothetical Case 2

According to Model Rule 1.6, the attorney would be under no obligation to disclose the large amounts of hazardous materials since it was part of a past crime. However, unlike the previous hypothetical, this case involves a spill of "a large amount of hazardous materials," raising the question of the potential harm to the public welfare and ecology. In these circumstances, consideration of the second factor (i.e., broad versus narrow conceptualization) may lead the attorney to be more willing to consider a narrow ("moralistic") view of confidentiality. Although the client is taking responsibility to contain the spill and remove the materials, it may be necessary to report the violation in order to facilitate security of public safety. Further, the social utility of main-

112. NYSBA, *supra* note 96, at 17.

taining confidentiality may be vitiated as the client may not be amenable to recommendations by the attorney to alert the proper officials. The client has already chosen to contain the spill without reporting to any environmental agency. Inclusion of the second factor in the analysis may provide the attorney with greater perspective in considering options with breach of confidentiality. Further, the consideration of the second factor may also facilitate consideration of the next factor.

The present case presents an example of the difficulty in discriminating between a continuing and a past crime, the third critical factor for the analysis. It may be unclear whether the past spillage of large amounts of hazardous materials is an event of present concern. This certainly may be a violation of such a "serious" nature that the costs of violating confidentiality are far outweighed by the benefits of mediation and the prevention of possible future effects from this violation. Consideration of this factor may prompt the environmental attorney to research the potential effects from the particular act. The information collected from such research may help in evaluating the first two factors (i.e., ethical rules and broad versus narrow conceptualization).

Fourth, jurisdictional rules clearly are an important consideration for the attorney in this case, as the spill was a violation "under several federal, state, and local environmental laws." Inclusion of this factor may lend even further weight toward disclosure, as the attorney needs to consider the impact of both federal, state and local laws on this act.

Fifth, as argued, the environmental attorney must consider the impact of agency-enforced laws. In the present circumstances, CERCLA would compel disclosure of the spill, as it involves the release of hazardous material in the past. Furthermore, the attorney may disclose a client's crime if the effects of the crime are still being felt or the crime itself is not complete.¹¹³

Sixth, regarding prosecutorial considerations, the attorney should consider that a prosecutor would see the present viola-

113. See 42 U.S.C. § 9603(a); Targ, *supra* note 9, at 260 (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1470 at 396 (1981)).

tion as a willful violation of environmental laws. Further, a prosecutor would recognize the severity of the public and environmental harm. What is not so clear from this hypothetical are the issues of the duration of the offense and the ability of the suspect to comply with environmental laws. Again, inclusion of the sixth factor in the analysis allows increased depth of consideration of other factors (e.g., agency). In this circumstance, the attorney may consider the characteristics of the act itself in relation to intent. Recognition of CERCLA in light of prosecutorial approaches provides further support for the confidentiality balance.

Finally, as argued, there must be a strong consideration of the impact of the violation upon third parties. Further, an attorney would have to consider the potential harm of not reporting the violation to environmental agencies who may have the expertise in preventing further harm to the public and the environment.

Unlike the previous case, the facts of the present case are not as favorable toward maintaining confidentiality. Regardless, several principles must be considered by the environmental attorney before coming to this conclusion. In particular, this case involves a spill of "a large amount of hazardous materials," requiring the consideration of the potential harm to the public welfare and ecology. However, it is still not clear whether there are any continued effects of the crime. Nevertheless, as noted, CERCLA requires notification by the "person(s) in charge"¹¹⁴ about the release of hazardous substances.¹¹⁵

This example again illustrates how the inclusion of these factors facilitates increased depth of analysis. Each additional factor may flesh out different aspects of another factor. Again, the additional information drawn from such an analysis may foster the fine balancing the environmental attorney must exercise when considering confidentiality.

Hypothetical Case 3

An industrial client's foundry disposed of materials containing lead and organic matter behind the foundry property. It did so

114. 42 U.S.C. § 9603(a).

115. *See id.* § 9603(c).

from the 1940s to 1950s, conforming with then-standard operating practices in the industry. The foundry closed, and several years later the building was leased to another manufacturer. The industrial client now discovers documents describing its past disposal practices and wishes to check the property for possible contamination. The property is not listed on either federal or state lists as a hazardous waste site.¹¹⁶

Analysis of Hypothetical Case 3

First, Model Rule 1.6 would not compel the attorney to make a disclosure, as the conduct occurred in the past. Further, it is not clear whether a violation of any sort has actually occurred. At issue is a possible violation, which the industrial client wants to assess. Second, in choosing between a broad versus a narrow conceptualization of confidentiality, the attorney may want to consider maintaining a broad conceptualization. This conceptualization is the most appropriate, as it is unclear whether the client committed a violation. Further, it appears that the attorney is dealing with a client who wants to "do the right thing" by investigating whether it contaminated the leased property.

Hence, consideration of a broad versus narrow conceptualization of confidentiality may afford the attorney the opportunity to examine his/her moral beliefs in light of the actual circumstances of the case. In the present case, it may allow the attorney to consider his/her values in light of the fact that the client is attempting to "do the right thing." Reliance primarily on the first factor, without examining possible varying perspectives, may have led the attorney to examine the facts in an analytical vacuum that would possibly favor disclosure. Consideration of the second factor leads the attorney to further consider both society and the client.

Regarding the third factor, consideration of a continuing versus a past crime, some may argue that the improper disposal of lead and organic matter on property subsequently leased to another is sufficient cause to believe that a past action has continuing effects. Thus, the attorney may be dealing with a continuing crime, whereby s/he may take preventive measures, even though

116. See NYSBA, *supra* note 96, at 21.

some act has already occurred, if some material and harmful consequence of the act has not yet been inflicted on a victim.¹¹⁷ However, again it is unclear whether there are continuing adverse effects resulting from the client's past actions. Again, consideration of this factor may prompt the environmental attorney to research the potential short-term and long-term effects from the particular act. The information collected from such research may help in the balance between the first two factors.

In addition, the fact that the disposal of the lead and organic matter was within legal parameters complicates the analysis. Hence, obligations to report, under CERCLA standards, are not clear, as there was not a past violation of law. Nevertheless, there may be a continuing violation of current environmental standards. The continuation of a violation may compel the attorney to disclose this information.

In terms of the fourth factor, there were no jurisdictional laws stated in this hypothetical. Nevertheless, as previously argued, these laws must be considered in the analysis.

As to the fifth factor, prosecutorial considerations must be evaluated, as a prosecutor may be more likely to recognize this act by the client as one of "bumbling ignorance," rather than one of willful violation of environmental laws. Although the effects of the act may be severe, prosecution will probably see minimal knowledge, willfulness, and recalcitrance on the part of the client. Further, there may be some consideration given for the client's good faith attempt to evaluate the situation. In the present case, the client decided to assess the problem after discovering possible error in the disposal of the lead. Hence, this good faith act to address the problem provides further argument against attorney disclosure.

Exclusion of prosecutorial considerations may have led the environmental attorney to weigh too heavily toward disclosure. In light of the previous factors, this may have resulted in the attorney still being in conflict on the issue of breaching confidentiality. The inclusion of the fifth factor allows the attorney to ac-

117. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 117A cmt. (d) (1996).

count for the practical aspects of dealing with federal and/or state prosecutors and arrive at a conclusion.

In the present case, it is not clear whether the client committed a crime. Further, the client appeared to be making a good faith attempt to address the problem. Again, it is unclear whether there are any continued deleterious effects from the conduct. In this instance, CERCLA would not necessarily indicate that this client has an obligation to report the act, as it is unclear whether a crime was committed. Hence, it would benefit the environmental attorney to consider the various principles noted, including weighing between a narrow versus broad conceptualization of confidentiality, continuing versus past crime, and prosecutorial considerations.

In particular, the inclusion of each factor provides further analysis of the facts and practical circumstances of the case. The consideration of a broad versus narrow interpretation, in the present case, may allow an attorney to evaluate his/her value in light of what the client is doing. The examination of whether the act is a continuous or a past crime may lead the attorney to pursue additional research to further enrich the analysis. Again, such data may allow the attorney to arrive at a conclusion that is grounded in current understanding of the potential environmental hazard. Finally, the inclusion of prosecutorial considerations, in the present case, may reinforce the attorney's analysis, leading to the conclusion that a breach of confidentiality is not necessary.

CONCLUSION

The literature on confidentiality, as it applies to the environmental attorney, reveals several principles in determining whether the disclosure of client confidences is warranted. A model incorporating all of these principles provides a comprehensive analysis of fact patterns in order to arrive at some resolution of some of the issues. Each factor increases the depth of analysis, providing additional perspectives and/or the incorporation of additional facts. Furthermore, the inclusion of each factor in the analysis facilitates the difficult and delicate balancing between withholding information and disclosure of confidences.

However, as may be observed in the above hypotheticals, the model does not provide a simple and definite answer to the issue of disclosure of confidences. In some circumstances, the environmental attorney may experience greater hesitation in deciding between disclosure and non-disclosure. Further, the model does not provide a simple resolution to the conflict between ethical rules and CERCLA. The model does not provide a simple balancing test in determining the proper approach to these problems. Rather, it provides an analytical framework by which the complexity of facts and issues may be organized and analyzed. The factors are interactional, hopefully providing greater comprehensiveness to the environmental attorney's analysis.

In many respects, however, the attorney still returns to the basic conflict between the duty to maintain confidential information and the duty to prevent a client from committing a crime or perpetrating a fraud.¹¹⁸ This is essentially the conflict between balancing the needs of the client and the needs of society. In the ideal situation, the attorney may serve both.

118. See Chattman & Kinburn, *supra* note 1, at 427.