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Complexity, Competence, and Confidentiality: Ethical Issues at the Cutting Edge of Environmental Law

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I. Introduction

The pace of technological innovation in the past several decades has been breathtaking. The benefits are apparent to us all. We now have access to information almost instantaneously. Modern medicine uses technologies to extend and improve the quality of our lives in ways unimaginable just a few decades ago. But along with the benefits, technological innovation often generates new and significant risks to human health and the environment. As environmental lawyers, we are familiar with many of these risky byproducts of technological innovation. Some of the risks are now fairly well understood. Many other risks are less clear, but may be managed in ways generally thought to be acceptable. And then there are some health and environmental risks that are quite speculative, but potentially very serious, perhaps even catastrophic.

Environmental law addresses many of these risks. For example, the Toxic Substances Control Act authorizes EPA to regulate new chemical substances and significant new uses of existing substances in an effort to ensure that Athe manufacture, processing, distribution in commerce, use, or disposal of@ such materials do not Apresent an unreasonable risk of injury to health or the environment.@[1]. The Resource Conservation and Recovery Act heavily regulates the hazardous byproducts of much technological production Ato promote the protection of health and the environment.@[2] The Clean Air Act and the Clean Water Act contain grants of authority to EPA that are sufficiently broad to enable EPA to monitor and regulate a variety of practices

[1] 15 U.S.C. ' ' 2603(a)(1)(A)(I), 2605(a).

[2] 42 U.S.C. ' 6902(a).

that may create risks to human health and the environment. The Supreme Court=s decision in *Massachusetts v. EPA* is a vivid reminder of the breadth of EPA=s regulatory authority and of the agency=s duty to exercise that authority. [3]

Two categories of risky activities that lie at the cutting edge of environmental law are nanotechnology and greenhouse gas (GHG) emissions. Global climate change caused by the emission of GHGs is now widely recognized to be one of the greatest risks confronting humanity and the environment. The extent and distribution of negative (and positive) effects of climate change have become clearer as investments in climate research are now beginning to bear fruit. [4] Nonetheless, gross uncertainties remain. We have also witnessed an explosion of interest in engineered nanotechnology B a field that may produce astonishing benefits for the public at large.[5] Yet, the health and environmental risks of many of these technologies are simply unknown.

Climate change and nanotechnology present some difficult problems for environmental lawyers. Neither is presently subject to clear regulatory requirements. In addition, the scientific background in both of these emerging areas is complex. But aside from, but connected to, these difficulties, lawyers may face an array of ethical issues.

The kinds of ethical issues faced by lawyers practicing on the cutting edge of environmental law are as varied as the kinds of legal issues that may be confronted. A small sampling of some of these ethical issues is considered in this paper. The rules governing lawyer competence, the attorney-client relationship, and confidentiality of information relating to the representation of a client are specifically addressed. One caveat: This paper addresses only the ABA's Model Rules of Professional Responsibility. As model rules, they are not directly binding unless adopted by the relevant authority. Lawyers are advised to consult the applicable rules of their jurisdiction before reaching conclusions about specific issues of professional responsibility.

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[3] 127 S. Ct. 1438 (2007). *See generally* Arnold W. Reitze, Jr., *Controlling Greenhouse Gas Emissions from Mobile Sources* B Massachusetts v. EPA, 37 E.L.R. 10535 (July 2007).

[4] Intergovernmental Panel On Climate Change, Fourth Assessment Report (2007), available at http://www.ipcc.ch/., last visited Jan. 10, 2008,

[5] *See* United States Environmental Protection Agency, *Nanotechnology White Paper* (Feb. 2007), available at http://www.epa.gov/osa/pdfs/nanotech/epa-nanotechnology-whitepaper-0207.pdf, last visited Jan. 10, 2008); J. Clarence Davies, *EPA and Nanotechnology: Oversight for the 21st Century* (May 2007), available at http://www.nanotechproject.org/file_download/files/Nano&EPA_PEN9.pdf, last visited Jan. 16, 2008. For a discussion of how some of the benefits of nanotechnology may impact developing countries and the poor, see Todd F. Barker et al., Nanotechnology and the Poor: Opportunities and Risks (Jan. 2005), available at http://www.meridian-nano.org/gdnp/paper.php, last visited Jan. 15, 2008.

II. Model Rule 1.1: Duty to Provide Competent Representation

The Afirst rule@ of ethical practice is the duty to represent clients competently.[6] Model Rule 1.1 states the obligation simply: AA lawyer shall provide competent representation to a client.@[7] To satisfy this obligation, a lawyer must have Athe legal knowledge, skill, thoroughness and preparation necessary for the representation.@[8] A

The comments to Rule 1.1 recognize that competence is not necessarily correlated with training or experience in the relevant legal subject matter. AA lawyer can provide adequate representation in a wholly novel field through necessary study.@[9] Nonetheless, the comments caution that A[e]xpertise in a particular field of law may be required in some circumstances.@[10]

Where reasonable amounts of study are not likely to yield sufficient understanding of the relevant legal context and issues,[11] a lawyer may satisfy the duty of competence by associating with another lawyer who has the relevant expertise, so long as the client consents.[12] As the San

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[6]MODEL RULES OF PROFESSIONAL CONDUCT 1.1. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER=S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 83 (2007) (AIt is no accident that the first Model Rule requires competence, for the drafters of the Model Rules believed that the first rule of legal ethics is competence.@); IRMA S. RUSSELL, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW 41 (2003) (AThe first rule of ethics is the duty of competence.@).

[7]MODEL RULE 1.1.

[8]*Id.*

[9] *Id.* Comment [2].

[10] *Id.*

[11] In circumstances when study is necessary to provide competent representation, the lawyer must determine whether the delay associated with, and expense of, such study are consistent with the best interests of the client. The ABA=s Model Code of Professional Responsibility limited the amount of study deemed ethically appropriate to that which does not cause Aunreasonable delay or expense to [the] client.@ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, E. C. 6-3.

[12] MODEL RULE 1.1, Comment 2. *See*, e.g., *Oliver v. Board of Governors, Kentucky Bar Ass=n*, 779 S.W.2d 212, 216 (Ky. 1989) (When a firm intends to Ause a temporary attorney service on the client=s case, in any capacity,@ the firm must disclose such intention to the client Ain order to allow the client to make an intelligent decision whether or not to consent to such an arrangement.@). *See generally* Ass=n of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion No. 2006-3 (Aug. 2006), available at http://www.nycbar.org/Publications/reports/print_report.php?rid=503&searchterm=2006. (Last visited Jan. 14, 2008) (discussing circumstances in which use of another attorney or non-lawyer support must be disclosed to client).

Diego County Bar put it, Athe duty to act competently requires an attorney to know whether they can handle a particular case and, if they are unable to do so, the attorney must choose a suitable alternative to protect the client=s interests,@ which may include associating with another lawyer.

Rule 1.1 also emphasizes that competence depends on adequate preparation. This aspect of competence is closely related to Rule 1.3's requirement that A[a] lawyer act with reasonable diligence and promptness in representing a client.@[13] But these ethical rules are not mutually exclusive; the failure to prepare adequately may subject a lawyer to discipline for providing incompetent representation, even in circumstances where the lawyer has years of experience in the relevant area of law.[14] Moreover, it may be that violations of other ethical responsibilities also implicate the duty to provide competence representation. For example, and as discussed more fully below, in the corporate setting, if an attorney representing a corporation has knowledge of unlawful or fraudulent conduct on the part of a corporate employee that may cause substantial damage to the client corporation, the lawyer may in some circumstances be responsible for reporting the matter Aup the ladder@ to superior corporate managers.[15] Though no reported decision of which I am aware so holds, it is imaginable that a lawyer who fails to attend to this responsibility might be charged with providing incompetent representation in violation of Rule 1.1.

An issue that has been addressed by a few bar ethics committees concerns the outsourcing of legal support services. They have noted that the use of unlicensed lawyers or non-lawyer support personnel implicates the ethical responsibility of the outsourcing lawyer to provide competent legal representation.[16] In some cases, lawyers have outsourced such tasks as legal research and document drafting to firms located overseas. The committees that have

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[13] MODEL RULE 1.3. The close relation between Rule 1.1 and Rule 1.3 is noted in Center for Professional Responsibility, supra, at 20 (citations omitted) (AThe duty of diligence is closely related to the duty of competence; a violation of one often accompanies a violation of the other.@)

[14] *See Atty. Griev. Comm'n v. Harris*, 810 A.2d 457, 478 (Md. 2002) (AThere is no dispute that respondent [lawyer] possesses the legal knowledge and skill to provide competent representation under Rule 1.1, as evidenced by his long practice history involving thousands of cases; he, nonetheless, can still be held to violate Rule 1.1 due to . . . lack of thoroughness and preparation in respect to a particular case@; also finding a violation of Rule 1.3's diligence requirement)); *In re Capps*, 942 P.2d 588, 589 (KS 1997) (failure to meet deadlines in CERCLA case resulted in finding that lawyer Afailed to competently represent his client with diligence and promptness thereby [Rules]1.1 and 1.3").

[15] *See infra* notes 29- 34 and accompanying text.

[16] See, e.g., Ass=n of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (Aug. 2006); San Diego County Bar Association, Ethics Opinion 2007-1 (available at http://www.sdcba.org/ethics/ethicsopinion07-1.htm.) (last visited January 14, 2008). This practice also implicates the prohibition against assisting another in the unauthorized practice of law. *See* MODEL RULE 5.5(a).

considered these arrangements have concluded that in order to meet the duty to provide competent representation, the outsourcing attorney must have sufficient knowledge of the subject matter to enable the attorney to supervise and vet the work that has been outsourced. Put another way, A[t]o satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.@[17]

Most lawyers regard environmental law as a highly complex and specialized field of practice. As Professor Irma Russell has observed, A[I] general, the learning curve for any environmental representation is so great that as a practical matter only lawyers who specialize in environmental law should undertake a representation that involves complicated environmental matters.@ [18] It is also worth emphasizing that environmental law is becoming, or has become, an area where sub-specialization is particularly prominent. Even seasoned practitioners of environmental law may press the margins of competence when venturing into remote corners of environmental law that they have not previously considered. For example, it is doubtful that, for a complex matter involving the Clean Air Act, an attorney with substantial experience in NEPA and Endangered Species Act matters would be considerably more competent than a lawyer with like experience in securities regulation.

While the law governing certain areas of environmental law practice is complex in its own right, it is equally important that an attorney understand the nature of a client=s activities and how those activities may be characterized by regulatory authorities. In the emerging field of nanotechnology, this understanding may be somewhat difficult to obtain. Engineered nano-materials behave in ways that do not track more conventional materials that contain the same constituents.[19] Determining whether and where particular nano-materials fit within the current array of regulatory authorities is subject to large amounts of uncertainty.[20]

Consider the application of the Toxic Substances Control Act to engineered nanotechnology.[21] Corporation ABC is developing a new version of an established product B a

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[17] *Id.*

[18] IRMA S. RUSSELL, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW 41-42 (2003).

[19] *See, e.g.*, Mary Ellen Ternes, ABA SEER CAA Nanotechnology Briefing Paper (June 15, 2006), p. 5 (AWhile nanoparticles may consist of constituents that are currently regulated pursuant to the Clean Air Act, they behave very differently from those currently regulated due to their small size, negligible mass and higher reactivity resulting from larger surface areas.@).

[20] The ABA=s Section on Environment, Energy, and Resources has initiated a Nanotechnology Project that explores many of the issues associated with applying existing law to nanotechnology. See http://www.abanet.org/environ/nanotech/, last visited Jan. 10, 2008. See also Environmental Law Inst., *Securing the Promise of Nanotechnology: Is U.S. Environmental Law Up to the Job?* (Oct. 2005), available at http://www.elistore.org/reports_detail.asp?ID=11116, last visited Jan. 15, 2008.

[21] I proceed here with a large caveat: the reader should not take the views of TSCA

golf club. The company is working with a chemical substance that is listed in the Environmental Protection Agency=s TSCA Inventory of existing chemicals. It is planning to incorporate a nano-engineered version of the chemical substance into its new golf club, tentatively called the Nano-Max Driver. The nano version exhibits some beneficial properties that cannot be achieved with the conventional material B *e.g.*, the nano version reduces the weight of the club while simultaneously increasing its strength. Is the nano material an Aexisting@ chemical substance or is it a new chemical substance subject to TSCA=s premanufacture notice requirements? If it is not a Anew@ chemical substance, is the nano version a Asignificant new use@ of an existing substance?

As a practical matter, it might in most cases be hard to say that any conclusion a lawyer reaches on these questions would be substantively Aincompetent,@ because neither question has a clear-cut answer.[22] But it is unlikely that the duty of competent representation would be considered satisfied simply because the legal issue addressed in the representation has no determinate resolution. Indeed, Rule 1.1 seems to imply that some process-based requirements must be observed. First, and most basically, the lawyer should have, or secure through study, sufficient knowledge to understand that TSCA requirements are not clearly inapplicable simply because the constituents are chemically the Asame@ and the product is not functionally different from an existing product. [23] Second, it may be that, in this complex area of regulation, the

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expressed in this paper as correct or even reasonable; they are offered only for purposes of illustration.

[22] For some guidance on the substantive question, see U.S.E.P.A., *TSCA Inventory Status of Nanoscale Substances B General Approach*, available at http://epa.gov/oppt/nano/nmsp-inventorypaper.pdf, last visited Jan.16, 2008.

[23] For some of the complexity governing conclusions of Asameness,@ see *id.* The general approach outlined in the cited paper is that Aa nanoscale substance that has the same molecular identity as a substance listed on the Inventory (whether or not reported to the Agency as being manufactured or processed in nanoscale form) is considered an existing chemical, i.e., the nanoscale and non-nanoscale forms are considered the same chemical substance because they have the same molecular identity.@ *Id.* at 6. Appropos of the question presented in the text, environmental attorneys might note that EPA has stated: AIn order for manufacturers or importers of nanoscale substances to determine whether their substances are new or existing chemicals, and thus whether they are subject to PMN reporting requirements, EPA encourages companies to contact the New Chemicals Program to arrange a pre-notice consultation or to submit a request for an Inventory search under the *bona fide* intent to manufacture provision in 40 CFR '720.25.@ *Id.* J. Clarence Davies reports that Ain 2005 [EPA] reviewed 15 new nanoscale chemicals and found that only one . . . had >unique properties that would cause it to act differently than a larger form of the same chemical would be expected to act.= . . . The agency decided that the other 14 were not covered by the new chemical provisions of TSCA.@ Davies, *supra* note 5, at 31 (quoting Pat Rizzuto, AEPA Reviews 15 New Nanoscale Chemicals,@ BNA Daily Environment Reporter, vol. 158, at A-7 (Aug. 16, 2006). The other chemical B a carbon nanotube B was granted a ALow Release and Exposure

attorney should enlist the expertise of another attorney who is familiar with the technology and TSCA. Finally, it seems likely that the duty of competence demands that the lawyer inquire of the client about whether any of the novel properties associated with the nano version of the substance pose health or environmental risks that the conventional versions do not pose B if not solely for purposes of making an informed judgment about TSCA=s reach, but to alert the client of potential liabilities under other environmental, occupational safety, or common law requirements. [24]

III. Model Rule 1.2 The Attorney-Client Relationship

Model Rule 1.2 broadly addresses some basic aspects of the lawyer-client relationship, including the scope of representation and limits on what lawyers may properly do in support of a client=s interests. Under Rule 1.2(d), A[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.@ Nonetheless, Aa lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.@[25] The comments to the rule recognize a Acritical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.@[26]

Suppose ABC Corporation decides to develop a new nanoscale material that will be included as inert material in the formulation of a new pesticide product. Because the new product is a pesticide, it is potentially subject to regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Before the new product may be marketed, ABC will have to register the pesticide with EPA. The new product contains the same active ingredient and inert material as a registered pesticide product that ABC currently markets, but the inert material in the registered product is manufactured at the conventional, bulk scale. The attorney advising the client knows that the inert material has been changed, but the client doesn=t admit this. Moreover, the attorney is aware that the nano version is the same type of material that has been associated with certain adverse health risks in some recent studies B risks that are not associated

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Exemption@ from TSCA=s notice. *Id.*

[24] For an interesting, but dated, overview of ethical responsibilities of a lawyer preparing an environmental opinion letter, see Ralph F. Holmes, *The Preparation of an Environmental Opinion Letter: A Practitioner=s Guide*, 11 B.C. Envt. Aff. L. Rev. 413 (1984).

[25] MODEL RULE 1.2(d).

[26] *Id.*, Comment 9.

with the registered product.

Suppose that in discussions with the lawyer representing ABC, the client insists that the new product be reported to EPA not in an application for a new registration but instead be added to the existing registration through a supplemental statement. The client=s preferred course of action would eliminate the need for a risk assessment of the nano pesticide, reducing significantly ABC=s costs of bringing the pesticide to market.[27]

There may be room to argue that, because the new nano pesticide contains the same ingredients and makes the same claims as the registered pesticide, submitting a supplemental statement in lieu of a registration request is not improper. On the other hand, because the lawyer and the corporation know that the nano version may pose significantly different health and environmental risks than the registered pesticide, the client=s preferred course of action may very well be regarded as fraudulent. The products are, after all, not the Asame@ for purposes relevant to the registration process, which is principally concerned with assessing the risks of pesticides and imposing appropriate restrictions on the pesticide=s use in light of those risks.[28] If the submission of a supplemental statement is, indeed, regarded as fraudulent or unlawful activity, the lawyer must, under Rule 1.2(d), refuse to assist the client in pursuing the fraudulent course of behavior.[29]

In the corporate context, the lawyer may have other duties. If the person insisting on filing a supplemental statement is a manger or other employee of the corporation, Rule 1.13 may require action on the part of the lawyer. Rule 1.13(b) provides:

> If a lawyer for an organization knows that an officer, employee, or other person associated with the organization . . . 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization. Unless the lawyer believes that it is not necessary in the best interests of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by

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[27] *See* James C. Chen, et al., ABA Section of Environment, Energy, and Resources, *The Adequacy of FIFRA to Regulate Nanotechnology-Based Pesticides*, at 11 (May 2006) (citing 7 U.S.C. ' 136a(e)), available at http://www.abanet.org/environ/nanotech/pdf/FIFRA.pdf, last visited Jan. 21, 2008).

[28] *See id.* at 9-12 (discussing registration of pesticides under FIFRA).

[29] See MODEL RULE 1.2, Comment 10 (AThe lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.@).

applicable law.[30]

The obligation to report the matter Aup the ladder@ in the corporate context is designed to ensure that the organization=s interest, not the officers= interests, are protected within the representation. If the highest authority within the organization does not address the potential violation of law Ain a timely and appropriate manner, . . . and . . . the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation . . . but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.@[31] In exercising discretion to Areport out@ a violation that the highest authority is unwilling to deal with appropriately, the rules do not indicate whether disclosure is appropriate in circumstances where the violation of law is unlikely to be discovered by the relevant authorities. The better interpretation is that the lawyer should assume the crime will be discovered in assessing whether the violation will cause Asubstantial injury@ to the client. [32]

But what constitutes a Asubstantial injury@? Some scholars have taken the position that any activity that is criminal in nature is per se substantially injurious to a client.[33] Others disagree, pointing out that A[neither the Comments nor the black letter of Rule 1.13 define >substantial= to mean all crimes.@[34] Moreover, there are any number of activities that, while technically Acriminal,@ do not pose risks of substantial damage to the client corporation B running a red light, for example. Nonetheless, a lawyer should be cautious in quickly concluding that dubious conduct in a regulatory setting will not substantially damage the client simply because the expected, or possible, liabilities do not represent a significant expense relative to the overall assets of the client.[35]

Suppose that the attorney submits the supplemental statement on behalf of the client without knowledge that the new pesticide includes the nano-material, but later learns of the Anew@ ingredient? The attorney is now in a very delicate position. Comment 10 to Rule 1.2 provides:

> A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore withdraw from the representation of the client in the

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[30] MODEL RULE 1.13(b).

[31] MODEL RULE 1.13(c).

[32] *See* ROTUNDA & DZIENKOWSKI, *supra*, at 541.

[33] *See id.* at 543 (*citing* 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT ' 17.11 (3d ed. 2001).

[34] *Id.*

[35] *See id.* at 542.

> matter. . . . In some cases, withdrawal alone may be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.[36]

An interesting variation on this sort of predicament might arise in the context of regulatory developments rather than newly acquired knowledge. Suppose that our lawyer knew that the new pesticide contained nano-material but made an informed decision that existing regulatory requirements would be satisfied with the supplemental statement rather than a new or amended registration. Suppose further that the supplemental statement does not mention the nano-material. Finally, suppose that immediately after the supplemental statement is filed with EPA, the agency issues an interpretive rule clearly stating that any registered product that is re-engineered with nano-material must be registered separately from the previously registered product. The client insists that the lawyer take no action to amend the supplemental statement. In the absence of a good-faith doubt about the legality of the interpretive rule,[37] the model rules suggest that the attorney must withdraw and, likely, do so in a Anoisy@ way by disaffirming the content of the previously filed supplemental statement.[38]

III. Model Rule 1.6 Confidentiality

As I have written before, A[c]onfidentiality is a >constitutional norm=@ of the legal profession, A>so central . . . that the [bar] perceives threats to the norm as threats against the [bar] itself - against the [bar's] very existence.=@[39] Model Rule 1.6 embraces this basic norm,

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[36]MODEL RULE 1.2, Comment 10.

[37] Rule 1.2(d) permits a lawyer to Aassist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.@ MODEL RULE 1.2(d).

[38] Model Rule 1.16 governs a lawyer=s termination of representation and mandates withdrawal Aif . . . the representation will result in violation of the rules of professional conduct r other law.@ MODEL RULE 1.16(a)(1). Model Rule 3.2 may also be implicated. It provides that A[a] lawyer may not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.@ MODEL RULE 3.3(a)(1). Model Rule 1.0 defines the term Atribunal@ to include an Aadministrative agency . . . acting in an adjudicative capacity.@ An agency is deemed to be acting in an Aadjudicative capacity@ if, Aafter the presentation of evidence or legal argument by a party . . . [the agency] will render a binding legal judgment directly affecting a party=s interests in a particular matter.@ MODEL RULE 1.0(m). For a discussion of the scope of the duty of candor in the environmental law context, see *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457-60 (4th Cir. 1993).

[39]Douglas R. Williams, *Loyalty, Independence, and Social Responsibility in the Practice of Environmental Law*, 44 St. Louis U. L. J. 1061, 1073 (2000) (*quoting* Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1427 (1992)).

providing: AA Lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .@

The information subject to this rule of confidentiality is quite broad. Unlike the attorney-client evidentiary privilege, which protects from disclosure communications between lawyers and their clients, Model Rule 1.6 extends confidentiality to all Ainformation relating to representation of client.@ Comment 3 to Rule 1.6 notes:

> The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.[40]

The breadth of the rule is illustrated by *Statewide Grievance Committee v. Heghmann*.[41] In that case, a lawyer was reprimanded for violating Rule 1.6. The lawyer had represented clients in an action in South Carolina, which was dismissed, and later participated in but ultimately ceased to represent the same individuals in a second suit in South Carolina. The lawyer then filed a related claim for another client in Connecticut. The lawyer sent several emails to the defendants in the Connecticut action urging them to settle the case before the former clients in South Carolina Agot wind of the Connecticut action.@[42] In these emails, the lawyer Areferred to the former clients' personal nature of conducting litigation and attacks on the character of opponents. He indicated that they favored >circus= litigation, . . . >ha[ve] a nasty tendency of litigating his cases in the media=@ and that A>their litigation quickly degenerates into personal attacks.="[43] In defending against the charge that these emails violated Rule 1.6, the attorney argued that the information disclosed in the emails was publicly available and was neither obtained in confidence from the client nor obtained by virtue of the attorney-client relationship.

The court rejected these defenses, concluding that A[t]here can be no doubt that Heghmann's emails revealed information relating to representation of a client: the references to

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[40] MODEL RULE 1.6, Comment 3. On the relation between the attorney-client privilege and ethical rules of confidentiality, see *Adams v. Franklin*, 924 A.2d 993, 999 & n.6 (D.C. 2007); CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra*, at 94-95; Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. Tex. L. Rev. 69 (1999).

[41] 2004 Conn. Super. LEXIS 3794 (Dec. 20, 2004).

[42] *Id.* at 3.

[43] *Id.* at 4.

litigation behavior, untruthfulness and vendetta-like conduct in the course of the South Carolina proceedings, some explicit and some inescapably inferred, are well within the proscriptions of the rule. None of the specifically included exceptions apply.@

While the proscription of Model Rule 1.6 is thus very broad, there are some exceptions to this sweeping norm of confidentiality, including Adisclosures that are impliedly authorized in order to carry out the representation.@[44] Disclosures of this sort might include stipulating to facts that cannot reasonably be disputed.[45] In addition, Model Rule 1.6 authorizes lawyers to exercise discretion in some circumstances, making disclosure of information relating to the representation of a client permissible, but not required, when

> the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
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> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer=s services;
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> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client=s commission of a crime or fraud in furtherance of which the client has used the lawyer=s services;
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> (4) to secure legal advice about the lawyer=s compliance with these Rules;
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> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
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> (6) to comply with other law or a court order.[46]

This list of circumstances in which disclosure may be permitted represents a significant expansion from the prior version of the rule. The old rule did not allow disclosure of

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[44] MODEL RULE 1.6(a).

[45] *See* MODEL RULE 1.6, Comment 5.

[46] MODEL RULE 1.6 (b).

information to protect other persons except in circumstances where the lawyer reasonably believed that disclosure was necessary Ato prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.@ The prior version of Model Rule 1.6 did not permit disclosure where client conduct posed risks to others= financial or property interests. The expansion of permissible disclosure was prompted by the Enron bankruptcy and other scandals in which investors suffered severe financial losses as a result of corporate fraud.[47] By expanding permissive disclosure, Model Rule 1.6 attempts to strike a balance between the societal interest in preventing harm to third parties and the client=s interest in confidentiality. That balance is a delicate one, and the manner in which it is struck is subject to considerable disagreement among attorneys, ethicists, and others.

For environmental attorneys, the exception to the confidentiality rule most likely to come into play is the first exception, involving risks of death or substantial bodily injury. Unlike the old rule, the revised Model Rule 1.6 does not tie this condition for disclosure to criminal activity on the part of the client.[48] Nor does the revised rule require that death or injury be Aimminent.@ The rule thus permits disclosure Aif there is a present and substantial threat that a person will suffer [death or substantial bodily harm] at a later date if the lawyer fails to take action necessary to eliminate the threat.@[49] These changes may significantly enlarge the circumstances where a lawyer may exercise discretion to reveal otherwise confidential information, particularly with respect to matters that fall within the purview of environmental law. Indeed, the Comments to Rule 1.6 provide an environmental example to illustrate the scope of the new provision: Aa lawyer who knows that a client has accidentally discharged toxic waste into a town=s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer=s disclosure is necessary to eliminate the threat or reduce the number of victims.@[50]

In the emerging field of engineered nanotechnology, the ethical issues involving disclosure of information relating to representation can become quite complex. Consider this hypothetical. ABC Nano Co. (ANC) manufactures carbon nanotubes (CNT). ANC has no reason to believe its workers are exposed to potentially harmful nanoparticles in the workplace, but has not independently investigated air quality issues. Nor has ANC determined if current workplace personal protective equipment (PPE) is adequate to mitigate potential risks pose by the inhalation or dermal exposure of CNT if, in fact, workers are being exposed to these materials. If an attorney representing ANC is aware of these facts, does the attorney have discretion to warn workers that they may be exposed to CNT?

The first consideration is whether the facts are Arelated to the representation of a client.@

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[47] *See* generally ROTUNDA & DZIENSKOWSKI, *supra*, at 274

[48] *See id.* at 273.

[49] MODEL RULE 1.6, Comment 6.

[50] *Id*. *See also* CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra*, at 101 (AThe exception now authorizes disclosure to prevent serious physical harm that may occur at a later date, such as happens in the case of toxic torts.@).

Given the broad interpretation typically given to this condition, it seems likely that the information would fall within Rule 1.6's rule of confidentiality. Accordingly, the lawyer may not disclose this information unless it falls within one or more of the categories for which disclosure is permitted. Importantly, regardless of the conclusions about whether disclosure is *permitted,* the Model Rules clearly do not *require* disclosure, unless disclosure is required by another Model Rule.[51]

In considering whether the information may be disclosed, the comments to Rule 1.6 counsel the lawyer Afirst to seek to persuade the client to take suitable action to obviate the need for disclosure.@[52] If those efforts prove unavailing, then the lawyer is faced with the question of whether, in the hypothetical situation framed above, he or she Areasonably believes@ disclosure is Anecessary . . . to prevent certain death or substantial bodily harm.@ The short answer here appears to be that disclosure would not be permitted. Even though Rule 1.6 now does not require that the client=s conduct be criminal and does not require that harm to others be Aimminent,@ it does require reasonable certainty that some harm to others will occur. That high threshold of a Areasonable belief@ that death or substantial bodily harm be Areasonably certain@ cannot be satisfied given the uncertainties surrounding (a) the fact of worker exposure, and (b) the consequences of such exposure, assuming it does occur.

Suppose, however, that the lawyer is approached by a representative of the union that represents ANC=s workers. The union rep informs the lawyer that he has read that nanotechnology may pose health risks not posed by more conventional materials. The union rep also tells the lawyer that he knows that ANC is using CNT in its production process. The union rep then asks the lawyer, AAre we being exposed to this stuff and, if we are, will our PPE protect us?@ The truthful answer is, of course, that the lawyer does not know. This disclosure may be regarded as adverse to the client=s interest because it may prompt union demands for workplace testing and risk assessments. But the truthful answer is also information Arelating to the representation,@ and thus, is protected by Rule 1.6. Note, however, that Rule 4.1 prohibits a lawyer from Aknowingly . . . mak[ing] a false statement of material fact to a third person . . . or

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[51] Other Model Rules may require a lawyer to disclose information that may but is not required to be disclosed under Rule 1.6. *See, e.g.*, Rule 4.1 (truthfulness in statements to others). Rule 3.3. may require a lawyer to disclose information that would otherwise be protected under Rule 1.6. *See* MODEL RULE 3.3(c).

If disclosure is permitted under one or more of the circumstances listed in Model Rule 1.6(b), the comments provide that, in exercising discretion about whether to disclose, Athe lawyer may consider 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.@ MODEL RULE 1.6, Comment 15. *See also* South Carolina Bar, Ethics Advisory Committee, Ethics Advisory Opinion 04-02 (Feb 20, 2004) (discussing the permissive nature of disclosure of information falling within one or more circumstances listed in Model Rule 1.6(b).

[52] MODEL RULE 1.6, Comment 14.

fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.@[53] The lawyer is in a bit of a bind. He cannot say he doesn=t know, because that information is protected. He can=t say, ANo,@ because that is Afalse statement of material fact.@ The best bet here may be that the lawyer should simply refer the union rep to the responsible ANC manager.

Matters may become more complex if the responsible ANC manager then lies to the union rep. Suppose the manager says that ANC is engaging in traditional manufacturing operations, not involving the use of nanotechnology. To add a bit of a wrinkle, suppose the properties of the CNT used by ANC have been found to be associated with adverse health effects in the scientific literature, but there is overwhelming evidence to the contrary. Suppose the union rep then asks the lawyer if this is true. Again, the safe response is likely avoidance: refer the union rep to another company manager.

But the lawyer may also consider some other obligations. First, the lawyer may confront the manager and ask him to reconsider his statements, if the lawyer believes that the manager=s conduct is fraudulent and might cause substantial harm to ANC. The lawyer may then consider whether his representation might require him to report this conduct Aup the ladder@ within the company. Finally, the lawyer may consider whether disclosure to the union rep is necessary to prevent the client from engaging in fraud. Though a conclusion that the manager=s conduct is fraudulent would depend on an assessment of the Asubstantive or procedural law of the applicable jurisdiction,@[54] it is doubtful that Rule 4.1 requires disclosure because (1) disclosure is not Anecessary to avoid assisting@ the client, because the conduct does not involve the assistance of the lawyer, and (2) disclosure is likely prohibited by Rule 1.6, as discussed above.

In conclusion, Model Rule 1.6 seems to provide relatively clear answers regarding the scope of permissive disclosure when there is significant uncertainty about the effects of new technologies, such as engineered nanotechnology. The high threshold of Areasonably certain@ to cause harm is unlikely to be met in most cases involving nanotechnology, giving the very large uncertainties about this technology, particularly the fate and transport of these technologies. In some ways, the Model Rule=s threshold seems unreasonably demanding, particularly to environmental lawyers whose practice regularly involves materials that pose substantial risks, but not reasonable certainty, of harm. Perhaps greater liberalization of the lawyer=s ability to disclose substantial risks might strike a better balance between the societal interest in protecting third parties from harm and the client=s interest in confidentiality.

Conclusion

In emerging, complex fields of technology and scientific understandings of technology=s effects on human health and the environment, lawyers are confronted with difficult legal and ethical questions. The Model Rules provide substantial guidance on how a lawyer, as a

[53] MODEL RULE 4.1.

[54] MODEL RULE 1.0(d) (defining Afraudulent@ or Afraud@).

professional, may respond to some, but certainly not all, of the ethical dilemmas the lawyer may face in practice. The rules continue to evolve and the ethical balance struck by the Rules, particularly Rule 1.6, may come under pressure from new, and perhaps unexpected, risks and harms.