Ethics: Balancing Ethical Disclosure Requirements with Statutory Regulations for Lawyers Practicing before Regulatory Agencies

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I. Introduction

"Virtually all difficult ethical problems arise from [the] conflict between a lawyer's responsibilities to [the] clients, to the legal system and to the lawyer's own interest." The traditional attorney-client privilege and its underlying confidentiality principle are being challenged by regulatory agencies when attorneys fail to disclose to the agencies the proprieties of the attorneys' government-regulated clients. While regulatory agencies continue to rely on traditional theories of liability, as well as their own regulations, recent enforcement actions against attorneys have also relied on the ethical rules which guide attorneys' professional conduct.

The enforcement actions have left unresolved whether an attorney must abandon the attorney-client confidentiality rule by disclosing a client's continuing or future crime or fraud. The traditional lawyer's role is that of zealous advocate for the interests of the client. In contrast, some regulatory agencies contend that lawyers representing government-regulated companies have a responsibility to the public, not just to their clients. Furthermore, the regulatory agencies deny the existence of any conflict and maintain that their regulatory disclosure requirements coincide with established ethical rules. Attorneys, however, claim that expanding the disclosure

2. Remarks of Harris Weinstein, Chief Counsel, Office of Thrift Supervision, United States Department of Treasury, in THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER 403, 406 (PLI Corporate Law & Practice Course Handbook Series No. 779, 1992) [hereinafter Remarks of Harris Weinstein].
3. John K. Villa, Emerging Theories of Liability for Lending Counsel, in THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, supra note 2, at 93, 97.
6. Charles W. Wolfram, Mapping the Minefield: The Applicable Ethics Rules and Conflicting Duties, in THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, supra note 2, at 53, 56 [hereinafter Wolfram, Mapping the Minefield]; see Amy Stevens & Paulette Thomas, How a Big Law Firm Was Brought to Knees by Zealous Regulators, WALL ST. J., Mar. 13, 1992, at A4 (stating that the strategy was to be literally truthful without assisting the opposition in discovering damaging information). The strategy was typically sanctioned by professional ethics rules absent violating any law or assisting the client in violating a law. Id.

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requirements by adding a responsibility to volunteer information to regulatory agencies, which in effect represent the public, would violate ethical rules protecting the client.\textsuperscript{9}

Part II of this comment will explain the existing framework of disclosure sources and the effect of the attorney's role on disclosure. This comment emphasizes the disclosure requirements of the Oklahoma Rules of Professional Conduct and all ethical rules herein refer to the Oklahoma Rules unless otherwise indicated. Substantive departures from the disclosure requirements of the American Bar Association Model Rules of Professional Conduct are specifically identified. Part III of this comment will discuss particular theories upon which the regulatory agencies rely. Part IV will suggest alternative approaches to resolve the present conflict between the attorneys and the regulatory agencies as to an attorney's duty to disclose the client's improprieties.

\section{II. Existing Framework of Disclosure Sources}

\subsection{A. Ethical Disclosure Obligations in Oklahoma}

In 1988, the Oklahoma Rules of Professional Conduct (the Rules) were approved and adopted by the Oklahoma Supreme Court to replace the state's existing Code of Professional Responsibility.\textsuperscript{10} The Oklahoma Rules are a modified version of the American Bar Association's Model Rules of Professional Conduct (the ABA Model Rules), which were adopted in 1983.\textsuperscript{11} As a result of the modifications, the Oklahoma Rules are both more and less discretionary, depending on the circumstances, than the ABA Model Rules. Thus, an attorney practicing before a regulatory agency in Oklahoma is subject to disclosure requirements distinct from the requirements of other states which adopted the ABA Model Rules without modification.

Oklahoma's Rules of Professional Conduct have traditionally resolved the ethical disclosure issues created by the conflicting interests of an attorney, a client, and the legal system.\textsuperscript{12} The Rules provide the parameters within which an attorney-client relationship functions.\textsuperscript{13} Initially, the attorney-client relationship must be defined by the client who determines the purpose, or scope, of the lawyer's representation,

\begin{itemize}
\item \textsuperscript{10} \textit{In re Adoption of the Oklahoma Model Rules of Professional Conduct}, 59 OKLA. B.J. 846 (1988).
\item \textsuperscript{11} \textit{Letter Regarding Proposed Model Rules by Gomer Smith, Jr., Chairman, Model Rules Committee}, 57 OKLA. B.J. 32 (1986).
\item \textsuperscript{12} \textit{OKLAHOMA RULES OF PROFESSIONAL CONDUCT Preamble/Scope} (1988) (stating that the Rules, in part obligatory and in part discretionary, define the nature of the relationship between attorney and client).
\item \textsuperscript{13} \textit{Id.}
\end{itemize}
subject to the legal system and the lawyer's professional responsibilities.\textsuperscript{14} Once an attorney-client relationship has been established, the Rules provide the framework to resolve ethical disclosure problems.\textsuperscript{15} The Rules specify the circumstances in which the lawyer may be obligated or permitted to disclose the client's confidential communications.\textsuperscript{16}

B. Regulatory Disclosure Obligations

Administrative and regulatory agencies represent another source of disclosure requirements.\textsuperscript{17} In the past, regulatory efforts to broaden lawyers' disclosure duties met with mixed success.\textsuperscript{18} Today, however, regulatory agencies, such as the Office of Thrift Supervision and the Securities and Exchange Commission, each have statutory disclosure regulations. Thus, in addition to the Rules, an attorney practicing before a regulatory agency must adhere to that agency's disclosure regulations.\textsuperscript{19}

1. Office of Thrift Supervision Disclosure Regulations

The Office of Thrift Supervision (OTS) regulates the lawyers who practice before the agency.\textsuperscript{20} The rules of the OTS, formerly the Federal Home Loan Bank Board (FHLBB), provide that the attorney-client privilege and the related confidentiality principle do not create a right to mislead.\textsuperscript{21} The OTS regulations are intended to coincide with the ethical rules.\textsuperscript{22}

The OTS may bar any person from practicing before the agency who has engaged in "dilatory, obstructionist, egregious, contemptuous, . . . or other unethical or improper professional conduct."\textsuperscript{23} Furthermore, the OTS prohibits willfully aiding and abetting violations of the agency's laws, rules or regulations.\textsuperscript{24} Sections 563.180(b)(1) and (b)(2) prohibit the regulated company and its agents, including

\begin{enumerate}
\item Id. at Rule 1.2.
\item Id. at Preamble/Scope.
\item Id.; see id. at Rule 1.6 cmt.
\item Compare SEC v. National Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (holding that lawyers have an obligation to report client's securities laws violations to the SEC) \textit{with In re Carter, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84,172} (Feb. 28, 1991) (holding that an attorney is not required to disclose client's illegal act either publicly or to affected third party). \textit{See} Stevens & Thomas, supra note 6, at A4 (stating that in the early 1980s, the Treasury Department briefly considered requiring attorneys to notify the Internal Revenue Service if the attorney believed a client was filing a questionable return).
\item See 12 C.F.R. §§ 513-590 (1992); \textit{Remarks of Harris Weinstein, supra} note 2, at 406-07.
\item 12 C.F.R. § 513.4 (1992).
\item \textit{Remarks of Harris Weinstein, supra} note 2, at 406 (stating that if an attorney makes a statement, the statement cannot be misleading or a partial truth).
\item Id. at 412-13.
\item Id. § 513.4(a)(4).
\end{enumerate}
lawyers, from knowingly making false or misleading statements or omissions as to material facts to the regulatory agency or within the company or to auditors.25

2. Securities and Exchange Commission Disclosure Regulations

Like the OTS, the Securities and Exchange Commission (SEC) regulates lawyers who practice before the SEC.26 Under SEC Rule 2(e), an attorney who engages in unethical or improper professional conduct may be suspended from practicing before the SEC.27 Rule 10(b)(5) prohibits false or misleading statements, whether written or oral, to the agency.28 An attorney violates Rule 10(b)(5) if he knowingly makes untrue statements of material fact, or omits a material fact that renders misleading, any statements made in connection with the purchase or sale of securities.29

C. Effect of Attorney’s Role on Disclosure

Based on the attorney’s role in representing the client, different disclosure requirements apply.30 The rules that govern an advocate in the courtroom differ from those that apply to an advisor and from those that apply to a lawyer in the bank examination process.31 When representing a client, a lawyer may perform various functions, including advocate, advisor, negotiator, or evaluator.32 Each function defines a different relationship among the lawyer, the client, third parties and the legal system.33

As an advocate, the lawyer zealously represents the client’s position under the rules of the adversary system.34 Although an attorney representing a client as a litigator has a duty to argue the client’s case as persuasively as possible, the attorney

25. Id. §§ 563.180(b)(1), (b)(2).
27. Id. Rule 201.2(e) permits the SEC to suspend or prohibit an attorney from practicing before the SEC if it finds the attorney is not qualified to represent others, lacks character or integrity or has engaged in improper or unethical conduct. Id. Rule 201.2(e) further suspends or prohibits an attorney from practicing before the SEC if the attorney willfully violated or aided and abetted the client in violation of the federal securities laws or regulations. Id.
30. Remarks of Harris Weinstein, supra note 2, at 408-10 (stating that a law firm acting as agent for a regulated client may have disclosure responsibility distinct from that required if performing role of evaluator or advisor).
31. Id.
32. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Preamble (1988). A fifth function is that of intermediary, in which the lawyer operates as an advisor and as a spokesperson between two clients to reconcile their divergent interests. Id.
33. See L. Ray Patterson, The Limits of Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited, 1979 DUKE L.J. 1251, 1252 (stating that the principle of loyalty and the rules resulting therefrom are determined by three factors: nature of client, role of lawyer, and legal process).
34. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Preamble (1988).
must also comply with the ethical obligation of confidentiality.\textsuperscript{25} The Oklahoma Rules require a lawyer to keep in confidence information relating to representation of a client, unless disclosure is required or permitted by the Rules or other law.\textsuperscript{26}

As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and the resulting implications.\textsuperscript{27} The attorney, however, may not counsel a client to engage in criminal or fraudulent conduct.\textsuperscript{28} The lawyer must not be deterred merely because the proffered advice may be unfavorable to the client.\textsuperscript{29} In fact, the lawyer is obligated to clarify the limits of the representation if the client expects assistance contrary to the Rules or other laws.\textsuperscript{30}

A negotiator seeks results advantageous to the client but consistent with the requirements of honest dealings with others.\textsuperscript{41} As an evaluator, the lawyer examines a client's legal affairs and reports to the client or to others.\textsuperscript{42} Lawyers practicing before regulatory agencies could be called upon to perform these roles successively based on the circumstances. For example, a lawyer representing a financial institution in responding to a bank examination report will provide reasons why any disputed issues should be resolved to the financial institution's advantage. The resolution of the disputed issues will likely be a negotiated compromise, requiring progress reports of corrective measures taken to resolve the disputed issues. Thus, the lawyer may then represent the financial institution as an evaluator, reporting to the regulatory agency as to the client's corrective actions taken in response to the bank examination report.

A final role that an attorney might perform is that of accessory or agent to a client's improper conduct.\textsuperscript{43} A lawyer is prohibited from knowingly assisting a client's crime or fraud by both the Rules and the regulatory agencies.\textsuperscript{44} However, specifically defining the point at which an attorney strays from performing a proper function, such as advocate or advisor, to acting as accessory or agent is difficult.\textsuperscript{45}

\textsuperscript{25} Id.
\textsuperscript{26} Id.; see also id. at Rule 1.6.
\textsuperscript{27} Id. at Preamble.
\textsuperscript{28} Id. at Rule 1.2(c).
\textsuperscript{29} Id.; see also id. at Rule 2.1 cmt.
\textsuperscript{30} Id. at Rule 1.2(d).
\textsuperscript{31} Id. at Preamble.
\textsuperscript{32} Id.
\textsuperscript{33} Remarks of Harris Weinstein, supra note 2, at 410.
\textsuperscript{34} OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1988); 12 C.F.R. § 513.4(a)(4) (1992).
\textsuperscript{35} The OTS has claimed that, where regulatory disclosure pursuant to a bank examination is filtered through the law firm representing the financial institution being examined, the law firm succeeds to the disclosure obligations of the financial institution and in fact becomes the financial institution's agent. Notice of Charges, Fishbein, supra note 4, ¶¶ 45-51. As the financial institution's agent, the interposing law firm is prohibited from knowingly making false or misleading statements or omissions as to material facts. 12 C.F.R. § 563.180(b)(1) (1992).
III. Analysis of Particular Issues & Treatment

A. Traditional Theories of Civil Liability

Once a regulated company suffers a loss attributable to improper conduct, the governing agency may try to prove that the company's attorneys were knowingly involved in fraudulent transactions that contributed to or hid the loss.\textsuperscript{46} Regulatory agency actions against attorneys may include claims based on traditional theories of liability.\textsuperscript{47}

1. Malpractice

A legal malpractice\textsuperscript{48} claim is founded on a breach of the lawyer's duties to a client, whether the attorney is an individual or an organization.\textsuperscript{49} The theory of malpractice liability requires that a lawyer exercise the degree of care that is commonly observed by other professionals in the industry.\textsuperscript{50} A lawyer who fails to provide the ordinary diligence of lawyers in similar situations is subject to liability in damages to the client.\textsuperscript{51}

In \textit{FDIC v. O'Melveny & Meyers},\textsuperscript{52} the FDIC, as conservator of a defunct bank, was permitted to bring a malpractice claim against the bank's attorneys. The bank's officers had intentionally and fraudulently overvalued the bank's assets and inflated profits to induce investment from outside investors.\textsuperscript{53} The attorneys' negligence was based on their failure to make an independent investigation, as was the custom of securities counsel, in preparing certain syndication documents.\textsuperscript{54}

The court in \textit{O'Melveny} rejected the attorneys' position that a lawyer owes "no duty to uncover a client's fraud nor to advise the client and the world of that fraud."\textsuperscript{55} An attorney must act competently to avoid public harm once the client's dishonesty is discovered.\textsuperscript{56} The attorney's duty of care includes protecting the client from liability which may occur from distributing false or misleading information to prospective investors.\textsuperscript{57}

\textsuperscript{46} Villa, \textit{supra} note 3, at 104. An attorney who is unwittingly used by an organization or its management to engage in improper activities is distinguished. \textit{Id.} For example, an attorney is unlikely to have first-hand knowledge of any unwritten understandings between the financial institution-client and its borrowers. \textit{Id.}

\textsuperscript{47} \textit{Id.} at 97.

\textsuperscript{48} The elements of malpractice coincide with those for negligence: duty, breach of that duty, proximate causation, and damages. \textsc{William L. Prosser et al.}, \textit{Torts: Cases and Materials} 117-82 (8th ed. 1988).

\textsuperscript{49} Villa, \textit{supra} note 3, at 98.

\textsuperscript{50} \textsc{Charles W. Wolfram}, \textit{Modern Legal Ethics} 209 (1986).

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} 969 F.2d 744 (9th Cir. 1992).

\textsuperscript{53} \textit{Id.} at 746.

\textsuperscript{54} \textit{Id.} at 749.

\textsuperscript{55} \textit{Id.} at 748.

\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 749.
The attorneys in *O'Melveny* argued that the FDIC's claim for relief was barred since the FDIC "[stood] in the shoes" of the wrongdoers at the bank.\(^{58}\) The attorneys sought to enforce the general principle that the perpetrator of a fraud cannot seek relief as a victim of that fraud.\(^{59}\) However, since the bank was the client, and not its officers, the misconduct of those officers could provide a defense for the attorneys only if the officers' misconduct could be attributed to the bank.\(^{60}\) Since the wrongdoers were acting adversely to the bank and not for its benefit, the court refused to attribute the officers' conduct to the bank or to the FDIC.\(^{61}\)

In contrast, where the wrongdoers benefit without directly harming the corporation, a malpractice claim could be barred. In *Cenco, Inc. v. Seidman & Seidman*,\(^{62}\) the corporate plaintiff was precluded from alleging malpractice against its auditors who had "stepped into the shoes" of management that was itself involved in fraudulent activities. The fraud by management of inflating inventory was against third parties, not the corporation itself.\(^{63}\) When the organization sued its auditors for not detecting the fraud, the court determined that no cause of action existed.\(^{64}\) As a participant in the fraud, the organization could not also be a victim since the element of reliance on any fraudulent representations was missing.\(^{65}\) Thus, under *Cenco*, a regulatory agency could be barred from alleging a malpractice claim.

### 2. Fraud

Fraudulent conduct includes misrepresentation, concealment or nondisclosure of a material fact.\(^{66}\) In especially egregious cases, an attorney may be charged with direct participation in the client's fraudulent activities.\(^{67}\) In *In re Fishbein,*\(^{68}\) the OTS claimed that a law firm which interposes itself between the client and the regulatory agency succeeds to the same disclosure obligations as the client. Thus, under *Fishbein*, the law firm could be subject to liability for misrepresentation or nondisclosure of material facts.\(^{69}\)

### 3. Aiding & Abetting

Regulatory agencies have sought to hold attorneys civilly liable for aiding and abetting their clients in violations of regulations or breaches of fiduciary duties.\(^{70}\) Whether aiding and abetting constitutes a tort cause of action is disputed.\(^{71}\) Aiding

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\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.* at 750.

\(^{61}\) *Id.*


\(^{63}\) *Id.* at 454-56.

\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) PROSSER ET AL., *supra* note 48, at 1023.

\(^{67}\) *Villa, supra* note 3, at 99.

\(^{68}\) Notice of Charges, *Fishbein, supra* note 4, ¶¶ 45-51.

\(^{69}\) *Id.*

\(^{70}\) *Villa, supra* note 3, at 101.

\(^{71}\) *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 452 (7th Cir.), *cert. denied*, 459 U.S. 880.
and abetting allegations have however been directed at attorneys in the securities context.\(^2\)

**B. Theories Predicated on Ethical Rules**

Since a law firm's insurance coverage typically has a dishonesty exclusion, the regulatory agencies do not necessarily "win" by proving that an attorney committed fraud or misrepresentation or aided and abetted a client's improper conduct.\(^3\) Thus, the agencies have pursued new theories of liability against attorneys.\(^4\) Recently, the agencies have targeted ethical violations as the means to seek recompense.\(^5\) Although professional standards are not meant to give rise to civil liability,\(^6\) "[t]he attempt to deny that there is anything in [the Rules] that is relevant to the legal duty owed by a lawyer to his client is . . . quite wrong."\(^7\)

The regulatory agencies' ethics-based theories are problematic since they could alter the fundamental relationship between attorneys and their clients.\(^8\) Traditionally, an attorney serves his client as advocate and/or advisor.\(^9\) The regulatory agencies' theories have been criticized for suggesting that an attorney be both auditor of his client's conduct, prepared to abandon the client at any sign of impropriety, as well as a reporter to governmental agencies about his client's actions.\(^10\)

1. **Duty to Disclose Client Wrongdoing to Others**

A duty to disclose a client's wrongdoing to parties outside the attorney-client relationship assumes a significant level of knowledge on the part of the attorney.\(^11\) Three situations exist in which an attorney may learn of a client's improper conduct.\(^12\) First, an attorney may learn of a client's wrongdoing which was

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\(^{73}\) Villa, supra note 3, at 99.

\(^{74}\) Id. at 115.

\(^{75}\) Id. at 108.

\(^{76}\) The Rules are not to be used as a basis for civil liability. OKLAHOMA RULES OF PROFESSIONAL CONDUCT pmbl. (1988); see, e.g., Martin v. Trevino, 578 S.W.2d 763, 770 (Tex. Civ. App. 1978) (finding that violation by attorney of disciplinary rules does not by itself create cause of action); Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.D. Iowa), aff'd, 590 F.2d 341 (8th Cir. 1978) (finding no private cause of action for alleged violation of professional responsibility code); see also Ayyildiz v. Kidd, 266 S.E.2d 108, 112-13 (Va. 1980) (stating that Model Code provides basis for disciplinary proceedings, not civil liability, against offending attorney).

\(^{77}\) ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 662 (3d ed. 1989).

\(^{78}\) Villa, supra note 3, at 117.

\(^{79}\) Id.

\(^{80}\) Id.; see Helms, supra note 9, at 283.

\(^{81}\) Villa, supra note 3, at 129; see, e.g., OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1988).

\(^{82}\) Villa, supra note 3, at 118.
previously committed outside the attorney's representation. Second, an attorney may learn of client wrongdoing committed during the course of the attorney representation. Finally, an attorney may learn of a client's intention to commit some future impropriety. Only in the latter two situations does the attorney need inquire as to disclosure obligations.

a) Confidentiality

The overriding obstacle to an attorney's disclosure of information learned from his client is the attorney's ethical obligation to retain inviolate the confidences and secrets protected by the attorney-client privilege. The general rule that the lawyer may not reveal the client's confidences is subject to limited exceptions. Under Rule 1.6(b)(1) of the Oklahoma Rules, a lawyer is permitted, upon reasonable belief, to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime." Oklahoma's rule is broader than the corresponding ABA Model Rule which only permits a lawyer to reveal information necessary to prevent the client from committing a criminal act that is likely "to result in imminent death or serious bodily harm." Absent that specific injurious type of crime, the ABA Model Rules prohibit a lawyer from revealing a client's crime, except in connection with a fee dispute or to defend himself. Thus, under the Oklahoma Rules, an attorney has more discretion to reveal the client's communications because the rule encompasses a wider variety of crimes.

A second exception to the duty of confidentiality permits a lawyer to disclose information "as otherwise permitted under these [R]ules." Finally, the Rules require, rather than permit, disclosure of confidential client communications pursuant to law or court order. Oklahoma added this provision to make explicit what is merely implied by the ABA Model Rules. This last exception seems to apply to agency statutes and regulations which clearly are laws and which may, depending upon their statutory or regulatory interpretation, require disclosure of

83. Id.
84. Id.
85. Id.
86. Id.
87. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1988).
88. Id.
89. See Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the Securities and Exchange Commission, 31 BUS. LAW. 543, 545 (1975) (stating that no obligation or right exists to disclose a client's fraud if a reasonable doubt exists).
90. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1988).
91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983).
92. Id.
93. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (1988).
94. Id. at Rule 1.6(c).
95. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (containing no express mandatory provision to disclose pursuant to law or court order, but implying authorization as necessary for representation).
confidential information. Notwithstanding these three exceptions, a presumption should exist against supersession of Rule 1.6.  

b) Candor

An attorney is usually not responsible for the veracity of a client's assertions absent some affirmation, such as an affidavit or statement in court, by the attorney. Advocate, which requires client confidentiality, is subject to Rule 3.3 which sets forth the attorney's duty of candor to a tribunal. Rule 3.3 is generally given a narrow construction based on an adversary system theory which presumes that the opposing sides will put forth their best information and the tribunal will decide which is the truth. Once the advocate purports to have personal knowledge as to the client's assertions, the attorney is subject to Rule 3.3.

The Oklahoma Rule is stricter than the corresponding ABA Model Rule, which merely concerns false statements and nondisclosure of material facts. In contrast, an attorney in Oklahoma is prohibited from knowingly making false statements of fact or law, regardless of materiality, to a tribunal. Likewise, Rule 3.3(a)(2) requires disclosure by the attorney of a fact, whether or not material, if necessary to avoid assisting the client in perpetrating a crime or fraud. Circumstances could exist where failure to make a disclosure constitutes an affirmative misrepresentation.

A lawyer is responsible for knowingly offering false evidence to a tribunal. If material evidence was offered which is later known by the attorney to be false, the attorney must advise the client to remedy the falsehood. If the client refuses, the lawyer must promptly disclose the "false character" to the tribunal. If a non-client offered the false evidence, prompt disclosure to the tribunal is also required, without any preliminary counseling between the attorney and the non-client. Under Oklahoma Rule 3.3(b), these duties "are continuing," whereas the corresponding ABA Model Rule provides that the duties terminate at the conclusion

96. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1988).
97. Id. at Rule 3.3 cmt.
98. Id. at Rule 3.3.
99. Id.
100. Id.
101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1983).
103. Id. at Rule 3.3(a)(2).
104. Id. at Rule 3.3 cmt; see State ex rel. Oklahoma Bar Ass'n v. Moss, 577 P.2d 1317, 1321 (Okl. 1978) (finding that concealment of facts by one with duty to disclose is deceitful); Sellers v. Sellers, 428 P.2d 230, 237 (Okla. 1967) (finding no privilege of nondisclosure absent confidential relationship and nondisclosure constitutes material misrepresentation); see also OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 8.4(e) (1988) (professional misconduct includes "conduct involving . . . misrepresentation").
106. Id. at Rule 3.3(a)(4)(A).
107. Id.
108. Id. at Rule 3.3(a)(4)(B).
109. Id. at Rule 3.3(b).
of the proceeding before the tribunal. However, both versions of 3.3 apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6." 

c) Truthfulness

An attorney is responsible for the truthfulness of statements made in transactions with persons other than the client. This responsibility does not constitute an affirmative duty to inform an opposing party of relevant facts, but merely prohibits false statements, omissions, and misrepresentations. While representing a client, the attorney "shall not knowingly make a false statement of material fact or law to a third person." The attorney may not make a misrepresentation by affirming another party's statements known to be false nor by failing to act. Furthermore, substantive laws could require a lawyer to disclose information to avoid being deemed to have assisted in the client's crime or fraud. Rule 4.1(b) requires disclosure by an attorney to a third person of a material fact if necessary to avoid assisting the client in perpetrating a crime or fraud. However, the disclosure requirement under Rule 4.1(b) is subject to the confidentiality requirement of Rule 1.6. Thus, in contrast to Rule 3.3, supra, which prioritizes disclosure to a tribunal over confidentiality, disclosure under Rule 4.1(b) could be prohibited by Rule 1.6.

2. Duty to Disclose Within Client Entity

Beyond any duty to disclose to parties outside the attorney-client relationship, certain kinds of knowledge on the part of an attorney as to a client's questionable conduct could trigger the attorney's disclosure duty within the client entity. Such a duty is less likely to offend traditional notions of the attorney-client relationship since any disclosure would be to constituents of the client and presumably in the best interest of the client. Rule 1.13 of the Oklahoma Rules is based on the fiduciary duty owed to an organization by its officers and other constituents.

Rule 1.13(b) provides the basis for disclosure of a client's wrongdoing within the client organization. Rule 1.13(b) contains qualifying language such as the

110. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1983).
111. Id.
113. Id. at Rule 4.1 cmt.
114. Id. at Rule 4.1(a).
115. Id. at Rule 4.1 cmt.
116. Id.
117. Id. at Rule 4.1(b).
118. Id. at Rule 4.1 cmt.
119. Villa, supra note 3, at 125.
120. Id. As a practical matter, however, any disclosure "up the corporate ladder" has a strong disincentive and could jeopardize the attorney's continued employment by going over the heads of those who might be responsible for retaining him. Id.
122. Id. at Rule 1.13(b).
attorney "knows" of improper plans in a "matter related to the representation"; the plans must violate some obligation; the violation must be "imputed" to the client's organization; and the violation must be "likely to result in substantial injury" to the organization. Consequently, violations of law which cannot substantially harm the client are not addressed by Rule 1.13(b). Therefore, an attorney could not take action under the Rule if the attorney believed that the entity, even if caught, would only have to pay a minor fine and would suffer only slight damage to its public image. Significant wrongdoing must be perpetrated to invoke the Rule.

According to Rule 1.13(b), the uncovered illegality must occur in a "matter related to the representation." The limiting phrase may be designed to discourage lawyers from interfering in corporate affairs. So long as the illegality is beyond the scope of the matter for which the lawyer's assistance was retained, the attorney would be under no duty to invoke Rule 1.13(b). A retainer letter or other agreement specifying the law firm's responsibilities is good evidence for establishing the scope of the representation.

A corporate client acts through its constituents, which include its officers, directors, shareholders, and employees. Where a constituent is acting illegally or adversely to the organization, a lawyer may have to report to the "highest authority that can act in behalf of the organization as determined by applicable law." The highest authority could be the chief executive officer, the board of directors, or the independent directors. Thus, merely consulting the board of directors could be insufficient and the lawyer may have to report to the independent directors.

Rule 1.13(b) favors the client entity as is evidenced by the remedies available to a lawyer. The requisite actions by the attorney include advising the wrongdoer to consider refraining from those actions that violate the law, suggesting that a separate legal opinion be obtained, and reporting the violation to a higher authority in the organization. Thus, the Rule contemplates a measured inquiry within the entity, working up the organization's decision-making hierarchy. The lawyer is specifically directed to minimize the risk of revealing confidential information to

123. Id.
125. Id.
126. Villa, supra note 3, at 128.
127. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1988).
128. WOLFRA M, supra note 50, at 744.
129. Villa, supra note 3, at 128.
130. Id.
132. Id. at Rule 1.13(b)(3).
133. Id. at Rule 1.13 cmt.
134. Id. at Rule 1.13(b).
135. Id.
136. HAZARD & HODES, supra note 124, at 242.
outsiders.\textsuperscript{137} If the highest authority refuses to correct the wrongdoer's illegal conduct, an attorney in Oklahoma has an obligation to resign from representing the client-organization.\textsuperscript{138} In contrast, the ABA Model Rules are not as strict as Oklahoma, providing the attorney in such circumstances the option to withdraw.\textsuperscript{139} Although the list of remedies is not exclusive, the premise of Rule 1.13(b) is that disclosure is prohibited except in extraordinary circumstances.\textsuperscript{140}

The American Bar Association (ABA) addressed the concept of internal disclosure in 1940 in response to an attorney's request for advice on client confidences and disclosure to a corporate board of directors.\textsuperscript{141} An attorney had drafted a contract for a trust company to buy out the interest of certain beneficiaries.\textsuperscript{142} In the course of that representation, the attorney advised the trust company to disclose to the beneficiaries certain improprieties by trust company employees.\textsuperscript{143} After the transaction was completed without his further involvement, the attorney learned that the trust company had not made the recommended disclosure prior to consummating the transaction.\textsuperscript{144}

The ABA committee concluded that such a disclosure should be to the client and not to third persons.\textsuperscript{145} The ABA committee reasoned that the attorney was not bound to disclose the information to third parties since the information was not acquired with the intention to commit a future crime.\textsuperscript{146} The committee determined, however, that the attorney should reveal the information to the trust company's board of directors so that the board could take any corrective action to protect the company from the wrongful acts of its management.\textsuperscript{147}

3. Duty to Investigate

A duty to disclose assumes the attorney has actual knowledge.\textsuperscript{148} However, knowledge cannot be avoided by an attorney simply by "closing [his] eyes."\textsuperscript{149} Knowledge can be "inferred from [the] circumstances."\textsuperscript{150}

\begin{enumerate}
\item 137. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1988).
\item 138. Id. at Rule 1.13(c). See infra notes 162-70 and accompanying text.
\item 139. MODEL RULE OF PROFESSIONAL CONDUCT Rules 1.13(c), 1.16(b)(1)-(b)(2) (1983).
\item 140. HAZARD & HODES, supra note 124, at 242.
\item 142. Id.
\item 143. Id.
\item 144. Id.
\item 145. Id.
\item 146. Id.
\item 147. Id.
\item 148. See OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rules 1.13(b), 3.3(a), 4.1 (1988) (providing, respectively, that specified action be taken only after attorney has knowledge of violation; that attorney cannot knowingly be less than candid toward a tribunal; and that attorney cannot knowingly disclose false information to third person nor, subject to rule 1.6 confidentiality, withhold material facts from that person).
\item 149. See Remarks of Harris Weinstein, supra note 2, at 408.
\item 150. OKLAHOMA RULES OF PROFESSIONAL CONDUCT Terminology (1988) ("Knowingly," 'Known,' or 'Known' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.").
\end{enumerate}
could allege that an attorney should have known or suspected wrongdoing.\textsuperscript{151} Thus, an attorney may have a duty to pursue and investigate those alleged suspicions.\textsuperscript{152} As a practical matter however, little authority, statutory or case law, exists for the proposition that an attorney has a duty to investigate.\textsuperscript{153}

Failure to investigate in certain circumstances could constitute deliberate ignorance, which in turn could constitute knowledge for aiding and abetting purposes if the attorney was under a duty to disclose wrongdoing.\textsuperscript{154} In Wyle v. R.J. Reynolds Industries, Inc.,\textsuperscript{155} the court found that the law firm's failure to investigate the substance of certain representations made on behalf of the client amounted to knowledge. In Wyle, the law firm affirmed in court the client's denial of antitrust violations.\textsuperscript{156} The law firm failed to investigate its client's assertion, even after learning that the client had previously been fined for such violations.\textsuperscript{157}

The duty to investigate was also explained in State v. Zwillman\textsuperscript{158} when an attorney was convicted for falsifying claims in a scheme to defraud an insurance company. The court concluded that an attorney is not responsible for deciding the truth or falsity of a client's representations, unless the attorney has actual knowledge, or unless, from the facts within his personal knowledge or professional representation, he should know or reasonably suspect that the client's representations are false.\textsuperscript{159} An attorney's duty is not to judge the client, but to seek all that the client is entitled to under the law.\textsuperscript{160} Thus, even for a matter within the attorney's representation, a duty to inquire arises only if reasonable grounds for suspicion exist.\textsuperscript{161}

4. Duty to Withdraw

Although an attorney may not be obligated to disclose a client's known or suspected wrongdoing, either within the entity or to outside third parties, the attorney may have a duty to withdraw from representing the client.\textsuperscript{162} That duty could be permissive or mandatory depending on the circumstances.\textsuperscript{163} For example,

\textsuperscript{151} Villa, supra note 3, at 129-30.
\textsuperscript{152} Id.
\textsuperscript{153} The Oklahoma Rules expressly addressing duties to investigate are limited. See, e.g., OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.6(a), 8.1(a) (1988).
\textsuperscript{154} See Remarks of Harris Weinstein, supra note 2, at 408 (stating that professional responsibility requires attorneys to investigate, where necessary, the factual basis for their opinion and representations); WOLFRAM, supra note 50, at 709-10 (stating that an evaluating lawyer is required to determine the accuracy of the facts stated by the client if the attorney has reason to suspect that they are inaccurate or incomplete).
\textsuperscript{155} 709 F.2d 585 (9th Cir. 1983).
\textsuperscript{156} Id. at 588.
\textsuperscript{157} Id. at 590.
\textsuperscript{159} Id. at 289.
\textsuperscript{160} Id.
\textsuperscript{161} Villa, supra note 3, at 132.
\textsuperscript{162} OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1988).
\textsuperscript{163} Id.
under Rule 1.13(b), if the attorney has advised the appropriate management level of improper conduct and has received no response, the attorney is required to withdraw from representation under Rule 1.16.\textsuperscript{164} Upon termination of representation, an attorney must reasonably protect the client's interests.\textsuperscript{165}

Rule 1.16 provides for declining or terminating representation.\textsuperscript{166} Rule 1.16(a) sets forth several situations in which withdrawal is mandatory. For example, an attorney must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Oklahoma Rules or other laws.\textsuperscript{167} Mandatory withdrawal is also prescribed if the attorney reasonably believes that the client is using the attorney's services to pursue a crime or fraud.\textsuperscript{168} Furthermore, an attorney must withdraw if the client has already used the attorney's services to commit a crime or fraud.\textsuperscript{169} The latter two mandatory withdrawal situations again illustrate the higher professional responsibility standard established in Oklahoma compared to the corresponding ABA Model Rule, which merely permits, rather than requires, withdrawal in those situations.\textsuperscript{170}

Permissive withdrawal is addressed in Oklahoma Rule 1.16(b).\textsuperscript{171} An attorney may withdraw if a client fails to substantially fulfill an obligation regarding the lawyer's services and has been given reasonable notice that the attorney will withdraw.\textsuperscript{172} Rule 1.16(b) includes a catch-all provision to withdraw for "other good cause."\textsuperscript{173}

\textit{IV. Analysis of Approaches to Disclosure}

Since the regulatory agencies have recently brought several significant enforcement actions against attorneys with varying results, the extent of the attorney's disclosure duty must be clarified. For example, on March 2, 1992, the OTS\textsuperscript{174} filed an administrative complaint seeking $275 million from the New York law firm of Kaye, Scholer, Fierman, Hays & Handler (Kaye Scholer).\textsuperscript{175} The OTS claimed that

\begin{itemize}
  \item\textsuperscript{164} \textit{Id.; see also id. at Rule 1.13(c).}
  \item\textsuperscript{165} \textit{Id. at Rule 1.16(d).}
  \item\textsuperscript{166} \textit{Id.}
  \item\textsuperscript{167} \textit{Id. at Rule 1.16(a)(1). The client's mere request that the attorney engage in an improper course of conduct does not create an obligation on the attorney to decline or withdraw from representation. Id. at Rule 1.16 cmt.}
  \item\textsuperscript{168} \textit{Id. at Rule 1.16(a)(3).}
  \item\textsuperscript{169} \textit{Id. at Rule 1.16(a)(4).}
  \item\textsuperscript{170} \textit{MODEL RULE OF PROFESSIONAL CONDUCT Rules 1.16(b)(1), (b)(2) (1983).}
  \item\textsuperscript{171} \textit{OKLAHOMA RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1988).}
  \item\textsuperscript{172} \textit{Id. at Rule 1.16(b)(2).}
  \item\textsuperscript{173} \textit{Id. at Rule 1.16(b)(4).}
  \item\textsuperscript{174} On August 9, 1989, pursuant to the provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, the Office of Thrift Supervision succeeded the Federal Savings and Loan Insurance Corporation as the regulatory agency charged with the supervision and regulation of all savings associations and savings and loan holding companies.
  \item\textsuperscript{175} Notice of Charges, \textit{Fishbein, supra} note 4. The OTS also obtained an order to freeze the assets of Kaye Scholer, which applied as well to the assets of the individual partners. \textit{In re Fishbein, No. OTS
Kaye Scholer violated its responsibility to the public by concealing damaging information about its former client, Lincoln Savings and Loan Association of Irvine, California (Lincoln), which was seized in 1989 by the government regulators. The OTS specifically charged Kaye Scholer with ethical and legal violations including knowingly disregarding material facts in rendering advice to Lincoln, failing to disclose material facts to the Federal Home Loan Bank Board (FHLBB), and obstructing and misleading the FHLBB in its examination of Lincoln. On March 10, 1992, Kaye Scholer agreed to a $41 million settlement with the OTS (the Kaye Scholer Settlement).

The hasty settlement left unresolved whether an attorney must abandon the attorney-client privilege by disclosing a client's crime or fraud. As alleged by the OTS, lawyers representing government-regulated companies have a responsibility to the public, not just to their clients. In contrast, the traditional lawyer's role is that of zealous advocate for the interests of the client. Since the Kaye Scholer Settlement, that role has been questioned.

A. Analogous Disclosure Actions

Federal regulatory agencies argue that a lawyer has a duty to disclose a client's impropriety to the regulatory agency. The agencies contend that an attorney is responsible to the public for the adequacy of a regulated entity's internal procedures for regulatory compliance. Regulatory agencies have sued attorneys based on the attorney's failure to ensure the client's compliance with applicable regulations. Regulatory agencies have relied not only on traditional theories of civil liability, but also on analogous situations to reconcile the regulatory agencies' perspective on disclosure with the attorney-client relationship.

AP 92-20, slip op. at 11 (Office of Thrift Supervision, Dep't Treas. Mar. 1, 1992) (temporary order to cease and desist).

176. Notice of Charges, Fishbein, supra note 4, ¶¶ 182-85. Lincoln was wholly owned by American Continental Corporation, a publicly-held corporation with its principal place of business in Arizona and which, in turn, was controlled by Charles H. Keating, Jr. Id. ¶¶ 3-5.

177. Notice of Charges, Fishbein, supra note 4, ¶ 5.

178. The FHLBB is governed by the Office of Thrift Supervision. Hereinafter, the terms "FHLBB" and "OTS" are used interchangeably.

179. Notice of Charges, Fishbein, supra note 4, passim.

180. In re Fishbein, No. OTS AP 92-19, slip op. at 13 (Office of Thrift Supervision, Dep't Treas. Mar. 10, 1992) (final order to cease and desist).

181. Lerner, supra note 5, at 14.

182. Notice of Charges, Fishbein, supra note 4, ¶¶ 182-85; see Ricc & Bell, supra note 7.

183. Wolfram, Mapping the Minefield, supra note 6, at 56.

184. See Stevens & Thomas, supra note 6, at A1 (suggesting the settlement indicates that law firms will now be called upon to disclose damaging information about the government-regulated companies they represent).

185. Helms, supra note 9, at 283-84.

186. Villa, supra note 3, at 110.

187. See, e.g., Notice of Charges, Fishbein, supra note 4, passim (administrative complaint by Office of Thrift Supervision against law firm for, inter alia, ethical violations in bank examination).

188. Helms, supra note 9, at 283-84.
1. Auditor's Duty to Regulators

An auditor's duty to disclose a client's criminal or fraudulent conduct to third parties provides an analogous disclosure framework for attorneys since both professions represent the interests of the client to outside parties. The court in *Gold v. DCL Inc.* determined that when an auditor gives an opinion or certifies a statement, the auditor assumes a role which carries a special relationship of trust to the public. In *Gold*, the defendant's auditor was discharged after a dispute with the defendant relating to a qualified opinion which the auditor anticipated giving. The defendant's auditor did not publicly disclose information relating to its intent to qualify an opinion. The plaintiff in *Gold* claimed that the defendant's former auditor either owed investors an independent duty of disclosure or aided and abetted the defendant's market manipulation by failing to disclose its expected qualified opinion.

The court in *Gold* recognized that mere possession and nondisclosure of material facts does not alone create liability under SEC Rule 10(b)(5). In addition, some relationship which generates a duty to inform must exist. The auditor in *Gold* had not issued a public opinion nor any certification concerning the financial figures released by the defendant which allegedly induced the public to purchase stock. Furthermore, the auditor had not invited the public in any way to rely on its financial statements. The court further found that the earnings information relied on by the plaintiff clearly noted that the figures were unaudited. The court concluded that no special relationship with the purchasing public existed which could impose a duty of disclosure upon the former auditors. Furthermore, absent a special relationship, the auditor's silence and inaction could not constitute aiding and abetting.

In *In re Rospatch Securities Litigation*, the court determined that an independent auditor had a duty to disclose ongoing securities fraud. The complaint alleged that an independent auditing firm knew, or was reckless in not knowing, of alleged fraud by the defendant following a significant markdown of the defendant's net worth.

190. See also OTS v. Ernst & Young, 786 F. Supp. 46, 47 (D.D.C. 1992) (holding that OTS could investigate accounting firm and enforce subpoena).
192. Id. at 1125.
193. Id. at 1127.
194. Id.
195. Id.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id. at 1128.
201. Id.
203. Id. at 1254.
The court in Rospatch noted that when an auditing firm gives an opinion or certifies statements, the firm publicly assumes a role that carries a special relationship of trust to the public.\textsuperscript{204} The auditor, thus, holds itself out as an independent professional source of assurance that the audited company's financial statements are accurate and reliable.\textsuperscript{205} The Rospatch court recognized "the spirit of the federal securities laws" requires that those who know of serious wrongdoing disclose the wrongdoing to the public.\textsuperscript{206} Therefore, the court in Rospatch imposed a duty to disclose upon an accounting firm who knows, or recklessly fails to know, of an ongoing fraud.\textsuperscript{207}

The accounting firm in In re National Smelting of New Jersey, Inc.\textsuperscript{208} was found to have no disclosure duty to bond investors. The accounting firm audited the balance sheet of a bond issuer, conducted a review, and prepared a draft of a financial forecast attached to a preliminary statement issued in connection with a bond offering.\textsuperscript{209}

The court in National Smelting set forth a "flexible duty test" to determine when a non-insider\textsuperscript{210} might have a duty to disclose under SEC Rule 10(b)(5).\textsuperscript{211} The flexible duty test is based on four factors: (1) the relationship between the parties, (2) the defendant's benefit from the relationship, (3) the defendant's awareness of the plaintiff's reliance on the relationship in making investment decisions, and (4) the defendant's role in initiating the transaction.\textsuperscript{212} The court found that the accounting firm's relationship with the plaintiffs was limited and indirect.\textsuperscript{213} The court also found that the only benefit received by the accounting firm was its normal fee.\textsuperscript{214} Furthermore, any reliance by the plaintiff was offset by the specific language counseling caution, because the statements were unaudited.\textsuperscript{215} Finally, the court found that the accounting firm had not initiated the bond offering which formed the basis of the lawsuit.\textsuperscript{216} Therefore, given the limited and circumspect nature of the accounting work performed and the accounting firm's lack of financial interest in the bond offering, the court in National Smelting concluded that the accounting firm had no disclosure duty.\textsuperscript{217}

\textsuperscript{204} Id. at 1251 (citing Fisher v. Kletz, 266 F. Supp. 180, 188 (S.D.N.Y. 1967)).

\textsuperscript{205} Id.

\textsuperscript{206} Id. at 1252; see Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1045 (11th Cir. 1986), cert. denied, 480 U.S. 946 (1987) (finding disclosure duty where accounting firm had actual knowledge of fraud and the firm's inaction while a fraud was perpetrated was misleading).

\textsuperscript{207} Id.


\textsuperscript{209} Id. at 171.

\textsuperscript{210} A non-insider is someone other than a corporate officer, director, or controlling shareholder.

\textsuperscript{Id.} at 170.

\textsuperscript{211} Id. (citing White v. Abrams, 495 F.2d 724, 735-36 (9th Cir. 1974)).

\textsuperscript{212} National Smelting, 722 F. Supp. at 170. No one factor is determinative. Id.

\textsuperscript{213} Id. at 171.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id.

\textsuperscript{217} Id.
The auditors' disclosure duty provides a guideline for a similar obligation in the legal profession. The nature of legal work entails the possession of facts and communications from the client. The attorney-client relationship may create a duty to inform, particularly when the attorney issues a legal opinion or certification which could induce the public to view the client more or less favorably. In that situation, the attorney expects that the public will rely on its documents. Thus, under Gold, a regulatory attorney establishes a special relationship with the public by preparing legal opinions and certifications, and the attorney's subsequent silence or inaction could constitute aiding and abetting. The disclosure duty is strengthened per Rospach if the attorney knows, or recklessly fails to know, of a client's wrongdoing.

In addition to the relationship and reliance by the public, two other factors were considered in National Smelting. First, the benefit the attorney receives could be significant, particularly if the compensation exceeds normal fees. Second, the attorney's participation in initiating the wrongdoing could support the imposition of a duty to disclose.

2. Corporate Fiduciary Duty to Disclose

In Chiarella v. United States, the Supreme Court held that, under federal securities laws, a duty to disclose arises from a fiduciary relationship of trust and confidence between the parties. Although the Supreme Court has not specifically addressed whether an attorney has a duty to disclose his client's fraud to a third party, such as a regulatory agency, some authority suggests that, absent a fiduciary relationship, no such duty is owed. However, in order to demand some disclosure duty on the part of attorneys, a regulatory agency could argue that the agency stands in the position of a stockholder of the regulated company. Thus, the regulated company and its counsel could owe the same fiduciary duty to the agency as that owed to a shareholder. The OTS claims that the fiduciary duty that a corporation's board of directors owes to its shareholders supports an attorney's disclosure duty to the public.

In Schatz v. Rosenberg, the court addressed whether a law firm is liable to a defrauded third party when an attorney allegedly aids the fraud by remaining silent. The plaintiff, who was selling an interest in two companies, alleged that the attorney had failed to disclose material facts about the buyer's financial condition in violation of securities law and common law.

218. 445 U.S. 222, 228 (1980).
220. See FDIC General Counsel Declines to Embrace Higher Duty for Fiduciaries in Failing Banks, 55 BANKING REP. (BNA) 941 (Dec. 10, 1990); Helms, supra note 9, at 284 (observing that the OTS, as the ultimate insurer of depositary institutions, has claimed an equity position in financial institutions and thus an attorney owes a duty to the OTS not unlike that owed by a board of directors to its shareholders).
221. Remarks of Harris Weinstein, supra note 2, at 411.
222. 943 F.2d 485 (4th Cir. 1991).
223. Id. at 489.
The Schatz court held that an attorney has no duty to disclose the client's fraudulent conduct absent a fiduciary relationship between the parties.\textsuperscript{224} The court reasoned that if attorneys had a duty to disclose information to third parties, attorneys would have an incentive not to press clients for information and thereby be unwitting accomplices to the fraud.\textsuperscript{225} The court distinguished cases where lawyers have been held liable for affirmative misrepresentations contained in legal opinions or other public disclosure documents.\textsuperscript{226} The court also distinguished the attorney's misrepresentation of the facts to a third party from the attorney's failure to disclose facts omitted or misrepresented by the client to the third party.\textsuperscript{227} Finding no fiduciary relationship, the court in Schatz concluded that the attorney had no duty to disclose the client's improprieties to third parties.\textsuperscript{228}

B. Prior Attorney Disclosure Actions

1. No Disclosure Duty to Third Parties

The SEC in \textit{In re Carter}\textsuperscript{229} announced its view of the appropriate response for an attorney who discovers that his client is failing to make appropriate disclosures. The SEC interpreted "unethical or improper professional conduct" as that term is used in SEC Rule 2(e) which sets the standard for suspending an attorney from practicing before the SEC.\textsuperscript{230} The SEC determined that when a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure becomes aware of substantial and continuing failure to satisfy the disclosure requirements, the attorney's continued participation violates professional standards unless he takes prompt steps to end the client's noncompliance.\textsuperscript{231} If the attorney's initial counseling is not followed, more affirmative action is required to avoid the inference that the attorney is aiding the nondisclosure scheme.\textsuperscript{232} The attorney could resign or approach the board of directors or take other prompt action that lends the conclusion that the lawyer is engaged in efforts to correct the

\textsuperscript{224} Id. at 490; see Ackerman v. Schwartz, 947 F.2d 841, 846 (7th Cir. 1991) (finding that attorney who wrote opinion letter for promoters of fraudulent tax shelter had no obligation to disclose nor correct the letter which was circulated to investors without the attorney's authorization). The court in Ackerman observed that while federal law would govern the attorney's duty to the investors once the attorney had spoken, a silent participant's liability for transactions depends on state law. \textit{Id.} at 846; see also Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988), \textit{vacated on other grounds sub nom.}, Fryar v. Abell, 492 U.S. 914 (1989) (finding that absent a relationship of trust and confidence, lawyers have no duty to disclose information about clients to third party investors).

\textsuperscript{225} Schatz, 943 F.2d at 493.

\textsuperscript{226} Id. at 491-92.

\textsuperscript{227} Id. at 491.

\textsuperscript{228} Id. at 490.


\textsuperscript{231} Id. at 84,172.

\textsuperscript{232} Id.
problem. The SEC acknowledged that an attorney is not required to disclose a client's illegal act either publicly or to an affected third party.

A nondisclosure theory such as in Schatz or Carter relies on the attorney-client privilege with its underlying confidentiality principle. Attorneys who criticize an obligation to inform regulatory agencies of a client's misconduct rely on the attorney-client relationship and its concurrent duty of confidentiality. Furthermore, opponents of disclosure contend that a disclosure duty to third parties, such as regulatory agencies, has no source in statute or regulation. However, the nondisclosure theory appears to ignore the possibility that the attorney is actually aware, or has knowledge, of the client's improprieties. The government agencies' regulations and the Rules of Professional Conduct clearly create a duty on the attorney who knows of the client's wrongdoing.

2. Duty to Disclose to Third Parties

In Commodity Futures Trading Commission v. Weintraub, the attorney for a bankrupt corporation was obligated to disclose client communications when the bankruptcy trustee waived the attorney-client privilege. The plaintiff in Weintraub was investigating the debtor corporation for commodity exchange violations when the corporation filed bankruptcy. During the investigation, the defendant-attorney asserted the attorney-client privilege and refused to respond to certain inquiries. At the plaintiff's request, the bankruptcy trustee waived the corporation's attorney-client privilege.

The attorney-client privilege promotes full and frank communications between attorneys and their clients. Because a corporation acts through its agents and cannot directly speak to its lawyers, it relies on its constituents to exercise or waive the privilege when disclosure is in the corporation's best interest. Clearly, the power to waive the privilege in a solvent corporation rests with the corporation's management, who must exercise the privilege consistent with their fiduciary duty to act in the best interest of the corporation. Furthermore, when control of the corporation passes to new management, the authority to assert or waive the attorney-client privilege passes as well.

Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the court in Commodity Futures reasoned that in

233. Id.
234. Id. at 84,173.
235. Helms, supra note 9, at 283.
236. Id.; see also Villa, supra note 3, at 118.
239. Id. at 345.
240. Id. at 346.
241. Id.
242. Id. at 348.
243. Id.
244. Id. at 348-49.
245. Id. at 349.
bankruptcy the party with duties similar to those of a solvent corporation's management should control the privilege.\textsuperscript{246} Because the trustee has broad management authority over the debtor, the trustee's role was deemed most similar to the management of a solvent corporation.\textsuperscript{247} Therefore, the bankruptcy trustee has the power to waive the corporation's attorney-client privilege relating to pre-bankruptcy communications.\textsuperscript{248} Thus, the attorney could be compelled to disclose client communications to third parties.\textsuperscript{249}

Under \textit{Commodity Futures}, a lawyer may have a disclosure duty to a regulatory agency. A receiver such as the OTS, like a bankruptcy trustee, differs from a normal successor in interest. Neither the receiver nor the bankruptcy trustee voluntarily "step into the shoes" of a bankrupt corporation's management.\textsuperscript{250} Furthermore, the receiver is usually neither a party to the original inequitable or illegal conduct nor is the receiver in a position to take action prior to assuming the bankrupt's assets to cure any associated defects.\textsuperscript{251}

\textbf{C. Recommended Approach}

Attorneys claim that volunteering client information to the public or regulatory agencies would violate the attorneys' ethical duties to the client. The regulatory agencies, however, deny the existence of any conflict and maintain that the disclosure requirements coincide with established ethical rules.\textsuperscript{252} The approach taken in \textit{In re National Smelting}\textsuperscript{253} provides a balancing test to satisfy concerns from both sides of the disclosure issue.

For example, assuming the flexible duty test set forth in \textit{National Smelting} was applied to the alleged facts resulting in the Kaye Scholer Settlement, the law firm clearly had a duty to disclose the client's wrongdoing. The flexible duty test provides four factors to consider in determining whether a duty to disclose exists. First, a relationship existed between the law firm and its client as well as with the regulatory agency. In the Kaye Scholer Settlement, the law firm's relationship with the client as well as the regulatory agency was direct and unlimited, particularly after the law firm interposed itself between the client and the agency. Second, although the law firm's benefit might have only been a fee, the fees earned were substantial. Third, by directly acting as a liaison between the client and the regulatory agency, the law firm likely was aware that those parties placed reliance on the relationship. Finally, the law firm, while not initiating the underlying improprieties that formed the basis of the lawsuit, allegedly aided and abetted the client's wrongdoing. Therefore, given the allegedly unlimited and careless nature of

\textsuperscript{246} Id. at 351-52.
\textsuperscript{247} Id. at 353.
\textsuperscript{248} Id. at 358.
\textsuperscript{249} Id.
\textsuperscript{250} FDIC v. O'Melveny & Meyers, 969 F.2d 744, 751 (9th Cir. 1992).
\textsuperscript{251} Id.
\textsuperscript{252} Remarks of Harris Weinstein, supra note 2, at 413.
V. Conclusion

Attorneys and commentators are up in arms over recent regulatory agency actions, such as the Kaye Scholer Settlement. The regulatory agencies' actions to compel disclosure of client communications and improprieties by the attorneys have been viewed as infringing on the traditional attorney-client relationship and its confidentiality principle. However, the critics of regulatory disclosure seem to evade the "knowledge" element contained in both the ethical and statutory rules.

An attorney who knows about a client's impropriety cannot hide behind Oklahoma's Rule 1.6. This admonition is particularly true when the attorney knows the impropriety affects a regulatory agency, by virtue of the agency's specific questions, in routine or litigious compliance examinations relating to an area where the improper conduct is occurring. Furthermore, the lawyer would have a disclosure duty to the regulatory agency, assuming the agency has a regulation which prohibits unethical conduct and aiding and abetting in such conduct. Clearly, the disclosure requirements under such a government regulation coincide with the ethical rules and do not impair the established attorney-client relationship.

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