"Ethical Responsibilities in Regulatory Practice: Where does Kaye Scholer Leave Us?"

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"Kaye Scholer" has come to stand for a variety of administrative and civil actions brought against attorneys by banking regulators in connection with the failure of Lincoln Savings & Loan and other financial entities controlled by Charles H. Keating, Jr. Most of the legal actions against Lincoln Savings lawyers have now been settled. But the settlements seem to have left the legal profession, especially lawyers engaged in practice involving regulatory agencies, with a great many more questions regarding ethical responsibilities than answers. This discussion will first address the settlements of the regulatory actions against Lincoln Savings lawyers and law firms, such as Kaye Scholer. The discussion will then focus on some of the ethical responsibility issues which were involved in these banking cases and are of particular interest to natural resources, energy and environmental lawyers. The discussion will conclude with a final comment about the context of these professional ethics issues.

Settlements in the Banking Cases

Over the past several years, three federal regulatory agencies which regulate financial institutions, including the Office of Thrift Supervision (OTS), the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC), have brought roughly 100 claims against lawyers for several hundred failed banks and over 700 savings and loans. The failure of Lincoln Savings & Loan was the most prominent source of claims against professional service providers. Accounting firms, as well as law firms and lawyers who had worked for Lincoln Savings were charged with professional misconduct which allegedly resulted in losses of more than $2 billion to the taxpayers and more than $250 million to the bondholders of Lincoln Savings' parent corporation, American Continental Corporation.

Banking regulators and American Continental bondholders brought monetary claims against at least eleven professionals who served Lincoln Savings. Eight of the eleven were law firms and lawyers. Over the past two years, settlements of these professional liability claims related to Lincoln Savings have amounted to more than a third of a billion dollars - at least $337.65 million, to be more precise. Of these settlements, legal professionals paid approximately 53%, amounting to at least $180.15 million. Additional costs resulting from these and other settlements by former lawyers for Lincoln Savings and other failed thrifts will affect most of the legal profession through increased malpractice insurance premiums. Natural resources, energy and environmental lawyers are among those with an interest in the professional responsibility aspects of these cases involving lawyers for financial institutions.
In April of this year, the former Chief Counsel of the Office of Thrift Supervision, Harris Weinstein, suggested the following specifics regarding the monetary measures of professional liability reflected in the Lincoln Savings settlements:\(^1\)

<table>
<thead>
<tr>
<th>Professionals (lawyers and accountants)</th>
<th>Paid to U.S. Government</th>
<th>Paid to ACC Bondholders</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lawyers and Law Firms</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jones, Day</td>
<td>$ 51,000,000</td>
<td>$ 24,000,000</td>
</tr>
<tr>
<td>Kaye, Scholer</td>
<td>41,000,000</td>
<td>20,000,000</td>
</tr>
<tr>
<td>Mariscal, Weeks</td>
<td>5,000,000</td>
<td>2,000,000</td>
</tr>
<tr>
<td>Parker, Milliken</td>
<td>(undisclosed)</td>
<td>4,650,000</td>
</tr>
<tr>
<td>Sidley &amp; Austin</td>
<td>7,500,000</td>
<td>4,000,000</td>
</tr>
<tr>
<td>Troutman, Sanders</td>
<td>20,000,000</td>
<td>N/A</td>
</tr>
<tr>
<td>Lee Henkel</td>
<td>50,000</td>
<td>N/A</td>
</tr>
<tr>
<td>Michael Gardner</td>
<td>350,000</td>
<td>N/A</td>
</tr>
<tr>
<td>James Fleischer</td>
<td>600,000</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>TOTAL Legal Professionals</strong></td>
<td>$ 125,500,000</td>
<td>$ 54,650,000</td>
</tr>
<tr>
<td>(at least)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Accounting Firms</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arthur Anderson</td>
<td>20,000,000</td>
<td>30,000,000</td>
</tr>
<tr>
<td>Deloitt &amp; Touche</td>
<td>N/A</td>
<td>8,500,000</td>
</tr>
<tr>
<td>Ernst &amp; Young</td>
<td>36,000,000</td>
<td>63,000,000</td>
</tr>
<tr>
<td><strong>TOTAL Accounting Firms</strong></td>
<td>$ 181,500,000</td>
<td>$ 101,500,000</td>
</tr>
</tbody>
</table>

**TOTAL settlements by professionals = at least $337,650,000**


Money is surely not the measure of the ethical responsibilities of lawyers. Large dollar figures certainly should not be allowed to obscure the real issues of professional responsibility which lie behind these figures. However, regulators believe that large monetary settlements direct attention to important issues regarding the ethical responsibilities of lawyers, particularly those engaged in regulatory practice.

The precise ethical meaning of the settlements involving Kaye Scholer and other Lincoln
Savings lawyers is somewhat unclear for at least two reasons. First, the settlements resolved the charges without adjudicated facts regarding what the Lincoln Savings lawyers actually did or did not do. Second, many different professional actions on the part of many different lawyers were challenged as unethical by the banking regulators. The cases brought against Lincoln Savings lawyers involved not one, but many alleged professional improprieties. A brief discussion of these two factors in connection with two of the settled cases, Kaye Scholer and Jones Day, will illustrate why generalizations about ethical responsibilities in regulatory practice based on these settlements can be difficult to draw.

To begin with, Kaye Scholer, Jones Day and other lawyers and law firms involved with Lincoln Savings continue to dispute the facts alleged by the regulators. The law firms and lawyers explain the settlements as based on reasons unrelated to ethical misconduct, which they earnestly deny. Without adjudicated facts, most of what the banking regulators have charged as professional dereliction has to be referred to as "alleged misconduct." For example, Kaye Scholer has explained its settlement with OTS in terms of the urgent necessity of lifting the freeze of the law firm's assets which had been imposed by administrative order. The Jones Day firm has offered an extended explanation regarding the business reasons which persuaded the firm to settle on the day its jury trial was scheduled to begin. Jones Day continues to maintain that it was properly carrying out compliance counselling designed to help Lincoln Savings meet federal regulatory requirements.

In addition, the banking regulators' charges of professional misconduct against attorneys for Lincoln Savings encompasses a wide spectrum of activities on the part of the lawyers. The very nature of what the lawyers were doing remains in dispute. The Kaye Scholer lawyers charged by OTS considered themselves to be engaged in litigation regarding a regulatory examination of Lincoln Savings. When the Kaye Scholer lawyers insisted on being the sole conduit of the information flow from their client to the bank examiners, OTS treated the lawyers as "institution-affiliated parties" of Lincoln Savings. The banking regulators asserted that, under the Federal Deposit Insurance Act, and regulations issued under it, institution-affiliated parties are legally required to prevent regulators from being misled regarding the financial soundness of the thrift with which they are affiliated. But the Kaye Scholer lawyers saw themselves as advocates for, not alter egos of, their financially troubled client. Jones Day similarly disagrees with the regulators regarding the role of the lawyers. The Jones Day lawyers charged by the RTC described their work as compliance advice. But regulators asserted that the legal advice was designed to assist an already insolvent financial institution in fraudulent actions which would allow the unsound thrift to avoid being taken over by regulators.

Professional Principles Asserted by Regulators of Financial Institutions

In presiding over early litigation involving Lincoln Savings, Federal District Judge Stanley
Sporkin denounced professional ethics failures on the part of both accountants and lawyers for Lincoln Savings in a series of haunting questions:

Where were these professionals . . . when these clearly improper transactions were being consummated?
Why didn't any of them speak up or disassociate themselves from these transactions?
Where also were the outside . . . attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

. . . . . Here it is clear that the private sector was not willing to cooperate with the public oversight regulators. Indeed, the private sector at times impeded the regulatory authorities from discharging their duties.\(^5\)

The administrative and civil actions later brought by banking regulators asserted a broad range of professional ethics failures on the part of Lincoln Savings lawyers and accountants.

The professional principles which banking regulators have asserted in moving against lawyers for financial institutions, such as Lincoln Savings, varied a bit from time to time and from case to case. After Lincoln Savings was declared insolvent and had been taken over by federal regulators, the regulatory agency lawyers initially seemed to suggest that they considered attorneys for insured financial institutions, or at least financially troubled ones, to have fiduciary duties to the depository insurance funds. Banking regulators appear to have pulled back from such broad assertions that lawyers for regulated entities have duties to the regulatory agencies. In a few cases, however, lawyers for failed financial institutions have literally found themselves to have professional obligations directly to the regulators. These are the cases in which a federal depository insurance agency has taken over control of a failed financial institution. In such cases, when the regulatory agency takes the place of former management, the agency acts on behalf of the client of the failed financial institution's lawyers.\(^6\)

Perhaps the most expansive expression of the professional ethics theories which banking regulators enforced against the Lincoln Savings lawyers has been offered by former OTS General Counsel Weinstein. In a 1992 speech, he suggested six professional principles:

The first is that a lawyer must be sensitive to the role he or she chooses to play, for the rules and principles that govern an advocate in the courtroom do not apply to the lawyer as advisor or to the lawyer in the bank examination process.

The second is the need to practice the whole law. So-called "loophole
"lawyering" must be illuminated by the whole body of law that pertains to an issue. The third is that a lawyer is at all times governed by a duty to deal honestly with the facts and to comply with the disclosure and other regulations that govern submissions to the regulatory agency.

The fourth is that a lawyer advising a fiduciary must not forget that the fiduciary's conduct must be in the best interests of the institutional client. The fifth is that a lawyer must report unlawful client activity up the corporate chain of command, going as far as the corporate board of directors.

The sixth is that a lawyer may not knowingly further a client's unlawful activity. More recently, Mr. Weinstein suggested that four professional principles should guide the professional conduct of lawyers for financial institutions:

[1] That a lawyer should, if necessary, go up the corporate chain of command to seek to induce a corporate client to abandon an illegal course of conduct.
[3] That a lawyer must give serious consideration to resignation if the client persists in going forward illegally.
[4] And that a lawyer may not tell misleading partial truths in circumstances where the law would make such action by the client actionable.

These professional conduct principles are the subject of a comprehensive report: Laborers in Different Vineyards? The Banking Regulators and the Legal Profession (Discussion Draft January 1993, with June 1993 Appendix). Prepared by the American Bar Association Working Group on Lawyers' Representation of Regulated Clients, this extremely useful report explores in great detail each of these issues, as well as the controversial asset-freeze order involved in the OTS action against Kaye Scholer, and many other aspects of the professional responsibility issues related to the regulatory actions brought against lawyers for Lincoln Savings.

The ABA Model Rules of Professional Responsibility provide a convenient baseline for discussion of professional ethics issues, such as those raised by the regulatory charges of unethical conduct on the part of Lincoln Savings lawyers. Five of the Model Rules are particularly pertinent: portions of Model Rule 1.2 regarding Scope of Representation; Model Rule 1.6 regarding Confidentiality of Information; portions of Model Rule 1.13 regarding Organization as Client; portions of Model Rule 1.16 regarding Terminating Representation; and portions of Model Rule 3.3 regarding Candor Toward the Tribunal. Model Rule 1.2(d) provides with regard to Scope of Representation,
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rule 1.6 provides with regard to Confidentiality of Information,

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

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Portions of Model Rule 1.13 provide with regard to the Organization as Client,

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interests of the organization . . . . Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority
that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

Portions of Model Rule 1.16 regarding Terminating Representation provide:

(a) ... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
   (1) the representation will result in violation of the rules of professional conduct or other law; ... 
(b) ... a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
   (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
   (2) the client has used the lawyer's services to perpetrate a crime or fraud;
   (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; ... 
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Portions of Model Rule 3.3 provide with regard to Candor Toward the Tribunal,

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal;
   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; ... or
   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know if its falsity the lawyer shall take reasonable remedial measures.

Under Model Rule 3.9, the candor required under Model Rule 3.3 also applies to advocates in nonadjudicative proceedings before legislative or administrative bodies. At the heart of most of
the ethical issues posed by the application of these professional ethics rules to the conduct of lawyers for rogue financial institutions, such as Lincoln Savings, is the nature of a lawyer's ethical responsibilities when her client has engaged, or is engaging, in misconduct.

Judge Sporkin and the banking regulators faulted former lawyers for Lincoln Savings for failing to do something about illegal activities which culminated in the failure of the thrift. Precisely what the Lincoln Savings lawyers should have done, but failed to do, is much less clear. Banking regulators now usually deny that their actions against Lincoln savings lawyers were based on any generalized ethical duty on the part of lawyers to "blow the whistle" and inform regulators of the misconduct of their clients, as Judge Sporkin's opinion in *Lincoln Savings & Loan Ass'n v. Wall* might have seemed to suggest. Banking regulators' current views regarding this issue seem to be reflected in a speech by former OTS general counsel, Weinstein, this past April:

> The OTS did not claim that the [Kaye Scholer] law firm had a professional obligation to blow the whistle on its client by volunteering confidential client information. Had the lawyers and their client remained silent instead of making affirmative representations, the charge of omission of material facts would not have been available. The material omission counts were premised on the client's disclosure obligation, coupled with a charge that the lawyers by their conduct had assumed the client's obligation for compliance with the OTS rules that forbid material omission in communications with the agency.9 (Emphasis in original.)

According to the chief architect of the charges against Kaye Scholer, what was unethical about the law firm's conduct was that the lawyers transformed themselves into "institution-affiliated parties" by controlling the information flow in the regulatory examination of Lincoln Savings. The law firm then violated legal duties imposed on such affiliates, including the duty to avoid misleading the regulatory agency.

**Regulatory Agency Practice Rules**

The professional liability actions brought by regulators against Lincoln Savings lawyers, such as Kaye Scholer, were in part based on agency regulations which set rules for lawyers who practice before these agencies. The agency practice rules involved in Kaye Scholer provide in part:

> The Office may censure any person practicing before it or may deny, temporarily or permanently, the privilege of any person to practice before it if such person is found by the Office, after notice of and an opportunity for hearing in the matter . . .
(3) to have engaged in any dilatory, obstructionist, egregious, contemptuous, contumacious or other unethical or improper professional conduct before the Office, or
(4) to have willfully violated, or willfully aided and abetted the violation of, any provision of the laws administered by the Office or the rules and regulations promulgated thereunder.¹⁰

The Securities and Exchange Commission (SEC) has somewhat similar suspension and disbarment rules:

The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter . . . (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder. ¹⁷ C.F.R. §201.2(e) (1992).

Beginning in the 1970s, lawyers for public companies regulated by the Securities and Exchange Commission occasionally faced SEC charges of improper professional conduct when the lawyers misled regulators. ⁴ S.E.C. v. National Student Marketing was the most prominent of the cases brought by the SEC involving ethics charges against securities lawyers.  Aside from federal agencies which regulate financial institutions, the Securities and Exchange Commission has been the most active agency in enforcing regulatory views regarding professional ethics against lawyers who practice before the agency.  Since the practice of some natural resources, energy and environmental lawyers involves regulated securities clients and public companies, these lawyers need to take particular account of the disclosure and due diligence responsibilities enforced by the SEC.¹²

Other regulatory agencies before which natural resources, energy and environmental lawyers practice follow a wide variety of practice rules.  For example, Federal Energy Regulatory Commission regulations provide,

A person appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the Untied States, and where applicable, to the requirements of Section 12(i) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 791(i)). ¹⁸ C.F.R. § 385.2101(c) (1993).
The United States Department of Agriculture provides in regulations that

Persons who appear as counsel or in a representative capacity in any hearing or proceeding must conform to the standards of ethical conduct required of practitioners before the U.S. District Court for the District of Columbia, and to any applicable standards of ethical conduct established by statutes, executive orders and regulations." 7 C.F.R. § 1.26(b) (1993).

The Department of the Interior's regulations provide for disciplinary proceedings in 43 C.F.R. §1.6(a) (1993):

Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Department on grounds that he is incompetent, unethical or unprofessional . . . or that he has been disbarred or suspended by any court or administrative agency. Individuals practicing before the Department should observe the Canons of Professional Ethics of the American Bar Association, by which the Department will be guided in disciplinary matters.

Department of the Interior regulations define "Practice" as including "any action taken to support or oppose the assertion of a right before the Department or to support or oppose a request that the Department grant a privilege." Id. at §1.2.

The Environmental Protection Agency's regulations require that "Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States." 40 C.F.R. § 22.10. (1993). The Commodity Futures Trading Commission has extensive rules of practice which include a Commission rule under which the Commission

may, after notice and opportunity for hearing in the matter, deny, temporarily or permanently, the privilege of appearing or practicing before it to any person who is found by the Commission by a preponderance of the evidence: . . . (b) To be lacking in character or integrity; or (c) To have engaged in unethical or improper unprofessional conduct either in the course of an adjudicatory, investigative, rulemaking or other proceeding before the Commission or otherwise. 17 C.F.R. § 14.8 (1993).

The Occupational Safety and Health Review Commission has adopted by regulation "Standards of Conduct," which include:

A wide variety of different practice rules followed by the many federal, state and local regulatory agencies may affect natural resources, energy and environmental law practice. The necessity of paying attention to these rules and to the regulatory programs of particular agencies is one of the important lessons illustrated by the ethics charges brought against Lincoln Savings lawyers.

Duties of Candor in Compliance Counselling

Of the ethical virtues, candor is among the most problematic. The professional duties of candor which the RTC accused Jones Day lawyers of violating in the course of regulatory compliance counselling are particularly interesting. The banking regulators charged that Jones Day's compliance counselling crossed over the line into what the regulators asserted amounted to providing the manipulators of Lincoln Savings with instructions regarding how to engage in deceit, and get away with it. Environmental lawyers whose practice involves compliance advice will be particularly interested in taking a closer look at the compliance counseling context of the charges brought by the RTC against Jones Day.

Consider first the terms of the settlement. Looked at from the law firm's point of view, the $51 million settlement is barely a tenth of the half-billion dollars in damages asserted by the RTC against the law firm. Moreover, Jones Day maintains that it settled the charges of misconduct for business reasons and points out that the law firm's compliance advice was rejected by Lincoln Savings which replaced Jones Day with other lawyers three years before Lincoln Savings was declared insolvent. Looked at from the regulators' point of view, however, the very stringent terms of the government's settlement with Jones Day seems to convey a different message with regard to professional responsibility. According to published reports, the $51 million settlement "took all of Jones, Day, Reavis & Poague's professional liability insurance . . . , plus $10-$15 million more."13 Given that Jones Day billed Lincoln Savings $760,000 for legal services, the $51 million monetary settlement was more than 50 times the law firm's billings to Lincoln Savings. Moreover, the terms of the settlement also required the law firm to agree to a detailed consent order governing the ways in which the firm would serve financial institution clients in the future. A Jones Day lawyer, who had been a former official of the Federal Home Loan Bank Board, was banished from the banking industry and debarred from OTS practice.

Banking regulators explain the settlement as a way to emphasize one specific point regarding the ethical duties of lawyers who provide compliance advice to financial institutions. That point is a complicated one regarding duties of candor. The regulators did not ultimately fault the law firm, and make it pay dearly, for failing to "blow the whistle" by informing regulators
about illegal activities at Lincoln Savings. Rather, the regulators accused the Jones Day lawyers of unethical professional conduct in failing to bring their client's improper and illegal activities to the attention of their client's board of directors. In other words, the regulators accused the Jones Day lawyers of failing to follow Model Rule 1.13's suggested route all the way up to Lincoln Savings' board of directors. According to banking regulators, when Jones Day reported the results of the firm's compliance evaluation to Lincoln Savings' parent company, American Continental Corporation, and Charles Keating, those reports compounded the law firm's ethical problems. The firm's candor with non-clients constituted yet another ethical lapse, according to the banking regulators. The regulators insist that Jones Day owed single-minded duties of loyalty to Lincoln Savings, not to American Continental or to Charles Keating. As a result, the ethical faults with which Jones Day was charged seem to add up to an odd double twist on duties of candor. On the one hand, the law firm was charged with being insufficiently candid about the regulatory compliance problems of the troubled financial institution with its client, Lincoln Savings. On the other hand, the firm was charged with being improperly candid about their client's regulatory compliance problems with others, whose interests conflicted with those of their client. The banking regulators consider a law firm's representation of both the subsidiary financial institution and its parent corporation to have been an unethical conflict of interest. The regulators charged that the Jones Day lawyers kept information about the thrift's financial unsoundness out of the thrift's own files and internal reporting channels, where the regulators would have uncovered it. Instead, the lawyers worked with their client's parent corporation and Keating on ways to prevent regulators from uncovering financial and other problems at Lincoln Savings.

Banking regulators continue to press these views regarding loyalty and candor in compliance counselling of financial institutions. OTS's most recent effort in this regard has been a pilot program which seeks to make these compliance counselling principles an integral part of regulatory examinations of federally insured thrifts. This OTS pilot program involves a modified version of the standard letter which the agency requires all regulated thrifts to send to their attorneys when the thrifts are examined periodically by regulators. Because the experimental OTS "attorney letter" can be somewhat difficult to find, a copy of the April 1993 draft is attached to this paper, identified by page numbers preceded by "OTS." What the final version of this attorney letter will look like is not yet certain.

Those of you familiar with the responsibilities of attorneys in the context of audited financial statements may not find this letter particularly surprising or troublesome. Even those familiar with such attorney letters may find the required disclosure of the identities of other clients and the detailed explication of specific ethical duties which the agency tells the client the client's lawyer is expected to live by. What is particularly provocative for the rest of us, not involved in securieites and banking practice, is to imagine the extrapolation of this approach of requiring client-directed disclosures from the securities and banking fields to other regulated areas of our energy, natural resources and environmental practice. Such an imagined extrapolation highlights,
I think, the vast difference between our roles and the roles of securities and banking lawyers. The
securities and banking lawyers, and accountants as well, are integral parts of the mechanism of
these transactions, which require lawyers and legal opinions. To the extent that natural resources
energy and environmental lawyers are involved in transactions, we are there as advisors, as
opposed to gatekeepers. If our regulatory agencies were to require such attorney letters, our
clients would simply not seek our legal advice, and the regulatory system as well as the legal
system would be the worse for the absence of legal advice. To the extent that NREEL
regulations are structured so that an attorney's opinion is a required aspect of particular regulated
actions, then attorney's letters of this type may find their way into our professional lives, if they
have not already entered as part of securities and banking aspects of the transactions.

Take a few moments to consider how you would respond to receiving such a letter from
your client. Note that the letter instructs you as the financial institution's attorney to affirm to the
regulatory agency your efforts to live up to the professional principles discussed at length in
the letter. Some may look at this letter as yet another heavy-handed instance of OTS preaching
about its views regarding professional ethics. Others may be concerned that the letter could
operate as a waiver of attorney-client privilege or attorney work product privilege with regard to
the matters required to be placed in issue by the letter. Although the draft letter stops short of
insisting that the financial institution's lawyers disclose particular legal advice or compliance audit
results to regulators, it does require the lawyers to agree to inform the board of directors of the
financial institution of compliance problems. When such compliance information has been
provided by a financial institution's lawyers to the board of directors, it becomes very difficult for
the financial institution to avoid having to disclose to the regulatory agency at least the factual
basis of compliance problems. Whether agencies beyond the specialized field of banking
regulation would have the authority or the desire to insist on this type of attorney letter in
connection with other types of investigations and required reports is difficult to say. So far as I
know, natural resources, energy and environmental agencies have not adopted this particular OTS
experiment.

Truthfulness in Regulatory Practice

Truthfulness is among the virtues generally expected of ethical persons, including lawyers,
whether or not they are involved in regulatory practice. The Model Rules of Professional
Conduct require truthfulness to tribunals before which a lawyer practices under Model Rule 3.3,
noted above. Model Rule 3.9 extends these duties of candor to nonadjudicative proceedings.

In the environmental law field, among the most interesting of the recent court decisions
enforcing a duty of truthfulness are a couple of decisions involving lack of truthfulness on the part
of government lawyers. Duties of truthfulness were behind the Environmental Protection
Agency's agreement to a settlement which vacated a consent decree in a Resource Conservation and Recovery Act (RCRA) action against a waste treatment firm in Connecticut in United States v. Envirite Corp., 143 F.R.D. 27 (D.Conn. 1992). The agency lawyers who negotiated the consent decree apparently knew and concealed from the court which entered the decree that the laboratory data upon which the charges were based had been improperly analyzed. The agency agreed to repay the $60,000 penalty the company had paid under the consent decree, plus interest. The agency also agreed to release the company from liability (which could have amounted to hundreds of thousands of dollars) connected with conduct charged in the untruthfully-based consent decree.15 In another environmental enforcement case, United States v. Shaffer Equipment Co., 796 F. Supp. 938 (S.D.W.Va. 1992), Judge Hallanan dismissed a $5 million superfund suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In that case, Department of Justice attorneys had failed to inform the court that the EPA's on-scene coordinator was under investigation for falsification of his academic credentials. Judge Hallanan ruled,

The conduct of counsel for the United States in violating the duty of candor has been most egregious and disturbing. Such conduct is worthy of sanction and must also be deterred. Dismissal with prejudice accomplishes these dual aims . . . . Today we will send a message to all counsel who appear before this court that the duty of candor will be upheld and preserved at all times irrespective of the identity of the parties and the monetary stakes in the litigation. Id. at 953.

Truthfulness is required of lawyers who represent regulatory agencies, just as it is required of lawyers for regulated parties. Truthfulness in dealing with federal agencies is something more than an ethical virtue. It is required by law. Being untruthful to federal agencies can result in statutory criminal penalties under 18 U.S.C. § 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or devise a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Other statutes, such as the False Claims Act, provide severe penalties for fraud and misrepresentation in monetary claims made to federal agencies. The False Claims Act
could apply, for example, to claims for compensation made by lawyers who assist federal agencies with environmental remediation. Criminal penalties for false claims are provided under 18 U.S.C. § 287. Civil actions for false claims are governed by 31 U.S.C. §§ 3729 and 3730. The controversial qui tam provisions of 31 U.S.C. § 3730 offer rewards (15-20% of the amount recovered) to those, including attorneys, who blow the whistle and report false claims which have defrauded the U.S. government. Natural resources, energy and environmental lawyers are required by these and other statutes, as well as general ethical principles, to be truthful in their dealings with federal regulatory agencies. Of course, lawyers for regulatory agencies are required to be truthful as well.

**Particularized Ethical Duties for Lawyers in Specialized Practice**

One final issue regarding ethical responsibilities in regulatory practice has been implicit throughout this discussion. That is the issue whether the particular regulatory context of a lawyer’s actions does or should create different ethical responsibilities. Part of what the regulatory actions against the Lincoln Savings lawyers has come to signify is the importance of paying attention to the particular regulatory context, when lawyers represent regulated clients.

Judge Sporkin, who asked why professionals, such as lawyers and accountants, had not prevented the Lincoln Savings debacle, refers to this focus on legal specialization as “new world lawyering.” In a speech before the Securities Litigation Committee of the San Francisco Bar Association in January of 1992, Judge Sporkin suggested that a lawyer’s ethical duties may vary according to the regulatory context in which she practices:

I am now convinced that the great unending debate over a lawyer's duty to disclose a client's misdeeds largely arises from the fact that such a duty varies greatly depending upon the client's field of specialty and the lawyer's area of practice. In the corporate and securities field there are essentially two kinds of lawyers - the legal advisor and the litigator. The responsibilities of these two groups are different in many respects between them as well as between them and their counterparts in other specialties. The corporate practice simply presents an altogether different set of problems than other specialties. Specifically, it is my view that those providing legal services to a public company get little if any instructive advice from the Code of Professional Conduct.

When we take into account corporate complexes with regulated entities as subsidiaries, the ethical questions become even more complex. . . .

. . . The corporate and securities practice is [a] . . . specialty that would
clearly benefit from a separate code of professional conduct.

Judge Sporkin also mentioned specialized ethics rules for domestic relations lawyers. Others have suggested specialized ethics rules for tax lawyers. The Internal Revenue Code provides special requirements for tax lawyers in connection with tax shelters.

These ideas are sometimes described as contextualizing the professional ethics responsibilities of lawyers. Some academics who study the legal profession insist that the only way to understand a lawyer's ethical responsibilities is to begin with the specific, real-world context of her actions. Echoing the legal realists, these academics insist on the importance of considering precisely what type of legal work the lawyer is doing, for what type of client, and in what forum, before the ethical responsibilities of the lawyer can be evaluated. The American Bar Association Model Rules of Professional Conduct reflect some of these ideas regarding the many roles lawyers may play in the Preamble:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. Preamble, ABA Model Rules of Professional Conduct, (1992)

The professional ethics actions taken against Kaye Scholer and other lawyers and law firms involved with Lincoln Savings may point to the importance of considering the role of a lawyer before a regulatory agency as yet another, different type of role a lawyer may perform.

Critics of this contextualization of professional ethics argue that recognizing different ethical rules for different legal specialties threatens to split up the legal profession into sub-professions. Other critics object that contextualization transforms professional ethics into indeterminate situational ethics, where nothing is right and nothing is wrong. "It all depends . . ." becomes the only answer to ethical questions. In the long run, what the legal profession, and the natural resources, energy and environmental lawyers within it, will do with regard to this and other issues regarding professional ethics will depend on our thinking and talking together. Facilitating that thinking and talking is a major task for SONREEL's Special Committee on
Ethics.

So far, natural resources, energy and environmental lawyers have not been the focus of suggestions for a separate code of professional conduct. You might consider what specialized ethical rules such a code might contain. Some environmentalists might cast such a code of ethics both broadly and deeply. In their view, natural resources, energy and environmental law practice deals with nothing less than the survival of the planet and its ecosystems. Others might feel that natural resources, energy and environmental lawyers are, by and large, a pretty ethical group whose consciences, aided by general principles of professional ethics, provide sufficient guidance.

To those of you who are just now settling into comfortable complacency regarding the particular ethical uprightness of natural resources, energy and environmental lawyers, let me suggest just two words: "Teapot Dome." Seventy years ago it was the scandal of the century. Will Rogers called it the "great morality panic of 1924." The transfer of the Teapot Dome and Elk Hills petroleum reserves and the corrupt issuance of the mineral leases on them could not have been pulled off without the assistance of lawyers. In fact, many of those accused in the scandal were lawyers. But that was not why they were accused. Teapot Dome clearly involved lawyers who worked with natural resources, energy and the environment, although, aside from natural resources law, these areas of the law did not exist, as such, at the time of Teapot Dome. It is intriguing to think about why, although lawyers played an essential part in the scandals associated with Teapot Dome, it did not seem to have occurred to anyone then to ask "Where were the lawyers?" The 1920s were a different time. The ABA had adopted aspirational Canons of Ethics in 1908. But professional responsibility was not a required law school course. Ethics training was not a part of compulsory programs of continuing legal education.

Today, the practice of natural resources, energy and environmental law is growing ever more complex. You may have seen the Arthur Andersen Environmental Services survey for the National Law Journal (August 30, 1993), which reported that nearly 70 percent of the corporate counsel surveyed believed that total compliance with all federal and state environmental regulation is simply not achievable. "[D]ue to the complexity of the law, the varying interpretations of regulators, the ever-present role of human error and the cost," violation of environmental laws and regulations seems to be both constant and inevitable for just about every business. Perceptions such as these highlight some of the reasons why natural resources, energy and environmental lawyers in regulatory practice face so many ethical challenges.
NOTES


7. These principles were suggested in a speech by Mr. Weinstein at the University of Michigan Law School on March 24, 1992. They are reprinted in Laborers in Different Vineyards, infra at 149-50.


10. 12 C.F.R. 513.4(a). This is the OTS "suspension and debarment" rule. Some of the Kaye Scholer actions were confrontations with OTS's predecessor agency, the Federal Home Loan Bank Board, which followed the same standard.


12. Appendix G to Laborers in Different Vineyards, supra, provides a useful short summary of SEC requirements and actions with regard to lawyer's ethical responsibilities.

13. 2 Bank Lawyer Liability No. 2 (April 30, 1993) at 3.
14. In the banking regulators' view, the optional conduct (indicated by "may" in the Model Rule) is mandatory under the particular circumstances of lawyers representing insured depository institutions.