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Malpractice and Environmental Law: Should Environmental Law "Specialists" Be Worried?

J.B. Ruhl

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ARTICLE

MALPRACTICE AND ENVIRONMENTAL LAW: SHOULD ENVIRONMENTAL LAW “SPECIALISTS” BE WORRIED?

*J.B. Ruhl**

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I. INTRODUCTION

The practice of environmental law is dynamic and exciting to many of us who have chosen the law as our profession. Environmental law also poses many opportunities, even for the most skilled practitioners, to commit malpractice. The very qualities that make the practice of environmental law

stimulating—rapid change, complex policy and regulatory issues, open-ended questions of interpretation, and high stakes liabilities—also add substantial risk to the unwary practitioner.

Still in its youth compared to many other fields of law, the growing pains (some would say psychoses) of environmental law lead to rapidly evolving standards of what is expected of attorneys in terms of knowledge and practice skills. Clients, dazed by the changing and complex features of environmental regulations, often ask much, perhaps too much, of their attorneys: clients want clear assessments and predictions concerning their past, current, and prospective compliance; they want definitive answers concerning liability exposure for potential violations; and they want sure outcomes in government enforcement actions and other litigation settings. While such client desires also pervade other areas of law, the pace of change and level of complexity in environmental regulation can make today's legal answer tomorrow's blunder, often with no advance warning. This situation provides the ingredients for malpractice claims.¹

Few statutes could illustrate this point better than the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² and the confusion (some say mayhem) it has caused under its liability scheme. That law,

1. Legal malpractice claims concern the quality of legal services and conduct of an attorney. See AMERICAN BAR ASS'N STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., *THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 4* (1992) [hereinafter *DESK GUIDE*]. A prima facie case of legal malpractice requires the plaintiff to prove: (1) the existence of an attorney-client relationship that gives rise to a duty the attorney owes to the client; (2) an act or omission by the attorney in breach of the duty owed; (3) injury suffered by the client; and (4) a proximate causal relationship between the attorney's breach of duty and the injury suffered by the client. *Id.* at 4-5. Those elements, in one form or another, may surface in three distinct causes of action available to clients for incompetent representation by their attorneys: (1) breach of fiduciary duty; (2) breach of contract; and (3) the tort of malpractice. Roy R. Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 *SMU L. REV.* 235, 235 (1994). The purpose of this Article is to define the degree to which environmental law practice presents a heightened exposure to malpractice claims because of special characteristics of the subject matter, administration, and practice of environmental law. Accordingly, this Article does not review the rudimentary elements of legal malpractice claims. Nor does this Article describe the common sources and "pitfalls" of malpractice experienced by practitioners generally or the procedures and "tips" that an attorney might follow to avoid liability. For a thorough bibliography of materials addressing such issues on a general level, see *DESK GUIDE, supra*, at 252-57.

2. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)). For a comprehensive overview of CERCLA law and procedure, see generally ALFRED E. LIGHT, *CERCLA LAW AND PROCEDURE* (1991) and ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* (1992).

slapped together during the last days of the Carter Administration,³ contains virtually no textual guidance about the scope of provisions dealing with who may be liable for remediation when hazardous substances have been released into the environment. Thus, Congress has left the courts to decide such issues, including retroactivity and the liability of successor corporations, dissolved corporations, bankrupt parties, lenders, estates, trustees, and other parties not obviously liable under the statute.⁴ Given the massive liabilities at stake, entities that have been sued as potentially responsible for remediation costs have fought hard, and the legal community has seen a veritable tsunami of litigation and regulation focused on the scope of liability under CERCLA.⁵ Decisions interpreting the statute have emerged from federal courts around the nation, with less than uniform results. While the precise forms of litigation have changed over the years, the pace of litigation defining liability and procedure under CERCLA has not slowed in the 1990s.⁶

Despite such rapidly changing horizons, and almost without regard to the risks involved for their attorneys, clients have demanded reliable legal opinions on environmental law questions, and attorneys have tried their best to deliver. Along the way, many malpractice land mines have been dropped, waiting, perhaps, to be triggered by the next unforeseen⁷ interpretation of the law or other turn of events. CERCLA may be an extreme case in this regard, but among environmental laws it is not alone in posing substantial malpractice risks to practitioners.

3. See LIGHT, *supra* note 2, at 12-18.

4. See generally *id.* at 94-122.

5. Each year the Hazardous and Solid Waste Committee of the American Bar Association's Section on Natural Resources, Energy, and Environmental Law (SONREEL) contributes a survey of cases decided under CERCLA to the Section's annual law survey. The discussion of CERCLA case law in the 1988 volume spanned 36 pages, the longest segment devoted to any single statute. See SECTION OF NATURAL RESOURCES, ENERGY, & ENVTL. LAW, AMERICAN BAR ASS'N & THE NAT'L ENERGY LAW & POLICY INST., UNIVERSITY OF TULSA COLLEGE OF LAW, NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW: 1988—THE YEAR IN REVIEW 174-210 (1989).

6. SONREEL's 1994 review of CERCLA litigation spanned 35 pages in its annual law survey, once again making it the longest segment devoted to any one statute. See SECTION OF NATURAL RESOURCES, ENERGY, & ENVTL. LAW, AMERICAN BAR ASS'N & NAT'L ENERGY-ENV'T LAW & POLICY INST., UNIVERSITY OF TULSA COLLEGE OF LAW, NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW: 1994—THE YEAR IN REVIEW 193-228 (1995). CERCLA's liability issues appear to go around in circles and are never confidently resolved. Refer to subpart II(B) *infra*.

7. Of course, whether or not the adverse consequences of an attorney's actions were foreseeable goes to the very heart of malpractice liability. Refer to notes 93, 115 *infra* and accompanying text (discussing the role of foreseeability in malpractice in the tax and securities arenas).

The jury is still out, however, as to whether these risks will materialize. While the consensus of opinion is that environmental law poses thorny professional responsibility⁸ and attorney liability⁹ issues, there is considerable debate about whether the characteristics of environmental law present a heightened risk of malpractice liability exposure for environmental attorneys.¹⁰ On the one hand, the number of malpractice claims involving environmental law representation and the number of reported decisions addressing environmental malpractice liability are insignificant when compared to other legal practice fields.¹¹ Environmental law is an even more

8. Attorney conflict of interest issues often arise in connection with CERCLA sites involving numerous potentially responsible parties, either when a number of parties attempt to hire common counsel or when an attorney hired by one party at the site has represented other parties in similar contexts. See Patrick E. Donovan, *Serving Multiple Masters: Confronting the Conflicting Interests That Arise in Superfund Disputes*, 17 B.C. ENVTL. AFF. L. REV. 371, 372 (1990); Richard H. Krochock & Deborah C. Eckland, *Conflicts of Interest in the Handling of Waste Disposal Cases*, FOR THE DEF., Jan. 1993, at 11, 11; see also State Bar of Mich. Standing Comm. on Professional and Judicial Ethics, Op. No. R-16, Nov. 19, 1993, at *4, 5, available in WESTLAW, MIETH-EO database (noting that a lawyer ethically may represent multiple potentially responsible parties at a single superfund site, provided that a disinterested lawyer would reasonably conclude that each client's representation will not be adversely affected by the multiple representation, and that each client consents after full disclosure and consultation). The requirement that lawyers maintain client confidences can also put environmental law practitioners under pressure when doing so jeopardizes public health or environmental integrity. See Ted A. Warpinski, *An Essay on Environmental Law and Ethics*, BARRISTER, Fall 1991, at 41, 43.

9. Attorneys acting as estate trustees may be personally liable for the decisions they make with regard to estate assets and operations if those decisions lead to the release of hazardous substances. See, e.g., *City of Phoenix v. Garbage Servs. Co.*, 827 F. Supp. 600, 605 (D. Ariz. 1993) ("[I]f a trustee has control over trust property, and knowingly allows it to be used for the disposal of hazardous substances, then it is the trustee who is responsible for the decision to use the property for an ultrahazardous activity."); see also Elayne Betensky, *Trustee CERCLA Liability: An Undefined Standard*, 13 UCLA J. ENVTL. L. & POL'Y 87, 126 (1995) (noting that the courts have not uniformly imposed CERCLA liability on trustees and concluding that the better rule is not to presume that trustees are the owners of CERCLA sites and therefore are not liable); James R. Arnold & Gerald J. Buchwald, *Superfund-Superliability*, A.B.A. J., Sept. 1993, at 117, 117 (noting that a lawyer who comes into possession of contaminated property as a trustee may be held liable as an owner or operator, even if the pollution predated the lawyer's service). In some cases, attorneys have been sued for direct liability, though never successfully, merely for giving legal advice to clients who later, acting on that advice, caused environmental damage to third parties. See, e.g., *City of N. Miami v. Berger*, 828 F. Supp. 401, 412 (E.D. Va. 1993) (finding that a corporation's attorney could not "be deemed to have possessed the requisite authority to control the landfill that would subject him to CERCLA liability as an operator").

10. See Thom Weidlich, *Will Environmental Law Be a Malpractice Trap?*, NAT'L L.J., June 13, 1994, at A26.

11. The American Bar Association's Standing Committee on Lawyers' Professional Liability and the National Legal Malpractice Data Center tracked malpractice

insignificant category in terms of the dollar amount of claims paid to malpractice claimants.¹² Thus, history suggests that environmental attorneys face no unusual or special malpractice threats.

On the other hand, environmental law indisputably imposes potentially high liabilities and expensive regulatory burdens for attorneys' clients, a condition that could lead to a spillover effect upon attorneys when clients stung by environmental liability and regulatory entanglements take issue with their attorneys' performance. As a number of legal practitioners and malpractice insurers have proposed, this may suggest that malpractice claims statistics do not fully reveal the latent potential for environmental malpractice exposure.¹³ Indeed,

claims filed nationally from 1980 through 1985. See STANDING COMM. ON LAWYERS' PROFESSIONAL LIAB., AMERICAN BAR ASS'N, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER at vii (1989) [hereinafter CHARACTERISTICS OF LEGAL MALPRACTICE]. Of the over 29,000 claims occurring from January 1, 1983 through September 30, 1985, 62 were categorized as involving natural resources law as the substance of the professional services, and 31 as involving environmental law. See *id.* at xi, 10 tbl. 4. Arguably, the ABA's data do not fully reflect the current degree of malpractice exposure because environmental law has expanded considerably in scope and complexity since 1985, thus potentially increasing the malpractice risk. More current data, however, indicate no increase in claims exposure since 1985. For example, the Attorneys' Liability Assurance Society (ALAS), a legal malpractice self-insurance entity that insures over 345 major law firms and over 47,000 attorneys, does not even list environmental law as one of its categories of malpractice claims experience, relegating it to the "other" category that accounts for an aggregate of two percent of total claims. See ATTORNEYS' LIABILITY ASSURANCE SOCIETY, 1994 ANNUAL REPORT 3, 18 (1995) (on file with the *Houston Law Review*). The number of reported cases dealing with environmental law malpractice reflects the low number of claims. Refer to text accompanying notes 81-85 *infra*.

12. The combined categories of natural resources law and environmental law accounted for only 0.5% of the total dollars paid to malpractice claimants during the ABA's 1980-85 period. See CHARACTERISTICS OF LEGAL MALPRACTICE, *supra* note 11, at 71 tbl. 38.

13. Commentary on malpractice exposure in environmental law is nascent, limited mainly to legal seminar papers, law practice journals, and legal malpractice insurer newsletters; these sources are in general agreement, though, that the potential for a wave of claims is not to be overlooked. See, e.g., James R. Arnold & Gerald J. Buchwald, *After the S & L Crisis: Are Environmental Lawyers Next?*, LEGAL MALPRACTICE REV., Spring 1994, at 3, 3 ("If liability claims against environmental lawyers are the coming wave, it has not hit, not yet at least."); William Freivogel, *Lawyer Liability in Environmental Practice*, ALAS LOSS PREVENTION J., Jan. 1995, at 2, 2 (noting that, despite the paucity of case law on environmental lawyer malpractice, the potential for liability exposure justifies examination); Christopher Kerns & Scott O. Reed, *The Liability of Attorneys for Environmental Exposures*, FOR THE DEF., Apr. 1994, at 8, 10 (predicting that lawyers and law firms will be "added to the list" of potential defendants in environmental cases); Jerry F. English, *Malpractice in Environmental Law*, Outline of Presentation for ABA National Legal Malpractice Conference 3.12 (Apr. 21-22, 1994) (on file with the *Houston Law Review*) ("The complexity of environmental law . . . certainly presents ample opportunities for lawyers to make mistakes."). Whether these sources turn out to be prescient observers or "chicken littles" in the popular eye will depend largely on whether the wave of

environmental law suits constitute a good number of the currently pending civil cases in federal¹⁴ and state¹⁵ courts, suggesting that a growing number of environmental law and related cases are in the pipeline, which could lead to malpractice claims. As one practitioner handling environmental malpractice claims has noted: "Environmental [malpractice] is certainly on everybody's lips. . . . The number of [environmental malpractice] cases throughout the U.S. is relatively small, but the antennae are very high."¹⁶

Based on the premise that it is better to have those antennae up rather than down, this Article explores the special quandary of the environmental lawyer balancing the desire to be responsive to client demands with the desire to avoid whatever heightened risk of malpractice liability might be associated with the unique characteristics of environmental law. Part II of this Article outlines the properties of environmental law that make it particularly susceptible to the risk of malpractice. Most notably, the heavily regulated field of environmental law is legally and technically complex, is rapidly changing, and subjects violators to tremendous liabilities.

Part III explores malpractice issues in environmental law to date. In general, specific malpractice standards have not developed because environmental law has not been a cohesive practice area long enough. Reported malpractice cases in the environmental law context are few in number, but many members of the bar believe that the potential exists for environmental law to experience a surge in malpractice claims involving potentially large liability figures. If that potential becomes a reality, it is almost certain that environmental law attorneys would be measured against a "specialist" standard requiring a heightened standard of care. Environmental attorneys have specialized to a degree unmatched by most areas of legal practice, and both attorneys and consumers of legal services have come to perceive, no doubt reasonably, that special expertise is

claims ever hits. A prudent environmental law practitioner, however, will take heed and avoid falling into environmental law's malpractice traps. If environmental lawyers as a class behave in that manner, out of either prudence or fear, the aggregate claims experience may continue to be insignificant, but that will not mean the potential for exposure in individual cases is also insignificant.

14. See *What's Clogging the Courts*, WALL ST. J., Aug. 7, 1995, at B5 (noting that environmental cases are the fifth largest category of federal cases at 3.1% of the total).

15. See *Types of Tort Cases*, WALL ST. J., Aug. 21, 1995, at B6 (noting that cases involving claims of toxic substance exposure are 1.6% of the total, the eighth largest category of state tort cases).

16. Weidlich, *supra* note 10, at A26 (quoting Thomas W. Hyland).

needed to tackle environmental law problems. Those conditions invariably will lead courts to adopt higher standards of care for environmental practitioners. But the specific standards to adopt are by no means clear.

Part IV explores appropriate standards of malpractice in environmental law by analogy to more mature practice areas that share environmental law's traits of technical complexity, heavy regulation, constant change, high potential liabilities, and public interest. Specifically, the discussion focuses on an assessment of malpractice principles from tax law (for its heavily regulated, changing, and complex qualities), patent law (for its technical subject matter qualities), and securities law (for its high liability exposure and public interest protection qualities) as mediums for creating malpractice guidelines for environmental law. Based on the lessons from other fields, Part IV provides a summary of what standards of care can be expected to develop for governing attorney malpractice in environmental law matters. Although environmental law and its malpractice jurisprudence have yet to mature, the current measures attorneys take, if consistent with the standards derived from this analysis, ultimately may protect them from malpractice claims brought by clients with unreasonable expectations.

II. THE QUAGMIRE OF ENVIRONMENTAL LAW— OPPORTUNITIES FOR MALPRACTICE ABOUND

If environmental law malpractice unleashes its potential energy, courts' and juries' perception of and response to the special characteristics of environmental law, as well as attorneys' response to those characteristics in practice, will have much to do with how the prevailing malpractice principles of environmental law practice unfold. Although laws regulating practices that impact the environment have existed for many decades, environmental law emerged as a generally recognized practice area in the United States only about twenty-six years ago—around the time of the first Earth Day,¹⁷ the creation of the Environmental Protection Agency (EPA),¹⁸ and

17. For a first-hand account of how Earth Day emerged in April 1970 from its founder, Gaylord Nelson, see Milo Mason, *Interview: Gaylord Nelson*, 10 NAT. RESOURCES & ENV'T, Summer 1995, at 72, 72-73.

18. See President's Message to the Congress Upon Transmitting Reorganization Plans to Establish the Two Agencies (July 9, 1970), in 6 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 908, 908-09 (July 13, 1970) (discussing President Nixon's reorganization of the federal government's environmental and natural resource agencies

the passage of the National Environmental Policy Act (NEPA).¹⁹

Environmental law has grown up fast and, at least from a malpractice perspective, has had an undisciplined and unruly home life. At twenty-six years of age, it has multiple personalities and idiosyncracies too numerous to name. A breakthrough in its psychotherapy is not on the horizon. Environmental attorneys, therefore, have to be keenly aware of the problem child they are handling.

A. *Navigating the Patchwork of Environmental Laws and Jurisdictions Is an Acquired Skill*

When a client poses a legal question to an environmental attorney, the first challenge for the attorney is determining what laws and regulations are pertinent to the question and who is responsible for implementation. Environmental law is both structurally and administratively fractured—there is no unified environmental “code” or omnibus environmental agency. Within federal environmental law, for example, no fewer than twenty-one laws form the core of environmental regulation,²⁰ and over fifteen different executive branch and independent agencies have some role in implementing one or more of those laws.²¹

Despite comprehensive, albeit cluttered, federal regulation of the environment, preemption of state regulation is disfavored and thus rare. Indeed, most federal statutes expressly preserve the states’ powers to regulate the environment,²² and many even allow states to assume the

to consolidate implementation of environmental laws under the authority of the EPA); see also ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY § 1.2(I)(2) (Celia Campbell-Mohn ed., 1993) [hereinafter RESOURCES TO RECOVERY] (discussing the formation of the EPA and the flurry of environmental statutes passed in the early 1970s); ROSEMARY O’LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 4-9 (1993) (outlining the political climate in which the EPA was created and the EPA’s early tumultuous history).

19. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331-4370d (1988 & Supp. V 1993)). For an overview of NEPA’s history and implementation, see Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolution*, NAT. RESOURCES & ENV’T, Fall 1995, at 3.

20. See FEDERAL ENVIRONMENTAL LAWS 1995 (West 1995) (containing the relevant provisions encompassed in the major environmental acts). Depending on how large one draws the circle of environmental law, the number can go much higher. Some popular treatises list dozens of federal laws by popular name as having something to do with environmental law. See, e.g., RESOURCES TO RECOVERY, *supra* note 18, § 4.1(3).

21. See RESOURCES TO RECOVERY, *supra* note 18, § 3.1(B)(3) tbl. 3-3.

22. For example, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (1994),

authority to implement the federal program.²³ Many states have seized such opportunities and, to complicate matters further, have followed the federal example by doing so through a multitude of statutes implemented by a balkanized array of implementing agencies.²⁴

Given the convoluted landscape of environmental laws and jurisdictions, it is almost never intuitively obvious which laws and agency regulations an attorney must consult in order to address a client's inquiry. For example, an environmental practitioner simply has to know that "[w]ater pollution from strip mines is regulated by the Department of the Interior . . . , water pollution from chemical plants by the Environmental Protection Agency . . . , water pollution caused by soil erosion by the Department of Agriculture, and water pollution caused by road salts not at all."²⁵ These compartmentalizations of environmental law are learned by raw experience, not by applying common sense.

To be sure, the jumble of environmental laws and jurisdictions can be learned, although many may need the crutch of flow charts and diagrams. Indeed, once they are mastered there is not much variation in the road map over time. Once one learns, for example, that the National Marine Fisheries Service handles specified marine species under the Endangered Species Act and the United States Fish and Wildlife Service handles the rest, the rationale for the division of jurisdiction becomes irrelevant; fortunately, this division has remained the same for decades.²⁶ Similarly, one simply accepts that *air* emissions from hazardous waste incinerators are regulated pursuant to the *Solid Waste Disposal Act* and have been for

states that it is not to be "construed or interpreted as preempting[] the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State." *Id.* § 2718(a)(1)(A).

23. For instance, the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1994), establishes a delegation procedure for "each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction." *Id.* § 1342(b).

24. See James T. Harrington, *The Importance of Negotiations in Illinois Environmental Rulemaking and Overview of the Illinois Environmental Regulatory Process*, 13 N. ILL. U. L. REV. 531, 531 (1993) (describing the environmental regulatory program in Illinois as a "complex array of various agencies and procedures"); see also Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1586, 1588-89 (1994) (arguing that the myriad comprehensive environmental laws and regulations implemented by numerous agencies at the federal, state, and local levels has resulted in complex, overlapping environmental regulatory schemes).

25. RESOURCES TO RECOVERY, *supra* note 18, § 3.1, at 74 (footnotes omitted).

26. See 50 C.F.R. § 402.01(b) (1994).

many years.²⁷ Malpractice problems could arise when one fails to learn the puzzle or simply forgets how the pieces fit.

B. Environmental Statutes, Regulations, and Judicial and Administrative Interpretations Thereof Evolve Rapidly and Inconsistently

Similar to its statutory and administrative *structure*, the *substance* of environmental law is also difficult to ascertain. Once environmental attorneys find the right statute and agency to address a client's question, they must address the difficulties in applying environmental law. Not only is the subject matter of this body of law complex, but the substance changes rapidly and unpredictably, making prediction of an outcome largely a guessing game.

A classic example of the dynamic quality of environmental law is provided by the continuing saga of what has come to be known as "lender liability" under CERCLA.²⁸ From its inception the CERCLA statute was regarded as having the potential for imposing sweeping liability, as it makes all present owners and operators of facilities that release hazardous substances liable to the federal government, states, and other entities for the costs of remediating those conditions.²⁹ The statute defines "'owner or operator'" as excluding "a person[] who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."³⁰ This "secured creditor exemption" creates three ambiguities—i.e., what constitutes "participat[ing] in management," what are "indicia of ownership," and when are those indicia not held "primarily to protect a security interest." These ambiguities imply in the negative that a person can hold an indicia of ownership with protection of a security interest in mind, but somehow still be considered

27. See 40 C.F.R. § 264.343 (1994).

28. The discussion that follows in the text is intended merely to illustrate the dynamic nature of environmental law through a brief overview of the major shifts that have taken place with respect to the existence and scope of lender liability under CERCLA. For a complete, current description of CERCLA lender liability issues, see generally 1 ELIZABETH G. GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS ch. 7 (1994); Edward B. Witte & Mark L. Prager, *Environmental Lender Liability: Searching for Safe Harbors in the Wake of Kelley v. EPA*, 1 WIS. ENVTL. L.J. 1, 4 (1994) (providing practical suggestions for lenders who take or hold a security interest in contaminated properties and wish to foreclose or transfer the property without incurring CERCLA liability).

29. See 42 U.S.C. § 9607(a) (1988). For a general overview of the elements of liability under CERCLA, see generally LIGHT, *supra* note 2, at 67-148.

30. 42 U.S.C. § 9601(20)(A) (1988).

an "owner or operator" for purposes of CERCLA liability because of "participat[ion] in the management" of the creditor's activities or because the ownership was not "primarily to protect [the] security interest."³¹ Those possibilities captured little attention in the lending community during the early years of CERCLA. Yet, the government eventually began pursuing theories of liability against lenders based on these implied sources of liability.

The lending community's ignorance of CERCLA's application vanished beginning with the first published decision endorsing the government's theory of lender liability, the 1985 decision in *United States v. Mirabile*,³² which found that a secured creditor who engages in the common lending "workout" practice of assisting the borrower's property and business management decisions so as to avoid foreclosure can be held liable under CERCLA if it "participate[s] in the day-to-day operational aspects of the site."³³ Since that case, the law of lender liability has undergone nothing, it seems, but inconsistent transformations. After *Mirabile*, the practice of foreclosure itself fell prey to CERCLA's liability tentacles,³⁴ an arguably reasonable interpretation given the language of the liability provision. However, courts were in disagreement as to what level of involvement lenders could take in pre-foreclosure scenarios and still avoid CERCLA liability.³⁵

As cases in different jurisdictions responded with different tests, attorneys responded with advice concerning pre-loan "audits" and "due diligence."³⁶ The EPA eventually offered its "fix" in the form of a regulation outlining permissible pre- and post-foreclosure steps a lender could take regarding management and ownership of CERCLA sites without incurring liability.³⁷ That regulation provided some welcome relief by

31. *Id.*

32. 15 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,994 (E.D. Pa. Sept. 4, 1985).

33. *Id.* at 20,996.

34. *See, e.g., United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) (finding that a bank that gained ownership of a hazardous waste disposal site through foreclosure is not exempt from liability under CERCLA).

35. *Compare United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990) (finding that liability attaches if the secured creditor has capacity to control operations, regardless of whether that control is exercised), *cert. denied*, 498 U.S. 1046 (1991) *with In re Bergsoe Metal Corp.*, 910 F.2d 668, 672-73 (9th Cir. 1990) (concluding that mere capacity to control is insufficient; actual management is required).

36. *See GELTMAN, supra note 28*, § 7.12 (noting that lenders can reduce their liabilities by making an environmental assessment of the property used as collateral and foreclosing only after a diligent investigation of the property).

37. *See* 40 C.F.R. §§ 300.1100-.1105 (1994) (Subpart L).

establishing a uniform rule addressing liability to the federal government, but it raised issues as to the effect of the rule in private CERCLA cost-recovery actions and under state remediation programs that paralleled CERCLA's secured creditor provision.³⁸

Before those issues were resolved, however, the foothold that the EPA's rule provided on the lender liability issue crumbled when the judiciary found that the EPA had exceeded its rulemaking authority by proclaiming the scope of statutory liability.³⁹ Since that decision, EPA rulemaking has remained inactive, Congress has failed to pass a bill addressing the issue, courts continue to refine the minutia of lender liability under CERCLA,⁴⁰ and some states have passed legislation defining lender liability under state remediation law.⁴¹

The point of recounting this roller-coaster history is to illustrate the quandary of an attorney asked at any point along the lender liability time line to opine on the CERCLA liability consequences of a lender's pre-foreclosure actions. In retrospect, it is easy to posit that an attorney should have advised a lender in, say, 1981, that the statutory provision implied the potential for lender liability, but it took five years after the original enactment before any court addressed that issue. In the period after *Mirabile*, from 1985 through 1992, the "participation in management" source of liability was more apparent, but its scope was neither defined nor applied uniformly by cases decided after *Mirabile*. The EPA's 1992 rule, which solved only part of the lender liability puzzle, was alive just less than two years, after which the world reverted back to *Mirabile* and its confused progeny. Depending on the jurisdiction, therefore, it is entirely possible that the same set of

38. See Louis S. Zimmerman & Janet L. McQuaid, *Hazardous and Solid Waste: EPA Adopts Controversial New Rule on Lender Liability Under CERCLA*, NAT. RESOURCES & ENV'T, Summer 1992, at 42, 44.

39. See *Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 900 (1995).

40. See Douglas O. Cooper et al., *Lender Liability: The Next Horizon*, PROB. & PROP., Sept./Oct. 1995, at 57 (reporting developments in lender liability case law under CERCLA after the *Kelley* decision). However, Congress has recently taken some action on the issue. Indeed, several bills introduced in the 104th Congress address lender liability issues. See, e.g., H.R. 1362, 104th Cong., 1st Sess. § 301 (1995). H.R. 1362 would amend the Federal Deposit Insurance Act to provide that "[a] lender shall only be liable pursuant to a Federal environmental law when the lender actually participates in management of another person's activities which create liability." It would also explicitly define participation in management to "not include merely having the capacity to influence, or the unexercised right to control such activities."

41. See, e.g., WASH. REV. CODE ANN. §§ 70.105D.020(6)(b)(ii), .040 (West 1992 & Supp. 1995).

conditions would have been subject to as many as five fundamentally different legal outcomes over the course of fifteen years. Moreover, these changes in the law took place while the statutory language remained the same. The lender liability scenario thus aptly illustrates the volatility of environmental law and the special concerns for environmental law practitioners.

To be sure, other areas of the law change, but not often by the magnitude of changes experienced in environmental law. The pace and degree of change in environmental law raises the question of whether it is reasonable for an attorney in the field *not* to expect environmental law to change. It may not be enough, therefore, to offer an opinion about the state of environmental law as it exists at one moment, even if the opinion is perfectly updated, without advising a client about the potential for change. Yet few clients want to hear that the legal opinion for which they have just paid expires tomorrow. Attorneys thus may be tempted or pressured to make opinions sound more permanent than the history of environmental law warrants, despite the fact that attorneys are duty-bound by the laws of malpractice to render candid advice.

C. The Rules of the Game Are Often Dense and Inscrutable, and Sometimes Even Invisible

Even when environmental law stands still long enough to allow one to refer reasonably to it as stable and predictable, the stark reality is that the law often turns out to be too complicated and difficult to uncover. Failure to know and properly apply the law is the largest category of substantive errors alleged in malpractice claims generally.⁴² The complexity of environmental law suggests that if the environmental law malpractice claims dam breaks, failure to know and properly apply the law will be fertile ground for claimants.

Two qualities in environmental law conflict in this respect. First, the primary substance of environmental law is heavily regulatory and dominated by dense, detailed script. Second, and a greater source of frustration, is the practice by many environmental law agencies of creating "law" through informal guidance that is not published in general circulation. A classic

42. See CHARACTERISTICS OF LEGAL MALPRACTICE, *supra* note 11, at 6 tbl. 3 (indicating that failure to know and properly apply the law comprised almost 10% of the substantive error malpractice claims analyzed in the ABA's 1980-85 study period).

example of both user-unfriendly qualities is provided in the EPA's solid and hazardous waste definitions under the Resource Conservation and Recovery Act (RCRA), which combined comprise about six pages of the Code of Federal Regulations,⁴³ scores of pages of the Federal Register,⁴⁴ and hundreds of pages of internal agency guidances.⁴⁵ Few lawyers, even the most experienced in solid waste law, fully understand the EPA's definitions.⁴⁶

43. 40 C.F.R. §§ 261.2-.3 (1994).

44. 57 Fed. Reg. 38,564 (1992); 56 Fed. Reg. 42,511-12 (1991); 56 Fed. Reg. 32,688 (1991); 56 Fed. Reg. 7206 (1991); 50 Fed. Reg. 33,542 (1985); 50 Fed. Reg. 664 (1985). For a discussion and evaluation of the EPA's drafting of the solid waste and hazardous waste definition regulation, as well as the full set of original RCRA implementation rules, see MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS—FROM NIXON TO CLINTON* ch. 4 (expanded ed. 1994). The RCRA rulemaking process has been described as a "self-perpetuating crisis." *Id.* at 125.

45. See generally SECTION OF NATURAL RESOURCES, ENERGY & ENVTL. LAW, AMERICAN BAR ASS'N, *RCRA POLICY DOCUMENTS: FINDING YOUR WAY THROUGH THE MAZE OF EPA GUIDANCE ON SOLID AND HAZARDOUS WASTE* 6-8 (Theodore L. Garrett & Joshua D. Sarnoff eds., 1993) (containing a compilation of many guidance-type policy documents); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992) (arguing that the use of nonlegislative guidance documents to bind the public violates the Administrative Procedure Act); F. William Brownell, "Regulation by Guidance": A Response to EPA, NAT. RESOURCES & ENV'T, Winter 1995, at 56, 58 (responding to George Wyeth's article and noting that the regulated community is troubled by "agency action that creates or changes fundamental legal obligation without notice and an opportunity to comment"); George B. Wyeth, *The "Regulation by Guidance" Debate: An Agency Perspective*, NAT. RESOURCES & ENV'T, Spring 1995, at 52, 52 (noting that the EPA supplements its statutes and promulgated regulations with guidance documents, which can range from highly detailed technical documents to broad policy statements).

This body of informal guidance often leads to difficulty in defining the "law" in particular circumstances. However, other problems also lurk on the environmental law landscape with respect to interpreting regulations that are "on the books." For example, several courts and administrative tribunals recently have refused to enforce EPA regulations because they fail to provide adequate notice of prohibited conduct. See, e.g., *General Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (refusing to enforce the EPA's regulatory interpretation of a rule the agency had promulgated under the Toxic Substances Control Act because it was "so far from a reasonable person's understanding of the regulations that [it] could not have fairly informed [the defendant] of the agency's perspective"); *In re CWM Chem. Servs. Inc.*, TSCA App. No. 93-1, 1995 WL 302356, at *13 (EPA App. May 15, 1995), available in WESTLAW, FENV-EPA database (refusing to enforce the EPA's regulatory interpretation of the Toxic Substances Control Act because of lack of "fair notice to the regulated entity of the conduct required or prohibited").

46. See Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 *Envtl. L. Rep.: News & Analysis* (Envtl. L. Inst.) 10,254, 10,256 (1991) (declaring that the definition of hazardous waste "is one of the most complicated and confusing aspects of the [RCRA] Subtitle C program"). As one EPA official stated with respect to the definition of hazardous waste, which is a subset of solid waste, the regulations are "a regulatory cuckoo land of definition. . . . I believe we have five people in the agency who un-

The foregoing is but a representative example of the complexity found in environmental law. During the EPA's twenty-five years of existence, it has amassed over ten thousand pages in the Code of Federal Regulations,⁴⁷ with a correspondingly hefty component of Federal Register preamble text to consult and a vast netherworld of informal guidance to explore.⁴⁸ Add the other fifteen or so federal environmental agencies, and the pot becomes even bigger.⁴⁹

Is it possible for any one attorney to know all this law? Never. Is it possible for any one attorney to know the full substantive "law" of even one environmental law statute cold? Probably not. Add to that reality the fact that environmental law is split into many portals and changes rapidly, and it requires a Herculean effort on the part of lawyers to claim competence in even an isolated sliver of environmental law. One does not "dabble" in environmental law, and those who practice in the field full time had better know what they do *not* know.

D. Factual and Technical Interpretive Gray Areas Make for Legal Guesswork

In today's high-tech world of lawyering, it may be possible to combine enough hard drive space, Internet connections, and sophisticated database software to allow instantaneous recall of all information that falls within the domain of environmental law. Despite this luxury, an environmental practitioner continues nonetheless to face vast gray areas in how to apply the law. Environmental law imports many concepts from other

derstand what "hazardous waste" is." *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991) (quoting Don R. Clay, EPA Assistant Administrator for the Office of Solid Waste and Emergency Response).

47. 40 C.F.R. pts. 1-799 (1995).

48. See William H. Rodgers, Jr., *Environmental Law Trivia Test No. 2*, 22 B.C. ENVTL. AFF. L. REV. 807, 812 (1995) (noting that the EPA's RCRA regulations fill 697 pages of the Code of Federal Regulations and 19,500 pages of informal guidance).

49. Refer to notes 20-21 *supra* and the accompanying text (discussing the number of other governmental agencies who play a part in regulating environmental law). Professor Jerry Anderson reports, presumably from first-hand experimentation, that "[i]f you stack on the floor the volumes of the Code of Federal Regulations that contain environmental regulations, they measure over three and a half feet high." Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 413 (1995). He reports further that the "EPA alone published almost 3500 pages of proposed and final regulations in the Federal Register during the first six months of 1994" and that the many federal agencies with some environmental jurisdiction combined "churn out over 35 pages of new or proposed regulations every working day." *Id.*

fields, such as chemistry and biology, that are not susceptible to easy translation into legal contexts. Environmental law thus imports all the uncertainties and imprecisions of the fields it incorporates. As sure as the law itself may be, this quality of environmental law practice clouds the picture.

A good example concerns the restriction under the Endangered Species Act (ESA)⁵⁰ of actions that might harm protected species of fish and wildlife. The ESA proclaims that no person may harm such species,⁵¹ and administrative regulation defines "harm" to mean any activity that causes death or injury to such species, even by way of habitat destruction.⁵² Indeed, after some controversy in the lower federal courts as to the validity of that regulatory definition,⁵³ the Supreme Court has clarified that the rule is a valid administrative interpretation of the statute,⁵⁴ but that only actions that foreseeably and proximately lead to such harm are prohibited under the ESA.⁵⁵ Congress may eventually have the last word on this issue, but for the moment the law is clear.

Clients, however, are seldom satisfied by a bland recitation of the current state of the law. They want an answer to the question: "If I were to do X, would I violate the ESA?" Clients may believe this is a straightforward question deserving a straightforward answer. In most circumstances, however, the answer lies in the vast gray area that is characteristic of many legal questions that must be resolved under the ESA.⁵⁶

50. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

51. See 16 U.S.C. § 1538(a)(1) (1994).

52. See 50 C.F.R. § 17.3 (1994).

53. *Compare Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (upholding the validity of the regulatory definition of harm and interpreting it to include imminent threats of injury to wildlife) *with Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 17 F.3d 1463, 1472 (D.C. Cir. 1994) (holding invalid the Fish & Wildlife Service regulation defining harm to embrace habitat modifications), *rev'd*, 115 S. Ct. 2407 (1995); see also Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 236 (1995) (describing the history of judicial interpretation of the harm definition). The history of the harm rule in the lower courts is a fitting example of the unpredictable change inherent in environmental law.

54. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2418 (1995).

55. See *id.* at 2412 n.9.

We do not agree with the dissent that the regulation covers results that are not "even foreseeable . . . no matter how long the chain of causality between modification and injury." Respondents have suggested no reason why . . . [the regulation] should not be read to incorporate ordinary requirements of proximate causation and foreseeability.

Id. (first alteration in original) (citation omitted).

56. See generally NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED

Whether an activity will foreseeably and proximately harm a protected species is a question that in many cases could long keep a battery of biologists occupied in heated debate.⁵⁷ Indeed, it is not unusual for controversy to surface over what constitutes a species, much less what activities will harm it.⁵⁸

The ESA is not alone in environmental law by injecting impossible-to-solve fact issues into the legal fabric. When those unresolved questions of science and technology are crammed forcibly into legal settings that generally require yes or no outcomes, the results may seem arbitrary. An environmental attorney's job of predicting those results thus becomes more a process of educated guessing than reasoned analysis. Unfortunately, a lawyer's natural impulse to provide concrete answers and advice pulls the attorney towards the practice of diminishing or ignoring the many hidden complexities of the scientific and technical issues lurking in environmental law.

E. When Public Protection Is Concerned, the Government Holds All the High Cards

The prototypical high-tech environmental lawyer, now armed with a bevy of technical consultants to help clarify the technical and scientific issues of a case, faces yet another complication in the form of the "500-pound gorilla" of environmental law—the government and its public interest mission. Environmental law broadly charges the government with protection of the public health and welfare⁵⁹ and gives government many

SPECIES ACT (1995) (pre-publication copy on file with the *Houston Law Review*) (outlining the various points of intersection between law and science under the ESA and reviewing the law's performance from a science perspective).

57. See, e.g., *Morrill v. Lujan*, 802 F. Supp. 424, 431 (S.D. Ala. 1992) (rejecting the claim that a house construction would harm the Perdido Key beach mouse because of insufficient scientific evidence of causation).

58. See, e.g., *Endangered Species Comm. of the Bldg. Indus. Ass'n of S. Cal. v. Babbitt*, 852 F. Supp. 32, 38 (D.D.C. 1994) (concluding that the Department of Interior Secretary's failure to publicly release a copy of one scientist's controversial research study defining taxonomy of species invalidated the Secretary's decision to protect species under the ESA). The ESA requires that many of the factual determinations relevant to the listing of protected species be made based on the "best available" scientific evidence, a determination that in itself is subject to intense scientific community debate. See Laurence M. Bogert, *That's My Story and I'm Stickin' to It: Is the "Best Available" Science Any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 149 (1994) (concluding that congressional failure to clarify legislatively what constitutes the "best available" scientific evidence renders the ESA imperfect).

59. See, e.g., 42 U.S.C. § 9606(a) (1988) (providing the executive branch with the authority to issue administrative orders to compel remediation for releases of hazardous substances posing an "imminent and substantial endangerment to the public health or welfare"). The theme of protecting the public health and welfare

advantages over the regulated community, from its broad rulemaking authority to its powerful enforcement arsenal, to carry out that purpose. The unequal balance of power in the government's favor poses practical complications for environmental lawyers in many settings.

Consider, for example, the prospect of settling with the federal government over the question of liability for investigation and remediation at a CERCLA site. The statute creates many "incentives" for the regulated community to settle such claims and creates methods for the government to induce such agreements. For example, if a party does not settle with the government, but others involved in the same violation do settle for part of the aggregate liability the government seeks, the nonsettling party could remain liable for the entire amount of unsettled liability.⁶⁰ Alternatively, parties who do settle with the government cannot approach the settlement process in the traditional sense of an arm's length negotiation, as the agencies make what is close to a "take it or leave it" offer with terms generally unfavorable to the regulated parties.⁶¹ Advising clients about settlement options on this lopsided playing field can be a painful experience.

The government enjoys many other built-in advantages, not the least of which is broad judicial deference to agency statutory interpretations⁶² and findings of fact.⁶³ One cannot

permeates federal environmental law. A computer assisted search in September 1995 of the phrase "public w/1 health w/1 welfare" in the U.S. Code file of the Environmental library of the LEXIS electronic database reveals that this construction appears in over 7000 different sections of the environmental statutes.

60. See 42 U.S.C. § 9622 (1988); see also Barry S. Neuman, *No Way Out? The Plight of the Superfund Nonsettlor*, 20 *Envtl. L. Rep.: News & Analysis* (Envtl. L. Inst.) 10,295, 10,296 (1990) (noting that nonsettlors do not have contribution rights against those parties that settle with the EPA, leaving them liable for the remainder).

61. See, e.g., Robert W. Frantz, *Superfund Settlements: A Vanishing Breed*, NAT. RESOURCES & ENV'T, Winter 1992, at 14, 14 (noting that the EPA's current approach to Superfund settlements "flies in the face of traditional settlement principles" because the EPA imposes terms and conditions in settlement documents that require "open-ended commitments by potentially responsible parties"). See generally THE INFO. NETWORK FOR SUPERFUND SETTLEMENTS, SUPERFUND NEGOTIATION HANDBOOK (1990) (analyzing EPA's model settlement document for allocating responsibility for remedial investigation of CERCLA sites). In July 1995, the EPA and the Department of Justice (DOJ) announced revisions to the model consent decree designed to streamline the negotiation process, though apparently not to the full satisfaction of the regulated community. See 60 Fed. Reg. 38,817 (1995). See generally *Changes to Model Consent Decree Ease Future, De Micromis Cleanup Liability*, 26 *Env't Rep.* (BNA) 587, 587 (1995) (noting that according to the DOJ the revised model consent decree contains language that "'suggests that settling defendants' liability for additional response actions simply be reserved,'" but that such language may be omitted in "appropriate circumstances").

62. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

take for granted, therefore, that good facts and favorable law will carry the day in the face of this stacked deck. Saying "we'll see you in court" to the government in the environmental law context can be a risky venture for the uninitiated.

F. Client Liabilities Are Potentially Astronomical

The characteristics of environmental law described in the preceding sections underscore the importance of assessing legal malpractice exposure when considering the potential extent of liabilities associated with environmental regulation. In short, clients face monumental exposure for the costs of implementing pollution control technology, the penalties for violating the laws, and the liabilities for remediation of environmental degradations they cause. The rules of liability exacerbate that condition. CERCLA, for example, imposes strict, joint and several, and retroactive liability⁶⁴ for remediations averaging in the tens of millions of dollars for implementation costs.⁶⁵ Under other environmental laws, civil penalties for violations can grow at rates as high as \$25,000 per day.⁶⁶

Other legal fields subject to intense regulation and high client liabilities, such as tax law and securities law, exhibit a disproportionately high number of expensive malpractice claim payouts.⁶⁷ Even if clients' malpractice antennae are not more acute in those settings, the simple reality that clients face higher potential losses in such fields can be expected to translate into higher potential malpractice exposures for attorneys.

U.S. 837, 844 (1984).

63. See 5 U.S.C. § 706(2) (1994) (listing the limited instances in which a court is to set aside agency findings).

64. See 42 U.S.C. § 9607(c)(2) (1988) (imposing "full and total costs" on the owner, operator, or otherwise responsible party).

65. The average cost of cleaning up a CERCLA site in 1984 was estimated to range from \$10 million to \$33.3 million. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SUPERFUND STRATEGY: SUMMARY at 22 tbl. 4 (1985).

66. See, e.g., 33 U.S.C. § 1319(d) (capping civil penalties for violation of the Clean Water Act at a maximum of \$25,000 per day).

67. In the ABA's study, 7.2% of tax malpractice claim payouts and 7.3% of securities malpractice claim payouts were over \$100,000, approximately twice the rate experienced by most other fields of practice at that level of payout. CHARACTERISTICS OF LEGAL MALPRACTICE, *supra* note 11, at 69-70 tbl. 38.

III. THE MALPRACTICE EXPERIENCE IN ENVIRONMENTAL LAW—A SPECIALTY PRACTICE WITHOUT DEFINED SPECIALTY MALPRACTICE STANDARDS

None of environmental law's characteristics described in the previous sections are unique within the practice of law. What makes the environmental law field special is that there are numerous settings in which many of those characteristics, if not all of them, are simultaneously in operation. This quality of environmental law propels practitioners towards increasing specialization. However, this trend does not necessarily lead to any particular conclusion as to whether specialists need to worry about malpractice more than the average lawyer. Unfortunately, the number of environmental malpractice claim decisions to date is too small to allow meaningful testing of this hypothesis. Nevertheless, there may be lessons to learn from practice fields sharing some of environmental law's characteristics.

A. *The Specialization of Environmental Law*

There is a joke told at environmental law seminars about two attorneys, strangers to each other, who take adjoining seats on an airplane flight. They introduce themselves, and, upon learning they are both attorneys, they begin to discuss the legal profession. After a while, much to their surprise they discover they are partners in different offices of the same large, multi-state law firm. As the discussion progresses, they are astonished to find that they both toil away in the firm's environmental law specialty section and, even more amazingly, that they both sub-specialize in solid waste regulation under RCRA. Finally both realize why they have never before met: one sub-sub-specializes in hazardous waste and the other sub-sub-specializes in nonhazardous waste.⁶⁸

As improbable as that anecdote seems, the prevailing degree of specialization in environmental law suggested by the story is a reality. Even with no formal national or state certification in the field of environmental law,⁶⁹ lawyers practicing

68. I cannot attribute a source for the joke; I can only attribute the person who first told it to me: Jeff Civins, one of the founders of environmental law practice in Texas.

69. As of May 1995, no national or state bar organization recognized any form of specialization certification in environmental law. See Memorandum from Alfred R. Light, Chair, ABA SONREEL Special Committee on Lawyer Competence & Specialization, to Kinnan Goleman, Chair, ABA SONREEL, at 3 (May 10, 1995) (on file

in the field themselves have organized into a highly structured array of sub-specializations. For example, within the ABA's Section on Natural Resources, Energy, and Environmental Law (SONREEL), over eleven different environmental committees exist,⁷⁰ many of which describe their substantive scope as embracing several sub-specialized areas.⁷¹ Environmental law is not exclusively in SONREEL's domain, however, as lawyers in other major practice areas have blended their practices with environmental law specialties. For example, the ABA's Real Property, Probate, and Trust Section designates several committees that handle environmental law.⁷²

B. The Absence of Cohesive "Specialist" Standards Addressing the Special Characteristics of Environmental Law

Specialization in environmental law, from the practitioners' perspective, makes sense as a defense mechanism against the

with the *Houston Law Review*) (predicting that state programs are unlikely to develop environmental specialties and concluding that if environmental law is to be recognized by certification, it most likely will occur on a national scale).

From 1988 to 1990, this author served on a committee of the State Bar of Texas that was charged with the task of determining whether an environmental law specialization certification was desirable. Although the committee issued no formal report, my sense of the deliberations was that most committee members concluded that environmental law was so full of sub-specializations that administration and evaluation of this program would be difficult and perhaps not useful to the public. For an overview of the legal specialization certification trend, see STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS'N, SPECIALIZATION DESK BOOK (revised ed. 1993).

70. The committees are: Air Quality; Environmental Crimes and Enforcement; Environmental Quality; International Environmental Law; Solid and Hazardous Waste; State and Regional Environmental Cooperation; Water Quality and Wetlands; Environmental Litigation Techniques; Climate Change and Sustainable Development; Special Committee on Toxic and Environmental Torts; and Brownfields Task Force. SECTION OF NATURAL RESOURCES, ENERGY, & ENVTL. LAW, AMERICAN BAR ASS'N, LEADERSHIP DIRECTORY 1995-1996, at 10-13 (1995).

71. For example, the SONREEL Water Quality and Wetlands Committee lists the following among its substantive areas of coverage: Wetlands; Surface Water Quality Standards; Groundwater Quality and Management; Watershed Planning/Non-Point Source Pollution; Coastal Zone Management; Pretreatment; Storm Water; Effluent Guidelines; Oil Spills/Oil Pollution Act of 1990; Safe Drinking Water Act; and Clean Water Act. ABA Section of Natural Resources, Energy, and Env'tl. Law, Water Quality and Wetlands Committee, Action Plan 5 (July 31, 1995) (on file with the *Houston Law Review*).

72. The committees are: Air Quality/Asbestos; CERCLA; Environmental Aspects of Corporations; Environmental Aspects of Lender Liability; Environmental Aspects of Real Estate Transactions; Fiduciary Environmental Problems; Solid Wastes, RCRA Issues and Underground Tanks and Wetlands and Endangered Species. AMERICAN BAR ASS'N, ABA ENVIRONMENTAL LAW AND CLE COMMITTEE CHAIRS AND LIAISONS 1995-96, at 26-27. Other ABA sections have created substantial environmental law specialization components, including the Administrative Law and Regulatory Practice Section, Business Law Section, and Litigation Section. *Id.* at 4-5, 6-8, 12-14.

complicating characteristics of the practice generally. It may take one person's entire efforts to learn just one environmental statute, keep abreast of all legislative and administrative developments under that statute, and field client questions arising in contexts that test the finest nuances and intricacies of the law. In that sense, specialization is a protection *against* malpractice.

Along with the increased degree of specialization, however, may come other sources of heightened malpractice exposure risks. Attorneys who profess to know more than the average attorney about an area might fairly be expected to perform commensurately and to not make substantive errors that a generalist might commit. The specialization of environmental law thus sends two messages to attorneys: to "non-environmental" attorneys, keep out; to "environmental" attorneys, stay in your niche. Because those messages run contrary to strong human impulses, such as maximizing income and creating a stimulating professional practice, malpractice opportunities could arise when an attorney strays into the wrong specialization area.

More importantly, the degree of specialization within environmental law sends messages to consumers of legal services. It is fair to say that both the legal profession and the legal services market perceive environmental law as an area that requires a high degree of specialized knowledge and experience for competent performance.⁷³ If consumers of legal services reasonably expect a specialist when they seek environmental law advice, is it not also reasonable for them to expect the attorney rendering such advice to live up to a specialist's standard?

Indeed, the specialized nature of environmental law suggests that malpractice standards within the field cannot be derived simply by applying the standards applicable to a legal generalist. To be sure, when environmental lawyers make mistakes that generalists should not make, such as missing filing deadlines and other administrative errors, treating clients poorly, or acting with intentional malfeasance, they may be found to have committed malpractice without the trier of fact having to consider the complicated fabric of environmental law.⁷⁴ However, allegations of *substantive* error make up the

73. For example, the Attorneys' Liability Assurance Society (ALAS), a legal malpractice insurer, advises its member law firms that "[g]iven the complexity of the environmental laws and the enormous stakes involved, this practice is not for generalists or 'dabblers.' Member Firm managements must ensure that their environmental specialists are highly trained and stay current." Freivogel, *supra* note 13, at 9-10.

74. A number of cases have involved allegations or findings that attorneys com-

largest category of malpractice claims generally.⁷⁵ Any mention of the substance of environmental law thus necessarily raises the question of the degree to which the notion of the environmental law specialist provides the relevant malpractice standard.

The use of the specialist standard is a relatively recent phenomenon in legal malpractice law. For example, a leading treatise on legal malpractice published in 1980 noted that a "specialist in a particular field of legal practice is held to a higher standard than the general practitioner . . . [is an] idea . . . yet to be accepted as established principle."⁷⁶ By the

mitted administrative and other nonsubstantive errors in environmental law. However, in such cases, the attorney's knowledge of environmental law is not determinative of the malpractice issue. See, e.g., *Sacco v. Burke*, 764 F. Supp. 918, 921 (S.D.N.Y.), *aff'd*, 953 F.2d 636 (2d Cir. 1991) (holding, on summary judgment, that an environmental law attorney was not liable for malpractice for failing to appear at a bond hearing because clients did not prove that, but for the alleged acts of malpractice, they would have prevailed in their request for stay of bond requirement); *International Controls Corp. v. Bondi*, 1993 WL 331172, at *4, 5 (Del. Super. Ct. July 9, 1993) (dismissing malpractice action against an attorney for failing to dissolve client's corporation, thereby rendering the client liable on an environmental claim, because of lack of personal jurisdiction); *B.K. Indus., Inc. v. Pinks*, 533 N.Y.S.2d 595, 596 (1988) (holding that, in a malpractice action against environmental attorneys who failed to attend a hearing in a criminal proceeding for unlawful discharge of pollutants against the client, the client must show his innocence as to the underlying conviction in order to prevail); *Scrivner v. Hobson*, 854 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that an environmental attorney who was sued for malpractice for, *inter alia*, settling clients' dispute without their authorization was not entitled to protect the discovery of certain documents relating to the settlement by privilege). On occasion, allegations of administrative and client relations errors by environmental law attorneys have been brought through discipline procedures. See, e.g., Complaint at 1-6, *In re Kanter*, Adm'r No. 93 CH (Ill. Attorney Registration & Disciplinary Comm'n 1993) (No. 01393936).

75. Substantive errors made up approximately 43% of the claims evaluated in the ABA's 1980s study. CHARACTERISTICS OF LEGAL MALPRACTICE, *supra* note 11, at 6-7 tbl. 3. The ABA study used five categories of alleged malpractice error: (1) administrative, (2) substantive, (3) client relations, (4) intentional wrong, and (5) other. *Id.* Substantive error included failure to know the law, inadequate investigation, planning error, failure to know or ascertain a deadline, record search errors, conflict of interest, missed tax consequences, and math errors. *Id.* Administrative errors, by contrast, included failure to calendar, procrastination, failure to file, failure to react to calendar, clerical error, and lost files. *Id.*

76. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 2:10, at 24 (1980). Prior to 1980, some legal commentators argued that "[i]t is to be expected that one who holds himself out as a specialist will be held to the legal skill and knowledge common among such specialists." John W. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 764 (1959). There is no evidence, however, of that assertion ever having been presented to and adopted by the courts during that period. See RONALD E. MALLEEN & VICTOR B. LEVIT, LEGAL MALPRACTICE § 253, at 327 (2d ed. 1981) ("Until the 1970's there were very few decisions which discussed the existence of specialization or suggested a standard of care predicated upon comparison to other than the 'ordinary' attorney."); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1302 (1963) ("[N]o case holding an attorney to a higher

time of publication of its supplement in 1995, however, the same treatise observed that the rule now is that "one who holds himself out as specializing and as possessing greater than ordinary knowledge and skill in a particular field[] will be held to the standard of performance of those who hold themselves out as specialists in that area."⁷⁷

This shift in approach mirrors the general trend towards specialization in legal practice. As one commentator observed in 1986, in the midst of the period of increasing specialization within the legal services industry, the general trend in the legal profession towards specialization appears to be impacting legal malpractice decisions:

If any one theme is emerging from these decisions, it is that attorneys who perform services in those areas such as tax, SEC work, or labor law which are generally considered to be the province of specialists, will be held to the standard of a specialist in that area rather than to the standard of a generalist who may also dabble in, say, giving sophisticated tax opinions.⁷⁸

Today no meaningful debate appears to exist, in either case law or commentary, over the proposition that "a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field."⁷⁹ Malpractice law thus has evolved along with the trend towards specialization in legal practice, and hence courts now routinely adopt a higher standard of care for legal specialists.⁸⁰

standard because he was a specialist has been found.").

77. MEISELMAN, *supra* note 76, § 2:10, at 34 (Supp. 1995).

78. James J. McCabe, *Legal Malpractice—The Lawyer as a Target*, PENN. B. ASS'N Q., Oct. 1985, at 209, 214.

79. *Wright v. Williams*, 121 Cal. Rptr. 194, 199 (Ct. App. 1975); *see also* 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 15.4, at 867 (3d ed. 1989) ("No court has rejected the concept that a more demanding standard of care should be applied to specialists."). Some courts have tempered their willingness to apply a specialist standard when the applicable state provides no formal procedure for specialization designation or certification. However, most courts have found the presence or absence of a formal specialization designation program immaterial to the malpractice standard or simply have not mentioned the issue at all. *Compare Hizey v. Carpenter*, 830 P.2d 646, 655 (Wash. 1992) (refusing to adjudge a real estate lawyer as a specialist when state law prohibits advertising as a specialist in this area) *with Duffey Law Office, S.C. v. Tank Transp., Inc.*, 535 N.W.2d 91, 94-95 (Wis. Ct. App. 1995) (deciding that the specialist standard "comports with the reality of modern-day legal practice," notwithstanding the fact that state bar rules prohibit lawyers from stating or implying they are specialists).

80. *See, e.g., Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 815 (7th Cir. 1994) (noting that specialists will be measured under "higher

A field that has become as specialized as environmental law, therefore, places the burden on *all* lawyers who render services involving the substance of environmental law to perform with the competence of the specialist, whether they hold themselves out as generalists or specialists. To environmental law specialists, moreover, the degree of sub-specialization within the field may even create the corollary danger—that any environmental lawyer rendering services on, say, a Clean Air Act matter, will be measured against the standard of a Clean Air Act sub-specialist. If it is beyond reasonable expectation that one lawyer alone can master the Clean Air Act, the Endangered Species Act, and the Resource Conservation and Recovery Act, then perhaps one ought not try. The day of the environmental law generalist, at least in the eyes of malpractice law, may have passed.

Although both of these conclusions follow from the trend in environmental law towards specialization and the trend in malpractice law to hold specialists to higher standards, the courts have tested neither conclusion. Indeed, very few published opinions involve environmental malpractice claims, and no cases raise the important issues of whether specialist standards can be applied to attorneys providing advice on environmental issues. For example, in *Wischkin v. Bellitto*⁸¹ the court denied summary judgment to an attorney whose client, the seller in a real estate transaction, accused him of malpractice for failing to comply with provisions of a Connecticut law requiring property

standards”), *cert. denied*, 115 S. Ct. 1990 (1995); *Weitzel v. Oil Chem. & Atomic Workers Int'l Union*, 667 F.2d 785, 787 (9th Cir. 1982) (implying that labor law attorneys are to be held to a specialist standard); *M & S Bldg. Supplies, Inc. v. Keiler*, 564 F. Supp. 1566, 1570 (D.D.C. 1983) (treating attorney as labor law specialist), *rev'd on other grounds*, 738 F.2d 467 (D.C. Cir. 1984); *Bowman v. Doherty*, 686 P.2d 112, 120 (Kan. 1984) (treating attorney as specialist in criminal defense law); *Procanik v. Cillo*, 502 A.2d 94, 101-02 (N.J. Super. Ct. Law Div. 1985) (treating attorney as specialist in medical malpractice law); *Rodriguez v. Horton*, 622 P.2d 261, 264 (N.M. Ct. App. 1980) (treating attorney as workmen's compensation law specialist), *writ quashed*, 622 P.2d 1046 (N.M. 1981); *Rhodes v. Batilla*, 848 S.W.2d 833, 843 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (treating attorney as tax law specialist); *Walker v. Bangs*, 601 P.2d 1279, 1283 (Wash. 1979) (treating attorney as expert in longshoremen personal injury actions under maritime law); *Duffey Law Office*, 535 N.W.2d at 96 (adopting, for the first time in Wisconsin, the specialist standard in case involving a pension benefits law expert); *see also Meyer v. Mulligan*, 889 P.2d 509, 518 (Wyo. 1995) (“[B]efore an attorney files a legal malpractice action where the underlying case of alleged malpractice involves a complex or specialized area of the law, with which they are unfamiliar, that attorney should first consult with an expert in the complex or specialized legal arena about the standard of care.”). Expert testimony is usually necessary to prove the standard of care required in specialty practice areas. *See Wilburn Brewer, Jr., Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 735 (1994).

81. No. CV92 030 02 10S, 1994 WL 386022 (Conn. Super. Ct. July 15, 1994).

sellers to provide both the buyers and the state with a "negative declaration" containing assurances that any hazardous wastes on the property had been adequately remediated or managed.⁸² The case makes no mention, however, of the need for expert testimony to define the environmental law specialist's expected level of knowledge, or even if a specialist's standard should apply.

Similarly, in *Hartt v. Schwartz*⁸³ the plaintiffs alleged that their attorneys in a real estate purchase transaction failed to request that the sellers produce adequate assurances regarding the presence of hazardous wastes and other sources of contamination of the property, including the type of "negative declaration" involved in *Wisckin*.⁸⁴ Without discussing the merits of that environmental law malpractice claim, however, the court dismissed the action as barred by the statute of limitations.⁸⁵ After extensive research, this author located no other dispositions involving allegations or findings of attorney *substantive* error in environmental law, much less what the standard of care in such cases would be.

The paucity of case law addressing malpractice in environmental law poses a dilemma for practitioners in the field. Although the data to date are thin, there exists a widely held, and perhaps not unreasonable, perception that malpractice claims in environmental law could increase significantly in the near future.⁸⁶ The aggressively self-specialized nature of environmental practice suggests that it could be subjected to higher malpractice standards. And yet there is virtually nothing to assist environmental attorneys in knowing what level of competence malpractice law will entail. Hence, as a "second best" guide to environmental law malpractice standards, other recognized specialty fields of legal practice that share some of the

82. See *id.* at *1. The attorney moved for summary judgment on the ground that the client was not fined by the State, and thus suffered no harm. See *id.* The Court, in denying the motion, noted that the client had alleged a loss of \$10,000, lost time from work, and expenditure of attorney's fees in renegotiating the sale. *Id.*

83. No. CV 92 0331912, 1993 WL 479806 (Conn. Super. Ct. Nov. 9, 1993).

84. See *id.* at *1.

85. See *id.* at *2. Similar malpractice allegations are discussed in the unpublished appellate opinion in *Liquid Air Corp. v. Ideal Gas Prods., Inc.*, No. A-2430-92T5 (N.J. Super. Ct. App. Div. June 1, 1994) (on file with the *Houston Law Review*), in which the purchaser of contaminated property alleged that the seller's attorneys were liable for rendering an opinion letter containing the statement that the sale of the property was "not in contravention of any applicable Federal, state or local law." *Id.* at 2. The appellate court reversed the trial court's dismissal of the claim against the attorneys, noting that the attorneys conceded ignorance of New Jersey statutes governing the transfer of contaminated properties. See *id.* at 15-16.

86. Refer to text accompanying notes 9-16 *supra*.

traits of environmental law, but which operate under more developed bodies of malpractice doctrine, are reviewed in the following Part.

IV. DRAWING MALPRACTICE PRINCIPLES FOR ENVIRONMENTAL LAW FROM ANALOGOUS SETTINGS

The discussion thus far has demonstrated several qualities of environmental law practice that necessitate reasoned development of malpractice standards. First, the characteristics of environmental law substance, administration, and practice give rise to conditions ripe for malpractice when weighed against ordinary legal practice experience. Second, malpractice law most likely will measure environmental attorneys facing claims of malpractice based on substantive errors against a specialist standard that imposes a heightened level of knowledge and care. Third, because of the low number of cases dealing with environmental law malpractice liability, virtually no instructive authority exists for determining what the content of the malpractice standards will be. At best, we can only predict how the substance of malpractice law in the environmental practice setting will unfold, and perhaps the best "crystal ball" for that prediction is to examine the malpractice experiences of those practice areas that resemble environmental law in the first two respects listed above.

A. *Lessons from Common Vineyards—Using Tax, Patent, and Securities Law as the Reference Points for Environmental Law Malpractice Standards*

Even before the notion of the specialist standard of care in legal malpractice was widely endorsed, several practice areas generally perceived as "specialties" were known for posing heightened malpractice problems for attorneys.⁸⁷ Among those specialty areas were practices in tax, patent, and securities law. These three practice areas offer close analogies to environmental law: tax law is highly regulated and subject to rapid change; patent law struggles with scientific and technical issues; and securities law involves potentially high client liabilities and a regulatory scheme directed at protecting the public. The

87. See generally MEISELMAN, *supra* note 76 (devoting separate chapters to litigation, securities, wills, trusts and estates, real property, domestic relations, appellate, criminal defense, and the combined category of tax, patent, corporate, and contract law).

experience of specialists in these practice areas, which has been the subject of significantly more malpractice claims than has environmental law,⁸⁸ may offer some indication of what lies ahead for attorneys practicing environmental law.⁸⁹

1. *Tax Law—Deference to Attorneys Hacking Through the Regulatory Thicket.* Unlike environmental law, which is partially governed by common law,⁹⁰ tax law is entirely a creature of legislation and regulation. Although tax law is not regulated by as many agencies as is environmental law, it is subject to a variety of interpretations, rapid changes, and disparate applications.⁹¹ Indeed, like environmental law, tax law suffers from the “invisibility factor” that is created by the presence of informal, but persuasive, sources of authority such as Revenue Rulings and proposed interpretive regulations.⁹² Hence, to the same extent as environmental law practitioners, tax practitioners must keep abreast of the changing nature of the law and the intricacies of interpretation that define the law.

Remarkably, however, notwithstanding that tax practitioners have faced their regulatory quagmire for far longer than environmental law practitioners, there are very few cases holding that an attorney has committed malpractice as a result of

88. Whereas environmental law provided the underlying subject matter of only 31 malpractice claims from 1980 to 1985, securities law produced 582 claims, tax law produced 458 claims, and patent law (together with the related practice area of trademark and copyright law) produced 167 claims. CHARACTERISTICS OF LEGAL MALPRACTICE, *supra* note 11, at 2-3 tbl. 1.

89. Consistent with the scope of this Article, the following discussion of legal malpractice in tax, patent, and securities law is focused on the characteristics of those practice areas that closely approximate those of environmental law and contribute to the potential for heightened malpractice exposure. For a general overview of sources discussing malpractice principles in tax, patent, and securities law, see DESK GUIDE, *supra* note 1, at 252-57.

90. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 2.1, at 112 (2d ed. 1994) (“To a surprising degree, the legal history of the environment has been written by nuisance law.”).

91. Tax law can fairly lay claim to having attained the reputation of being exceedingly complex long before environmental law reached that status. See, e.g., ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 141 (1992) (“Environmental law has become so complicated in recent years that the field is beginning to resemble tax law, where practitioners must be specialists in order to comprehend fully the meaning of regulations.”). For example, in 1913 the entire federal tax law, including explanations and related materials, fit into a single 400-page volume. Tom Herman, *Tax Report: Briefs*, WALL ST. J., Nov. 29, 1995, at A1. Today, those materials require 40,500 pages spread through 22 volumes. *Id.*

92. See David W. Evans & Cory M. Martin, *Liability and Loss Prevention for Tax Practitioners*, 2 LEGAL MALPRACTICE REP. 3, 16 (1990) (reasoning that positions taken contrary to Revenue Rulings and proposed interpretive regulations may subject attorneys to heightened malpractice exposure, even though such sources are not legally binding).

providing erroneous tax law advice. Claims of that nature have been litigated, but, perhaps based on sympathy for the burden imposed on tax attorneys by regulatory morass, tax practitioners are often relieved of liability for erroneous advice when the advice was the product of reasonable judgment and was followed after informed consent.

Tax law malpractice is judged according to a sensible rule: if an attorney rendering tax law advice remains diligently aware of the law, exercises reasonable judgment with respect to advice on questions of interpretation, and advises the client regarding reasonably foreseeable changes in the law and differences of interpretation that could result in the attorney's judgment being wrong, then the attorney will not be held liable for errors of judgment resulting from such doubtful or unsettled propositions in the law.⁹³ Thus, the difficulties attorneys face when confronting complex tax issues are tempered, albeit only when the attorney exercises reasonable judgment based on diligent inquiry⁹⁴ and only when the client is fully advised of the potential for error.⁹⁵

93. See, e.g., *Martinson Mfg. Co. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) (holding a tax attorney not liable for "an error in judgment on points of new occurrence or of nice or doubtful construction, or for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers"); *Quarles Drilling Corp. v. General Accident Ins. Co.*, 538 So. 2d 1029, 1032 (La. Ct. App.) (holding that a tax attorney did not commit malpractice for rendering erroneous advice on a question that was "complex and close" and "not definitely resolved by legislation or jurisprudence," because the attorney's opinion was "based upon reasonable consideration of applicable legal rules or principles"), *writ denied*, 541 So. 2d 856 (La. 1989); see also *Evans & Martin*, *supra* note 92, at 16 (noting that "informed consents" given by the client after disclosure of an unsettled or debatable question in the law is a tax attorney's best defense against malpractice).

94. The factors considered in determining whether the inquiry was diligent include: (1) the intensity of research, see, e.g., *Horne v. Peckham*, 158 Cal. Rptr. 714, 721 (Ct. App. 1979) ("[E]ven with respect to an unsettled area of the law, . . . an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision . . .") (alteration in original) (citation omitted); (2) the client's instructions and interests, see, e.g., *Rhodes v. Batilla*, 848 S.W.2d 833, 840-41 (Tex. App.—Houston [14th Dist.] 1993, *writ denied*) (holding a tax attorney's numerous actions in conflict with client's express interests, including signing of a consent form that rendered client liable for the tax assessed against her, sufficient to constitute legal malpractice); and (3) efforts to clarify the law through inquiry to authorities, see, e.g., *Harrell v. Crystal*, 611 N.E.2d 908, 914 (Ohio Ct. App. 1992) (finding that tax attorney who erroneously advised client of legality of tax shelter failed to meet standard of care because of, among other things, of his "failure to request letter ruling from the IRS to determine whether the shelters were legal").

95. See Dean A. Alper, *Risks of Preparing Tax and Securities Opinions*, 2 LEGAL MALPRACTICE REP. 9, 12 (1990) (stating that "California malpractice law requires attorneys to anticipate *and counsel* on the impact of reasonably foreseeable changes in the law affecting the client's interests" (emphasis added)). See generally Gary A.

Courts may find it difficult to detect any fundamental distinction between tax and environmental law that would counsel against applying the "reasonable judgment" malpractice defense of tax law to environmental law by analogy. Both fields share the characteristics of change and complexity. Attorneys in both fields are often called upon to predict the compliance of clients' proposed actions in the face of shifting and ambiguous principles. Attorneys in both fields, must exercise judgment about how the law would resolve a particular issue. Therefore, provided the environmental attorney exercises reasonable judgment by engaging in diligent research and investigation and applying reasonable analysis and prediction, and provided the limitations inherent in the judgment are fully communicated to the client, courts may conclude that the attorney did not commit malpractice, even though the attorney's judgment later appears to have been misguided.

2. *Patent Law—Self-Policing and Reasonable Reliance at the Intersection of Law and Science.* One of the principal services patent attorneys provide to clients is determining whether the client's actions will constitute infringement of a valid patent. Indeed, the step of obtaining such an opinion is so fundamental that the failure of an infringing party to do so is evidence of willful infringement, thereby entitling the patent holder to additional damages.⁹⁶ Reasonable reliance on a competent opinion, on the other hand, may provide the basis for a defense to a willful infringement claim.⁹⁷ When the client's activities involve highly technical mechanical, chemical, or other scientific applications, the patent attorney's role in providing an infringement opinion may involve the kind of intersection of law and science faced by environmental attorneys. Attorneys in these two fields of legal practice thus face the common problem of having to derive legal conclusions from complex, often ambiguous, technical and scientific information.

Patent attorneys, however, for the most part have not

Munneke & Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391, 448-49 (1989) (concluding that the establishment of a cause of action for attorney malpractice should incorporate the principles of informed client consent).

96. See *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 867 (Fed. Cir. 1985), cert. denied, 475 U.S. 1016 (1986); see also Ronald B. Coolley, *Attorneys' Opinions: Their Content and Can Corporate Counsel Write Them*, 73 J. PAT. & TRADE-MARK OFF. SOC'Y 261, 261 (1991) (stating that willful infringement can be found only after analyzing the totality of the circumstances, including whether legal advice was secured).

97. See Coolley, *supra* note 96, at 269.

confronted malpractice problems as a result of the technical nature of their practice. To be sure, patent attorneys have made substantive legal errors in infringement opinions and other services they provide, which have led to malpractice claims.⁹⁸ However, no reported case involves the claim, much less the finding, that the patent attorney's legal malpractice arose from the mistaken use of technical information or principles.⁹⁹

One possible explanation for the lack of malpractice claims, other than the possibility that patent attorneys simply do not commit malpractice,¹⁰⁰ is the fact that "patent law practice is so technically sophisticated, even to the ordinary attorney, it is unlikely that a client would independently detect an error by his patent attorney."¹⁰¹ However, a person who has been sued for infringement after securing a patent attorney's infringement opinion is likely to examine the opinion closely, possibly with the benefit of technical experts, and is likely to ferret out any technical errors the attorney may have made. In any event, relying on the ignorance of clients as a barrier to malpractice claims is a risky venture.

Another possible explanation—one that gives clients credit for being intelligent consumers—is the requirement that, in order to assert the attorney opinion defense to a claim of willful infringement, the party charged with infringement must demonstrate that the attorney's opinion was "competent."¹⁰² To sustain that burden, that party must show, among other things, that the attorney's opinion rested on a careful analysis that compared and contrasted the potentially infringing device or

98. See, e.g., *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 557 N.E.2d 525, 527, 530 (Ill. App. Ct. 1990) (finding that a claim of malpractice in the issuance of infringement opinion was barred by statute of limitations), *aff'd*, 1992 WL 356039 (Ill. Dec. 4, 1992); *Luk Lamellen u. Kupplungsbau GmbH v. Lerner*, 562 N.Y.S.2d 134, 135 (App. Div. 1990) (refusing to disqualify plaintiff's attorney in a suit involving claim of incompetent patent application prosecution by the defendant, even though defendant planned to call the attorney as its witness at trial); *American Medical Elecs., Inc., v. Korn*, 819 S.W.2d 573, 578 (Tex. App.—Dallas 1991, writ denied) (holding client's claim of malpractice arising from the issuance of an infringement opinion was barred by statute of limitations).

99. See MALLEN & LEVIT, *supra* note 76, § 454, at 526 ("[V]ery few malpractice cases involve technical difficulties in patent work, but rather concern breaches of fiduciary obligations and errors in litigation.").

100. One early discussion of patent law malpractice concluded that "[i]t is a credit to the profession that there have been so few actions against patent attorneys." B. Joan Holdridge, *Malpractice of Patent Attorneys*, 7 CLEV.-MARSHALL L. REV. 345, 345 (1958).

101. MALLEN & LEVIT, *supra* note 76, § 454, at 526.

102. See Coolley, *supra* note 96, at 266.

method with the patented invention.¹⁰³ This could include, for example, proof that the attorney rendering the opinion "request[ed] appropriate experimental data to resolve technical issues."¹⁰⁴ When such an opinion is delivered, it is reasonable for the client to rely on it if the "attorney is a qualified patent attorney who has been monitoring the relevant field for several years, and who relies on significant scientifically based objective factors in justifying the conclusions reached."¹⁰⁵ The infringement opinion doctrine thereby induces clients to ensure the competency of their patent attorneys' opinions and to avoid having their attorneys address unresolved technical questions without the benefit of reliable scientific data. The doctrine also clearly alerts patent attorneys to the standard of competence that they might face in malpractice claims if they delve into practicing science in addition to law.

Although environmental law contains no direct corollary to patent law's infringement opinion doctrine, enforcement provisions of environmental statutes often require that penalties assessed for violations of environmental regulations and orders be based on factors such as "the violator's . . . good faith efforts to comply"¹⁰⁶ and whether there was "sufficient cause" to disobey an order.¹⁰⁷ It would be difficult for parties to take advantage of those ameliorating criteria based on reliance on an attorney's opinion when the opinion reaches scientific conclusions that are obviously outside the attorney's expertise, or when the attorney reaches legal conclusions by relying on scientific data that plainly lack detail and objectivity.

Hence, though perhaps not as liberally as patent law, environmental law does incorporate some incentives for clients to ensure that their attorneys' opinions regarding compliance status do not commit either of those two faults. Moreover, when attorneys render advice on a client's environmental compliance status, courts likely would find it unreasonable that an opinion that commits either of these errors be considered competent under malpractice law. Courts may conclude that it makes considerable sense, therefore, for environmental law to import the "competence" standard of patent law's infringement opinion doctrine as a benchmark of competence in environmental law

103. See *id.*

104. *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 614 F. Supp. 1278, 1310 (S.D.N.Y. 1985).

105. *Cooley*, *supra* note 96, at 265.

106. 42 U.S.C. § 7413(e)(1) (Supp. V 1993).

107. 42 U.S.C. § 9606(b)(1) (1988).

with regard to an environmental law attorney's assessment of technical and scientific issues and information.

3. *Securities Law—You Pay when You Play with High Stakes and the Public Interest.* Perhaps no field of legal practice combines high client liability exposure and the goal of protection of the public interest like securities law. Those factors heighten malpractice concerns. Commentators have observed that for "securities lawyers, the liability risks and concomitant monetary exposure are magnified. Losses suffered by clients, investors, and other affected parties in matters that called for corporate counsel's expertise often total millions of dollars."¹⁰⁸ In particular, the potential for liability to nonclients in securities law parallels the concern of environmental lawyers, who often provide opinions as to environmental compliance that may be relied upon by nonclients or may lead a client to take actions contrary to environmental protection policies. The fact that some courts have expanded the universe of parties to which securities lawyers' are liable in malpractice to include nonclients in certain circumstances does not bode well for environmental attorneys.

Attorney liability to nonclients often has been implicated in the context of an attorney's drafting of a will in a way that impairs the interests of an intended beneficiary of the will.¹⁰⁹ In such circumstances, courts have allowed the third-party beneficiary to sue the attorney for malpractice.¹¹⁰ The third-party

108. Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 J. CORP. L. 375, 387 (1991).

109. See, e.g., *Rathblott v. Levin*, 697 F. Supp. 817, 818 (D.N.J. 1988) (alleging that attorney's negligence in drafting the deceased husband's will caused the widow to unnecessarily expend estate assets in defense of the will's execution).

110. See, e.g., *id.* at 820. Other courts have pronounced general standards governing malpractice liability to nonclients, even outside of the wills context: "[f]or a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982); see also DENNIS J. HORAN & GEORGE W. SPELLMIRE, *ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE* § 2-1 to -4 (1987) (discussing the *Pelham* rule and its application). The scope of attorney liability to nonclients also arises in the context of "entity representations" when the attorney allegiance might be split between the corporate entity, managers, stockholders, and investors. See Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 663 (1994). Moreover, courts in other practice fields have begun to question and relax the requirement that practitioners are liable only to those enjoying privity with the practitioner as a client. See James Podgers, *Third-Party Problems*, A.B.A. J., Dec. 1995, at 64, 65 ("Strict adherence to privity between lawyers and their clients is a 'vestige of a rule abolished for everyone else . . .'" (quoting Geoffrey C. Hazard, Jr.)). The American Law Institute is currently reformulating its

beneficiary theory of recovery has taken root in securities law—principally state securities law¹¹¹—as a means of allowing investors to sue a securities issuer's attorney who negligently drafts a legal opinion that the securities laws contemplate as a reliable source of information for the investing public.¹¹² The rationale for allowing such recovery is simply that in situations when

the client, with the attorney's knowledge, intends to confer the benefit of a legally enforceable opinion upon a specified third party, . . . [the] opinion letter may be viewed as analogous to a three-party contract in which the attorney is in the best position to evaluate and guard against the risks of issuing an opinion letter on which an identifiable third party . . . will rely.¹¹³

In such circumstances, many courts have warned that attorney "liability for negligent misstatements to one not in contractual privity may attach where the statement is made for the principle purpose of having it relied upon by such person, and where its benefit to the party authorizing the statement stems precisely from such reliance by the third party."¹¹⁴ Indeed, the California Supreme Court has refined that principle to a six-factor balancing test for nonclients dependent on consideration of:

1. the extent to which the transaction was intended to affect the plaintiff;
2. the foreseeability of harm to the plaintiff;
3. the degree of certainty that the plaintiff suffered injury;
4. the closeness of the connection between defendant's conduct and the injury suffered;

position on attorney liability to nonclients in its Restatement of the Law Governing Lawyers. *See id.*

111. *See* Edward F. Donohue & Barry K. Tagawa, *Current Trends in Liability Claims Against Securities Attorneys*, 2 LEGAL MALPRACTICE REP. 1, 15 (1990).

112. Although federal securities law also provides fertile ground for holding attorneys liable to nonclients, such liability had derived traditionally from an attorney's direct malfeasance, such as misrepresentation and fraud, or from participation in aiding the client in such malfeasance, rather than from committing substantive legal errors. *See e.g.*, *Kline v. First W. Gov't Sec., Inc.*, 24 F.3d 480, 487 (3d Cir.), *cert. denied*, 115 S. Ct. 613 (1994); Donohue & Tagawa, *supra* note 111, at 15-16. For comprehensive discussions of the liabilities attorneys face under federal securities laws, see generally HORAN & SPELLMIRE, *supra* note 110, chs. 5-7, and Rice & Steinberg, *supra* note 108, at 405-10.

113. Rice & Steinberg, *supra* note 108, at 393-94.

114. *Vereins-Und Westbank, AG v. Carter*, 691 F. Supp. 704, 709 (S.D.N.Y. 1988).

5. the moral blame attached to the defendant's conduct;
and
6. the policy of preventing future harm.¹¹⁵

The predominant factor under the California balancing test involves whether the purpose of the attorney's services is to benefit the plaintiff,¹¹⁶ and thus the scope of liability, for the most part, has been narrowly confined to plaintiffs who are "supplied with the attorney's advice with the attorney's knowledge and with the intent that they rely on it to confer a benefit upon the client."¹¹⁷ However, some courts have gone farther in the securities context, albeit most often against accountants and professionals other than lawyers, by allowing any reasonably foreseeable injured third-party investor to recover.¹¹⁸

Strong parallels exist between securities and environmental law with regard to nonclient beneficiaries, suggesting that courts might be influenced by the prevalent tests in securities law when fashioning malpractice standards for environmental

115. *Goodman v. Kennedy*, 134 Cal. Rptr. 375, 380 (1976); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958); see also MALLEN & SMITH, *supra* note 76, § 7.11 (describing the California test as the "modern trend" and citing cases from 20 states adopting it); *Donohue & Tagawa*, *supra* note 111, at 15 (noting that, as of 1990, six states had rejected imposition of securities attorney malpractice liability to nonclients and seven states had endorsed such liability using the California balancing test or a variant thereof).

116. MALLEN & SMITH, *supra* note 76, § 7.11, at 384. While initially referring to the first factor as "the extent to which the transaction was intended to affect the plaintiff," the court later recharacterized this factor as the "end or aim" of the transaction. *Biakanja*, 320 P.2d at 19. Some decisions have replaced the fifth factor, moral blame, with a factor that seeks to determine the extent to which imposing liability would create "an undue burden on the legal profession." MALLEN & SMITH, *supra* note 76, § 7.9, at 376.

117. *Koehler v. Pulvers*, 606 F. Supp. 164, 173 (S.D. Cal. 1985).

118. See, e.g., *Rosenblum, Inc. v. Adler*, 461 A.2d 138, 145, 155 (N.J. 1983) (finding accountant auditors could reasonably foresee that their clients would use audited financial statements in furtherance of their business); *Zendell v. Newport Oil Corp.*, 544 A.2d 878, 881 (N.J. Super. Ct. App. Div. 1988) (applying the *Rosenblum* principle to allow securities purchasers to sue lawyers who assisted in a fraudulent initial public offering); see also *Rice & Steinberg*, *supra* note 108, at 399-401 (highlighting the "reasonably foreseeable" standard in securities malpractice law and discussing its application in case law). *But cf.* *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1455 (1994) (finding that a cause of action for aiding and abetting under section 10(b) of the Securities Exchange Act—often used against lawyers and accountants—does not exist). The expanded scope of liability in securities practice poses the additional dilemma of the duty that attorneys may owe to the investing public to investigate their clients. For example, if a client engages an attorney to supply opinions based on information supplied by the client, the attorney may feel compelled to investigate the accuracy of the client's information in order to respond to the duty owed to nonclients, thereby possibly impairing the client's interests. However, courts have not extended the duty to nonclients that far as of yet. See *Donohue & Tagawa*, *supra* note 111, at 16.

law. For example, very often an environmental attorney is called upon to assess the compliance status of a particular facility or property with full knowledge that the client intends to use the lawyer's opinions to induce third parties to buy the facility or property.¹¹⁹ Indeed, often buyer and seller will agree explicitly in the purchase contract that the seller will commission and provide such reports.¹²⁰ Moreover, environmental compliance opinions rely heavily on information supplied by the client and involve analysis of complex legal and factual issues that even a sophisticated purchaser would not reasonably be capable of conducting alone. Therefore, courts may find those parallels to securities law sufficiently strong to import into environmental law the balancing test used in securities law when determining the malpractice liability of attorneys to nonclients for substantive legal errors made in legal opinions.¹²¹

B. Suggested Standards of Malpractice in Environmental Law

The final step in the process of defining malpractice standards for environmental law is to transfer those lessons learned from similar practice areas that are most appropriate when applied to environmental practice. Four main principles come out of that funnel as being sensible guidelines for environmental law attorneys and their clients to bear in mind when doing business together.

Principle 1: An attorney providing advice and representation dealing with the substance and procedure of a particular issue in environmental law will be expected to exercise the degree of

119. See generally RICHARD H. MAYS, ENVIRONMENTAL LAWS: IMPACT ON BUSINESS TRANSACTIONS 179-239 (1992) (providing sample questionnaires and contracts that seek to illuminate and address environmental issues that could lurk in a real estate transaction).

120. See *id.*

121. See, e.g., *Liquid Air Corp. v. Ideal Gas Prods., Inc.*, No. A-2430-92T5 (N.J. Super. Ct. App. Div. June 1, 1994) (on file with the *Houston Law Review*). In *Liquid Air*, the purchaser of a contaminated property sued the seller's attorneys, alleging that an opinion letter the attorneys rendered to the seller, and which the seller delivered to the purchaser, inaccurately stated that the sale complied with all applicable laws. See *id.* at 2-3. In fact, the sale violated a New Jersey statute governing transfer of contaminated property, and the attorneys confessed total ignorance of the existence of the statute. *Id.* The appellate court reversed the trial court's decision that the attorneys could not be guilty of malpractice because of a lack of privity between them and the purchaser, observing that generally "[i]f a professional negligently gives advice to a client causing the client to take action that foreseeably will injure a third party, the professional may be liable to that third party." *Id.* at 16.

skill and knowledge possessed by those attorneys who practice in the specific sub-specialty of environmental law within which that issue arises.

The descriptions of specialization found in malpractice jurisprudence usually are devoted to broad practice fields such as tax, patent, or securities law. The reality of the extreme degree of sub-specialization within environmental law, however, requires that malpractice law adopt not simply a specialist standard, but rather one that *explicitly* recognizes the utility of sub-specialization within the field. Clients usually will not appreciate, for example, that an attorney whose practice has focused on CERCLA litigation is ill equipped to provide advice regarding compliance with the Clean Air Act. Accordingly, the malpractice standard should alert attorneys that they will be measured against an "ordinary" member of the rather specialized cadre of experts who practice in the same particular subsets of environmental law. The use of specialization standards is now firmly established in malpractice jurisprudence. Environmental law presents the circumstances for extending these principles to the realm of sub-specialization.

Principle 2: An attorney providing advice and representation that requires the attorney to exercise judgment regarding unsettled or ambiguous questions of the substance or procedure of environmental law will not be held liable for errors in such judgment provided that: (1) the judgment was based on research and analysis of the applicable legal authorities commensurate with the standard of skill and knowledge described in Principle 1; (2) the judgment was reasonable in light of the client's interests, and the client's instructions, and other relevant circumstances; (3) the attorney made reasonable efforts to confirm whether the judgment was consistent with reasonably accessible policies and interpretations of any appropriate authority responsible for implementing the applicable law; and (4) the attorney fully informed the client regarding the unsettled or ambiguous nature of the applicable law, the alternative courses of action available to the client, and risks to the client inherent in following the attorney's judgment.

Given the abundance of unsettled and ambiguous issues in environmental law, it is reasonable to extend to attorneys in that field the same degree of "reasonable judgment" comfort given to attorneys in other specialty practices. This proposed malpractice standard increases the burden on environmental

attorneys, however, by explicitly recognizing the "invisible law" factor of environmental practice created by the plethora of informal agency policies and interpretations and the duty of attorneys to identify and evaluate those sources in the process of formulating their conclusions concerning environmental law issues. The reality of environmental practice is that the environmental law sub-specialists who represent the benchmarks of skill and knowledge under Principle 1 are keenly aware of the presence of the informal dimension of environmental law, the ways to uncover it, and the need to incorporate its details when analyzing environmental law issues. To be sure, the proposal acknowledges that those informal sources usually are not binding, and that the attorney's judgment thus need not conform necessarily to an agency's informal policies and interpretations in order to be reasonable. The proposed standard also acknowledges that it may not be reasonable, because of the client's time or budget constraints or the reticence of an agency to make its positions accessible, for an attorney to be expected to discover all potentially relevant informal authorities. With these limitations in mind, however, explicitly comparing an attorney's judgment against an agency's position under the malpractice standard is sensible and justified as a way of helping to ensure that attorneys will detect and inform their clients of any disparity between the attorney's and the agency's respective positions.

Principle 3: An attorney providing advice and representation on an issue of environmental law will not be liable for errors in the attorney's judgment regarding the resolution of the issue that are caused by the attorney's incorrect application of the technical information provided that: (1) the attorney has compiled, either by requesting it from the client or by commissioning experts, a body of technical information that is relevant to the legal issue in question and of adequate depth and detail to permit a judgment regarding the resolution of the issue; (2) the attorney is reasonable in concluding that the information was generated through scientifically competent and objective methods; (3) the attorney relies exclusively upon the whole body of the information for reaching a judgment on the legal issue; and (4) the attorney's judgment was reasonable within the meaning of Principle 2.

The difficulties environmental attorneys face when dealing with technical information so closely mirrors difficulties in patent law that no sound policy reason exists for departing from

the "competence" standard used in patent law for determining whether a patent infringer may use an attorney infringement opinion as evidence of good faith. Although the patent standard has not surfaced as a malpractice criterion for that field of practice, it very likely would be adopted were the question of technical judgment to become dispositive in a patent malpractice case. The proposed standard thus insulates an attorney against malpractice liability when technical issues are involved, provided the attorney is divorced from the process of generating the data and is justified in concluding that the data generated from the process are relevant, objective, and adequate to resolve the legal issue. If the attorney's judgment is mistaken, it would be because either the body of technical information was flawed or the attorney applied it to the legal issue incorrectly; however, if in such circumstances the attorney can demonstrate that all the parameters of Principles 1-3 are satisfied, a client should not be able to hold the attorney liable.

Principle 4: An attorney providing advice and representation on matters of environmental law is liable for injuries caused by the attorney's failure to satisfy Principles 1-3 only to persons: (1) with whom the attorney has established an attorney-client relationship regarding such matters; and (2) who the attorney knew or reasonably should have foreseen, based on the client's direct and explicit instructions to the attorney, would rely on the attorney's advice and representation for the direct benefit of the attorney's client and could be injured by substantive errors therein.

Environmental attorneys, particularly those involved in transactional matters, cannot reasonably claim ignorance of the fact that clients often commission an attorney's opinion on environmental law matters for purposes of inducing third-party behavior. Indeed, the potential injuries to the third parties occasioned by an erroneous opinion on an issue of environmental law can be dramatic. On the other hand, environmental law does not contain the highly formalized provisions regarding attorney opinions found in securities laws or the highly formalized expressions of intended third-party beneficiary effects found in estate planning practice. Often times an attorney is not told why the client is requesting an opinion about the environmental compliance of a certain facility when the reasons are not otherwise apparent. It is appropriate, therefore, to recognize that in some circumstances attorney malpractice liability may extend beyond the narrow confines of the attorney-

client relationship. However, liability should be limited in accordance with an attorney's understanding of the circumstances as related by the client. Thus, for example, if the seller of an industrial facility agrees to provide the buyer an analysis of the environmental compliance status of the facility and informs an attorney that the attorney is being retained to prepare the analysis for that purpose, the attorney's potential malpractice exposure should extend to the client *and* the purchaser. Malpractice exposure should not extend, however, to the purchaser's tenant, the purchaser's subsequent purchaser, workers in the facility, or to other parties not squarely within the original client's intended beneficiary target zone.

V. CONCLUSION

If the number of claims and cases is any indication, environmental law practitioners have not committed many instances of malpractice. Indeed, as a group they may be the least likely among attorneys to wind up facing a malpractice claim. All the chemistry is in play, however, to lead to an explosion of malpractice claims in environmental law, even if the attorneys in that field continue to practice as they have. Moreover, the factors at play in environmental law—complexity, changeability, and technologically difficult subject matters—show no signs of relaxing. The writing is on the wall; environmental attorneys must exercise extreme caution and deliberation in their dealings.

Perhaps, however, the consternation felt in the community of environmental attorneys is unnecessary. Other specialized practice areas have existed for decades without collapse under the weight of malpractice pressures. This Article has shown how malpractice law applicable in several practice areas has balanced the needs of clients with the pressures on attorneys to exercise competently professional judgment in a complex setting. The standards that have evolved in malpractice jurisprudence acknowledge the expertise necessary to practice competently in those fields, but provide latitude to attorneys when they grapple with unsettled legal issues and complex technical issues. In each case, a balance has been struck between the clients' reasonable expectations and the attorneys' reasonable protections.

That sense of balance belongs in environmental law as well. By adapting the malpractice standards that have evolved in fields such as tax, patent, and securities law to environmental law, malpractice jurisprudence would allow yet another area

of specialization to develop without having attorneys live in fear and doubt as to what measures of skill, knowledge, and competence will apply to them. Although the standards proposed in this Article are not yet in place, the prediction that they will be used should the explosion of environmental law malpractice claims ever occur is based on precedent from analogous fields of practice. Indeed, if environmental attorneys were to begin living by those standards now, the malpractice explosion in environmental law may never occur. Let's hope so!