

UIC School of Law

UIC Law Open Access Repository

UIC Law Open Access Faculty Scholarship

1-1-1992

To Tell the Truth: Should Attorneys Be Directly Accountable for the Content of Applications for New Radio and Television Broadcast Stations?, 41 DePaul L. Rev. 307 (1992)

Mark E. Wojcik

John Marshall Law School, mwojcik@uic.edu

Follow this and additional works at: <https://repository.law.uic.edu/facpubs>



Part of the [Communications Law Commons](#)

Recommended Citation

Mark E. Wojcik, To Tell the Truth: Should Attorneys Be Directly Accountable for the Content of Applications for New Radio and Television Broadcast Stations?, 41 DePaul L. Rev. 307 (1992).

<https://repository.law.uic.edu/facpubs/237>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Open Access Faculty Scholarship by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

TO TELL THE TRUTH: SHOULD ATTORNEYS BE DIRECTLY ACCOUNTABLE FOR THE CONTENT OF APPLICATIONS FOR NEW RADIO AND TELEVISION BROADCAST STATIONS?

Mark E. Wojcik*

INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") has the exclusive authority to grant licenses to persons who wish to construct and operate radio and television broadcast stations in the United States.¹ The FCC grants these licenses only upon written application.² Each applicant must sign the application,³ unless he or she is physically unable to sign, or is absent from the United States.⁴ Significantly, there is no requirement that an applicant submit the application under oath.⁵

Enticed by the prospect of obtaining a valuable broadcast license, applicants may make material misrepresentations or fail to include all relevant informa-

* B.A., *cum laude*, Bradley University, 1983; J.D., *with distinction*, The John Marshall Law School, 1986; LL.M. (in Trade Regulation), New York University School of Law, 1991. Admitted to practice in Illinois, Nebraska, the District of Columbia, Massachusetts, and New York.

1. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3003 (1990) (citing 47 U.S.C. §§ 151, 301, 303, 307, 309 (1982)); T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE: THE REGULATION OF MASS MEDIA* 44 (2d ed. 1989) (discussing the procedural and substantive aspects of the FCC's licensing duties).

2. 47 U.S.C. § 308(a) (1988). However, there are a few emergency situations in which no written application may be necessary. *Id.*

3. The FCC requires individual applicants to sign their application, any amendments to the application, and any related statements. 47 C.F.R. § 73.3513(a)(1) (1990). If the applicant is a partnership, one of the partners must sign. *Id.* § 73.3513(a)(2). If the applicant is a corporation, a corporate officer may sign. *Id.* § 73.3513(a)(3). If the applicant is an unincorporated association, a member who is an officer must sign. *Id.* § 73.3513(a)(4). If the applicant is a governmental entity, a competent and duly elected or appointed official must sign the application. *Id.* § 73.3513(a)(5).

4. *Id.* § 73.3513(b). Where the applicant is unable to sign or is absent from the United States, the applicant's attorney must explain why the document is not signed by the applicant. *Id.* Additionally, if any factual matter is based on an attorney's belief, rather than on his or her personal knowledge, a separate statement describing the reasons for believing that such statements are true must also be submitted. *Id.*

5. *Id.* § 73.3513(d). The FCC's regulations, but not the application form itself, provide that any willful false statements made in an application, amendment, or related statement of fact will: (a) violate 47 C.F.R. § 73.1015 (1990), rendering the application defective and subject to dismissal pursuant to 47 C.F.R. § 73.3566; (b) be punishable by fine and imprisonment under 18 U.S.C. § 1001 (1988); and (c) be punishable by appropriate administrative sanctions, including revocation of the broadcast station license pursuant to 47 U.S.C. § 312(a)(i) (1988).

tion in their applications for new radio or television broadcast stations. These misrepresentations or omissions may go undiscovered in an *ex parte* administrative examination of the application.⁶ If discovered, willful false statements in an application are punishable by fine and imprisonment under 18 U.S.C. § 1001,⁷ and by appropriate administrative sanctions, including revocation of the broadcast station license.⁸ These civil and criminal sanctions generally apply only to the applicants who sign the application, however, and not to those who prepare the application for signature.

This Article considers the desirability of making attorneys who prepare FCC applications for new broadcast stations directly accountable for the content of those applications. It is the author's belief that the importance of the public interest in broadcast communications, weighed against the danger of potential abuse by applicants who hope to win a valuable asset, dictates that attorneys be directly accountable for the content of applications to construct or operate new broadcast stations.

This Article begins with a general background of the FCC's construction permit and station licensing process. The Article will analyze the present laws, regulations, and ethical considerations already affecting the liability of attorneys for written statements made to the Commission. This Article also will consider experiences of other administrative agencies and conclude with a proposal to increase attorney accountability for statements made in new broadcast applications to the same enhanced duty of candor required of attorneys who make submissions to the United States Patent and Trademark Office. The scrupulous duties that the FCC requires of applicants should also apply to the applicants' agents. In preparing applications for new television or radio broadcast stations, attorneys should investigate their clients' responses in the FCC forms for factual verification as well as possible material omissions.

I. THE FCC'S CONSTRUCTION PERMIT AND STATION LICENSING PROCESS

A. *Applications for a New Broadcast Station*

To obtain authority to construct or operate a new AM, FM, or television broadcast station, an applicant must apply to the Federal Communications Commission for a construction permit or station license.⁹ An applicant first

6. A proceeding before a judicial or administrative tribunal is said to be *ex parte* when the tribunal acts at the instance and for the benefit of one party only. BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

7. See *infra* notes 52-85 and accompanying text (discussing criminal sanctions under 18 U.S.C. § 1001 (1988)).

8. 47 C.F.R. § 73.3513(d) (1990); see also 47 U.S.C. § 312(a)(i) (1988) (providing for the revocation of a station license or construction permit for knowingly making false statements in the application or any written statement of fact); 47 C.F.R. § 73.1015 (requiring truthful written statements and responses to FCC inquiries and correspondence).

9. The FCC Form 301 used to apply for authority to construct a new commercial station is also used to apply for authority to make changes in the existing facilities of such stations. An application for a new broadcast station license is made on FCC Form 302. While this Article is based on

asks for a construction permit to build the new broadcast facility.¹⁰ If no one objects to the FCC's granting of the permit,¹¹ and if there are no other qualified applicants for the same frequency,¹² the FCC may grant the application if it would serve the "public convenience, interest, and necessity."¹³ If the FCC grants the construction permit, the license to broadcast will follow almost automatically if the broadcast facility is constructed on schedule.¹⁴

By statute, all applications for station licenses must set forth:

such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as [the Commission] may require.¹⁵

The application is filed with the part of the FCC called the Mass Media Bureau.¹⁶ The bureau's staff reviews the papers to identify any deficiencies.¹⁷ If the application is routine, the FCC has authorized the staff of the Mass Media Bureau to grant the application.¹⁸

At any time after the applicant files the original application, the FCC may require further "written statements of fact" to enable the agency to determine whether it should grant or deny the original application, or whether it should revoke an existing license.¹⁹ The statute also requires that any application or statement of fact "be signed by the applicant and/or licensee."²⁰

The FCC's regulations also require applicants for new broadcast stations to

the FCC Form 301, it is the author's belief that the public policy and ethical considerations should apply equally to all broadcast station applications, amendments, written statements of fact, and report forms submitted to the FCC. A list of these forms is set forth in 47 C.F.R. § 73.3500 (1990).

10. CARTER ET AL., *supra* note 1, at 89.

11. See *infra* notes 24-30 and accompanying text (discussing the procedures employed when an objecting petition is filed).

12. See *infra* notes 31-39 and accompanying text (describing the procedures that are implemented in "comparative hearings" when more than one applicant requests the same frequency).

13. 47 U.S.C. §§ 307(a), 307(c), 309(a) (1988); *accord id.* § 307(d) (1988) (same standard of public convenience, interest, and necessity used for license renewals); see also Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 997 (1989) (describing the license application procedure for broadcast media).

14. See CARTER ET AL., *supra* note 1, at 89.

15. 47 U.S.C. § 308(b). The statute also applies to modifications and renewals of applications for station licenses.

16. CARTER ET AL., *supra* note 1, at 89.

17. *Id.*

18. *Id.* However, if the staff discovers any factual or legal questions after examining the application, a more complex inquiry is required. *Id.*

19. 47 U.S.C. § 308(b).

20. *Id.*

publish local notice in a newspaper of general circulation in the community where the station will be licensed.²¹ Since there is a requirement of public notice, there is always a possibility that a member of the public will oppose the application and file a petition to deny the application.²² There is also a possibility that other qualified applicants may be seeking rights to the same frequency, and this will require the FCC to conduct a "comparative hearing."²³

B. *Petitions to Deny the New Broadcast Station Application*

Any interested individual or citizens' group who objects to the authorization of a new broadcast station may file a petition to deny the application.²⁴ The petition to deny must contain specific allegations of fact sufficient to show that the petitioner is a party in interest²⁵ and that the Commission's grant of the broadcast station application would be *prima facie* inconsistent with the public interest.²⁶ Except for those facts of which official notice may be taken, the factual allegations of the petition to deny must be supported by an affidavit of someone having personal knowledge of those facts.²⁷

If the affidavit raises a substantial and material question of fact, the Commission will hold a public hearing on the petition to deny.²⁸ Responsible representatives of the public will be allowed to present their arguments to the Commission, and the hearing may be lengthy and expensive.²⁹ At the conclusion of the public hearing, the Commission must grant either the application or the petition to deny, or take some further action such as holding an additional hearing.³⁰

C. *Comparative Hearings*

Where there are other acceptable and bona fide applications for a broadcasting license or new station construction permit, the FCC will conduct a "comparative hearing" to decide which applicant will best serve the public interest.³¹ The competing applications are termed "mutually exclusive," be-

21. 47 C.F.R. § 73.3580 (1990). The general instructions for FCC Form 301 also remind the applicant of the public notice requirements.

22. See *infra* notes 24-30 and accompanying text (discussing petitions to deny an application for a broadcast license).

23. See *infra* notes 31-39 and accompanying text for a discussion of FCC comparative hearing procedures when there is more than one bona fide applicant for the same frequency.

24. 47 U.S.C. § 309(d) (1988); Spitzer, *supra* note 13, at 997.

25. See CARTER ET AL., *supra* note 1, at 93-94 (discussing standing for listeners).

26. 47 U.S.C. § 309(d)(1); see also 47 C.F.R. § 73.3584 (1990) (explaining the procedures to file petitions to deny applications for certain television stations); Spitzer, *supra* note 13, at 997.

27. 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.3584(b).

28. 47 U.S.C. § 309(e); 47 C.F.R. § 73.3593.

29. Spitzer, *supra* note 13, at 997 (noting the cost of a hearing could be hundreds of thousands of dollars).

30. 47 U.S.C. § 309(d), (e); Spitzer, *supra* note 13, at 997 (describing the FCC's alternatives in the case that additional hearings are required).

31. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3004 n.5 (1990) (citing Ashbacker

cause only one license can be granted.³³ When the FCC compares mutually exclusive applications for new radio or television broadcast stations, it considers factors such as the diversification of control over the mass media, an owner's full-time participation in station operation, proposed programming, the applicant's past broadcasting experience, efficient use of the frequency, and the character of the applicants.³³ Under statutory mandate³⁴ and the Supreme Court's approval of the FCC policy in *Metro Broadcasting, Inc. v. FCC*,³⁵ the FCC also considers it beneficial if a member of a minority group³⁶ will own the station and actively participate in its day-to-day management.³⁷

The FCC compares competing applications with regard to all relevant aspects of the public interest, and, in theory, awards the license to the applicant who will best serve the public interest.³⁸ The hearings can be extremely lengthy because each of the two or more competing parties may not only attempt to argue why it should receive the license, but also may present evidence attacking each of the other applications.³⁹

D. Observations on the FCC Application Process

The petition to dismiss an application⁴⁰ and the comparative hearing to

Radio Corp. v. FCC, 326 U.S. 327 (1945)); see also Spitzer, *supra* note 13, at 997-98 (discussing FCC procedures for comparative hearings).

32. See CARTER ET AL., *supra* note 1, at 91.

33. *Metro Broadcasting*, 110 S. Ct. at 3004-05 (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) and *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)).

34. 47 U.S.C. § 309(i)(3)(A) (1988) (stating a preference for applicants controlled by a member or members of a minority group).

35. 110 S. Ct. 2997 (1990).

36. The statute provides that the term "'minority group' includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders." 47 U.S.C. § 309(i)(3)(C). Although women are not expressly identified as a minority group, Congress' use of the word "includes" implies that the list is not exhaustive.

37. Professor Patricia Williams of the University of Wisconsin Law School observes that even if the Supreme Court's holding in *Metro Broadcasting* does not guarantee that minority owners will diversify programming in any meaningful way, the holding does increase the likelihood of diversification. Professor Williams also comments that, while the dissenters in *Metro Broadcasting* implicitly insisted on a guarantee that there be some relationship between minority ownership and programming for minorities, such a strict guarantee could never be attained without diminishing First Amendment freedoms. Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 545 (1990).

38. See *Cleveland Television Corp. v. FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984) (deciding that FCC's grant of a license to the plaintiff's competitor, as opposed to the plaintiff, was in the best interests of the public); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 545 (D.C. Cir. 1982) (reminding the FCC that preferences should not be given to those already in possession of a license, and that the FCC's duty is to select the applicant best able to serve the public interest); Spitzer, *supra* note 13, at 998 (describing the ranking procedure used by the FCC to determine which applicant would best serve the public interest).

39. See CARTER ET AL., *supra* note 1, at 91.

40. See *supra* notes 24-30 and accompanying text (discussing FCC procedures for petitions to deny applicants broadcast licenses).

choose between competing qualified applicants⁴¹ both represent opportunities to challenge applications for new broadcast stations. The challenges may be on grounds of public interest, but they also may challenge applications as deficient, unsubstantiated, or untrue. If an application is not in accordance with FCC rules, regulations, and other requirements, it will generally be considered defective and will be rejected or dismissed.⁴² The applications are complex and highly technical, and the statutory and regulatory requirements are strict. Indeed, courts have held that before a comparative hearing can be held, or at least before the FCC can issue a license or permit, the FCC must determine that the applicant meets the citizenship, character, financial, technical, and other qualifications prescribed by the FCC.⁴³

An applicant sets forth his or her qualifications in the responses to the formal FCC application form. Each application must include all information called for by the particular FCC form on which the application must be filed.⁴⁴ The FCC also may require an applicant to submit supplementary statements of fact or additional documentation, or the FCC may order an applicant to amend the application to make it more definite and certain.⁴⁵ If the application is facially sufficient, the FCC generally does not require any additional documentation or amendments to the application. Thus, in an uncontested *ex parte* proceeding, the FCC application form for a new broadcast station may provide the exclusive basis for the FCC to grant a construction permit or station license.⁴⁶

The Commission staff reviews the application and prepares a report with a recommendation for the Commission to either grant or deny the application.⁴⁷ However, the staff may lack the time and resources to investigate factual representations in the application. Administrative verification of each statement in each application places too great a burden upon the Commission's limited resources. Consequently, facts in an application may go unchallenged in *ex parte* proceedings. There is a belief that *ex parte* proceedings before administrative agencies are inherently unreliable.⁴⁸ Yet, even in contested proceedings

41. See *supra* notes 31-39 and accompanying text (discussing FCC comparative hearing procedures).

42. 47 C.F.R. § 73.3566(a) (1990). When an application is not in accordance with FCC rules, the applicant may file an appropriate request for a waiver or exception. There is no guarantee, however, that the FCC will grant the waiver or exception. *Id.*

43. See, e.g., *Fidelity Television v. FCC*, 515 F.2d 684, 697 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975); see also CARTER ET AL., *supra* note 1, at 94-96 (describing certain basic qualifications that applicants must meet before the FCC can issue them a license or permit).

44. 47 C.F.R. § 73.3514(a). A full list of FCC forms is set forth in 47 C.F.R. § 73.3500.

45. 47 U.S.C. § 308(b) (1988); 47 C.F.R. § 73.3514(b).

46. See 47 U.S.C. § 309(a). If there is a substantial and material question of fact, or if the FCC is unable to find that the application is in the public interest, the FCC may also order a hearing under 47 U.S.C. § 309(e).

47. 47 C.F.R. § 73.3561; CARTER ET AL., *supra* note 1, at 89.

48. See *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578 (9th Cir.) (referring to the examination of patent applications by the Patent and Trademark Office), *cert. denied*, 464 U.S. 996 (1983).

involving a petition to deny or a competitive hearing, factual allegations in an application may still go unchallenged. Contested proceedings may focus only on the statutory arguments about whether the application for a new broadcast station is in the public interest.⁴⁹ Thus, even contested proceedings may ignore the possibility that factual representations in the application may be false or incomplete.

II. ANALYSIS OF ATTORNEY ACCOUNTABILITY IN PREPARING APPLICATIONS

A. Preliminary Observations

The complexity of formal applications, the intricacies of effective communication with the Commission and its staff, and the need to understand and comply with strict statutory and regulatory requirements all dictate that attorneys be involved in the formal applications for new broadcast stations. Often an attorney will complete the formal application for the client's signature, using information supplied by the client or agents of the client. The attorney may or may not independently investigate any of the information provided. It is, after all, the client who must sign the application.⁵⁰ Furthermore, neither the criminal statutes nor the FCC statutes or regulations expressly make attorneys liable for the contents of the applications they prepare for their clients. The lack of express provisions may lull attorneys into a false sense of security in blind reliance upon the client.

Often the attorney will be entirely justified in relying upon the client's representations of fact. In some cases, however, the attorney's reliance may be misplaced. There is no guarantee that a client will tell the entire truth, or that the client will even tell the truth at all. The client has a strong financial interest in obtaining a broadcast station license. The station will bring in substantial sums of money from advertising revenue and from a possible sale of the station after it is operational.⁵¹ Yet, even in cases where the attorney may be justified in relying upon the client's representations of fact, there is no justification for complacency about the attorney's responsibilities to the administrative tribunal and about the possibilities that the attorney will face criminal and civil liability and professional disciplinary proceedings.

49. See 47 U.S.C. §§ 307(a), 309(a) (discussing FCC considerations in granting a license).

50. 47 C.F.R. § 73.3515(a). A limited exception to the client signature requirement has been created for circumstances where the client is physically unable to sign the application or is absent from the United States. Under the FCC's regulations, an attorney may sign the application, amendments, and related statements of fact in these cases. *Id.* § 73.3513(b). The attorney must explain why the applicant is not personally signing, and if any matter is stated on the basis of the attorney's belief only, the attorney must explain the basis for believing that the statements are true. *Id.*

51. For example, WFYR, now known as WWBZ, was sold in 1991 for \$19 million. James Warren, *Radio Tone Turns Somber After 80's Buying Binge*, CHI. TRIB., Sept. 15, 1991, § 7, at 1, 5.

B. Present Criminal and Civil Laws, Administrative Regulations, and Ethical Considerations

1. Criminal Sanctions

Section 1001 of the federal criminal statutes⁵² provides that:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.⁵³

Anyone who knowingly or willfully makes a false statement in an application for a new broadcast station can be prosecuted, sentenced, and fined under this criminal statute. The essential elements that the government must prove beyond a reasonable doubt in a prosecution under section 1001 are that the defendant made a statement; the defendant knew that the statement was false, fictitious, or fraudulent; the statement was made knowingly and willfully; the statement was within the jurisdiction of the federal agency; and the statement was material.⁵⁴

A statement made to obtain a new broadcast station is within the FCC's jurisdiction because the Commission has the exclusive authority to grant broadcast licenses.⁵⁵ Although the false statement in the broadcast station application must be made willfully, it is not necessary for the government to prove that the defendant had an "evil intent."⁵⁶ The word "willfulness" means only that the defendant did the forbidden act "deliberately and with knowledge."⁵⁷ With regard to whether the statement made is "material," the FCC application Form 301 states that "the applicant acknowledges that all statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein."⁵⁸ The instructions to Form 301 also advise that: "Replies to questions in this form and the applicant's statements constitute representations on which the FCC will rely in considering the application. Thus, time and care should be devoted to all replies, which should reflect accurately the applicant's responsible consideration of the questions asked."⁵⁹ It only follows that most

52. 18 U.S.C. § 1001 (1988).

53. *Id.*

54. See *United States v. Carrier*, 654 F.2d 559, 561-62 (9th Cir. 1981) (discussing the government's burden of proof under section 1001).

55. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3003 (1990) (citing 47 U.S.C. §§ 151, 301, 303, 307, 309 (1982)); CARTER ET AL., *supra* note 1, at 44.

56. *Carrier*, 654 F.2d at 561.

57. *Id.*

58. FCC Form 301, at 24.

59. FCC Form 301 Instructions, at 2.

responses on the application will be considered material.

While an applicant who knowingly makes a false statement in an FCC application form can be charged with the crime under section 1001,⁶⁰ someone who assists the applicant in creating the false statement can face charges of either conspiring to violate section 1001,⁶¹ or of aiding or abetting another to violate section 1001.⁶²

Lawyers should not believe that they are immune from prosecution under section 1001,⁶³ or for conspiring⁶⁴ to violate the section or for aiding and abetting⁶⁵ someone to violate the section. Attorneys have been convicted under section 1001 for written statements submitted to administrative agencies. Two examples of these cases involved statements made to the United States Immigration and Naturalization Service ("INS").

An immigration attorney was convicted in *United States v. Abrams*⁶⁶ for his role in creating an affidavit relating to an application for an extension of a stay of deportation. The affidavit, purportedly made by a client's son, falsely stated that the client intended to depart the United States on a scheduled date and had made plans for this voluntary departure.⁶⁷ In affirming the attorney's conviction, the United States Court of Appeals for the Second Circuit stated in *Abrams* that although the attorney may not have been specifically aware of what the client's plans for departure were, the jury could have found from the evidence that the attorney "acted with reckless disregard of whether the statements made were true *and with a conscious purpose to avoid learning the truth.*"⁶⁸

The Second Circuit expanded its decision in *Abrams* in another case involving an immigration attorney: *United States v. Sarantos*.⁶⁹ The case involved sham marriages conducted for immigration purposes. The attorney prepared and filed visa petitions shortly after a sham wedding ceremony.⁷⁰ The petitions

60. 18 U.S.C. § 1001 (1988); *see supra* text accompanying note 53 (quoting statutory language proscribing false representations to a federal agency).

61. 18 U.S.C. § 371 (1988). For an explanation of how 18 U.S.C. § 371 creates liability for conspiracy to violate section 1001, *see generally* *United States v. Lafaurie*, 833 F.2d 1468 (11th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *United States v. Puerto*, 730 F.2d 627 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984); *United States v. Anderson*, 579 F.2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978).

62. 18 U.S.C. § 2(a) (1988). For an explanation of how this section creates liability for aiding and abetting another to violate section 1001, *see generally* *United States v. Johnson*, 700 F.2d 699 (11th Cir. 1983); *United States v. Beck*, 615 F.2d 441 (7th Cir. 1980); *United States v. Lanier*, 578 F.2d 1246 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978).

63. 18 U.S.C. § 1001.

64. *Id.* § 371.

65. *Id.* § 2(a).

66. 427 F.2d 86 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

67. *Id.* at 91.

68. *Id.* (emphasis added) (citing *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970) and *Bentel v. United States*, 13 F.2d 327 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926)).

69. 455 F.2d 877 (2d Cir. 1972).

70. *Id.* at 879.

stated falsely that the parties were living together as husband and wife.⁷¹ The attorney also instructed American spouses who were summoned before the INS to say that they were living with their foreign spouses and not to mention that they were paid to marry.⁷² Although the government failed to show that the attorney was ever explicitly informed of the sham nature of the marriages, the *Sarantos* court upheld the attorney's convictions of conspiring to make false statements to the INS,⁷³ to defraud the United States under section 1001,⁷⁴ and of aiding and abetting others to make false statements to the INS.⁷⁵ The court concluded that the attorney should have known of the sham nature of the marriages because some of the newlyweds required interpreters (since the spouses shared no common language), divorce papers were executed simultaneously with immigration papers, the attorney was told that the American citizens were paid a fee to marry, and the attorney was "at least indirectly informed that the parties were not living together."⁷⁶

The defendant in *Sarantos* argued that to prove an attorney guilty of aiding and abetting a client to make a false statement to an administrative agency, it cannot be enough to show reckless disregard of the truth.⁷⁷ The attorney claimed that requiring only reckless disregard of the truth would radically alter the attorney-client relationship and turn the attorney into "an investigative arm of the government."⁷⁸ In rejecting the attorney's defenses, the court stated that the purpose of the *Abrams* decision was to prevent attorneys from circumventing criminal sanctions merely by closing their eyes to obviously unlawful conduct. The court construed the word "knowingly" to close a possible loophole by including an attorney's willful blindness to the truth.⁷⁹ The court also denied that attorneys must investigate the truth of their client's assertions "or risk going to jail."⁸⁰ The court emphasized that its holding was that an attorney could not counsel others to make statements to administrative agencies when the obvious indications are that those statements are false.⁸¹

The Federal Communications Commission is aware of both the *Sarantos* and *Abrams* decisions that held attorneys criminally liable under section 1001.⁸² The FCC Review Board cited *Sarantos* in *In re Fox River Broadcasting*⁸³ for the proposition that "[t]o sustain a § 1001 charge, it must be shown

71. *Id.*

72. *Id.* at 880.

73. *Id.* at 879 (convicting pursuant to 18 U.S.C. § 371 (1988)).

74. *Id.* (convicting pursuant to 18 U.S.C. § 1001 (1988)).

75. *Id.* (convicting pursuant to 18 U.S.C. § 2(a) (1988)).

76. *Id.* at 880.

77. *Id.* at 880-81.

78. *Id.* at 881.

79. *Id.*

80. *Id.*

81. *Id.* (citing *United States v. Benjamin*, 328 F.2d 854, 862-63 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964)).

82. 18 U.S.C. § 1001 (1988).

83. 88 F.C.C.2d 1132 (1982).

that the statement was not a 'careless act'; but even a statement made in 'a conscious effort to avoid learning the truth' or 'reckless disregard' of the truth is culpable conduct under that statute."⁸⁴ The Commission cited *Abrams* in *In re Hale*,⁸⁵ which involved a broadcaster's affirmative misrepresentations and lack of candor before the Commission. The FCC's citations of *Sarantos* and *Abrams*, however, did not relate to the liability of attorneys for assertions made in written statements presented to the Commission.

2. Program Fraud Civil Remedies

Other administrative agencies utilize extensive regulations to impose, through administrative adjudication, civil penalties and assessments against persons who make false claims or statements to the agencies. Recently adopted rules implement the Program Fraud Civil Remedies Act ("Act"),⁸⁶ which Congress enacted as part of the Omnibus Budget Reconciliation Act of 1986.⁸⁷ The Act provides for administrative adjudication where a person makes a claim or written statement that the person knows, or has reason to know, is false, fictitious, or fraudulent.⁸⁸ Liability attaches under the Act for any false, fictitious, or fraudulent claim for property, services, or money, and for any written statement that is false, fictitious, or fraudulent with respect to any claim, contract, bid, contract proposal, grant, loan, or benefit.⁸⁹ If a person making such a claim or statement to an agency under the statute does so with actual knowledge or deliberate ignorance of its falsity, or acts with reckless disregard for the truth, the person can be held liable for a civil penalty of up to \$5000 for each claim or statement.⁹⁰ The law requires no proof of specific intent to defraud.⁹¹ As an additional penalty, the person may be subject to an assessment of up to twice the amount paid out pursuant to a false claim.⁹² The implementing regulations set forth extensive administrative procedures to adjudicate liability under the statute.⁹³ In the statute's legislative history, the Senate Governmental Affairs Committee stated that it expected "that the regulations would be substantially the same throughout government."⁹⁴

The Program Fraud Civil Remedies Act is directed at claims involving money or property. The statute and implementing regulations of various agen-

84. *Id.* at 1135 n.6 (1982) (quoting *United States v. Sarantos*, 455 F.2d 877, 880-81 (2d Cir. 1972)).

85. 95 F.C.C.2d 682, 697-98 (1983).

86. 31 U.S.C. §§ 3801-3812 (1988).

87. The Program Fraud Civil Remedies Act was enacted on October 21, 1986, as sections 6103 and 6104 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874.

88. Program Fraud Civil Remedies, 15 C.F.R. § 25.1 (1991).

89. *Id.* § 25.3.

90. *Id.*

91. See 31 U.S.C. § 3801(a)(5) (1988).

92. *Id.* § 3802(a), (d); Program Fraud Civil Remedies, 15 C.F.R. § 25.3(a)(5).

93. See, e.g., Program Fraud Civil Remedies, 15 C.F.R. §§ 25.4-.47 (exemplifying such implementing regulations).

94. *Id.* (quoting S. REP. NO. 212, 99th Cong., 1st Sess. 12 (1985)).

cies apply to claims for property, services, or money, including money representing grants, loans, insurance, or benefits.⁹⁵ The statute and regulations also apply to claims made to an administrative authority (other than the Internal Revenue Service) to decrease a person's obligation to pay or account for property, services, or money.⁹⁶

The Act is not limited to false claims for money and property, however. The statute also applies to false written statements.⁹⁷ Additionally, the scope of the statutory language is broad enough to cover the actions of attorneys. The statute identifies as potentially liable "any person who makes, presents, or submits, or causes to be made, presented or submitted, a written statement that the person knows or has reason to know asserts a material fact which is false, fictitious, or fraudulent."⁹⁸ The written statement is also actionable if it omits a material fact, so that the statement is false, fictitious, or fraudulent because of the omission.⁹⁹ In the case of an omission, however, the person making, presenting, or submitting the written statement must be under a duty to include the material fact.¹⁰⁰ The written statement also must contain an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.¹⁰¹ If all the requirements of the violation are met, the person who makes, presents, or submits the written statement is subject to a civil penalty of not more than \$5000 for each statement.¹⁰² This civil penalty is in addition to any other remedy that may be prescribed by law.¹⁰³ Thus, one who makes a willful false statement can be subject to a criminal fine of up to \$5000 and an additional civil penalty of up to \$5000.

3. Commission Regulations

Despite the inclusive wording of the Program Fraud Civil Remedies Act, the FCC has not promulgated any regulations under that statute. This may be because of the statutory emphasis on fraudulent statements to obtain money or property. The assignment of radio and television licenses is not a "program" within the purposes of the Act, and it is an open question whether a license or construction permit would constitute "property" for purposes of the Program Fraud Civil Remedies Act. Property is not expressly defined in the statute.

Nevertheless, the FCC's present regulations do require that statements submitted to the Commission be truthful. With regard to an applicant's written submissions to the Commission, section 73.1015 of the Commission's regulations provide in relevant part:

95. 31 U.S.C. § 3801(a)(3)(A) (1988).

96. *Id.* § 3801(a)(3)(C).

97. *Id.* § 3802(a)(2).

98. *Id.* § 3802(a)(2)(A)(i).

99. *Id.* § 3802(a)(2)(A)(ii).

100. *Id.*

101. *Id.* § 3802(a)(2)(C).

102. *Id.* § 3802(a)(2).

103. *Id.*

The Commission or its representatives may, in writing, require from any applicant . . . written statements of fact relevant to a determination whether an application should be granted or denied No applicant . . . shall in any response to Commission correspondence or inquiry in any application, pleading, report or other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.¹⁰⁴

Section 73.1015 of the FCC's regulations thus imposes a duty upon applicants to avoid making any misrepresentation or willful material omission in an application for a new broadcast station. The FCC's regulations requiring applicants to sign their applications¹⁰⁵ also provide that any willfully false statements made in an application, amendment, or related statement of fact made to the FCC will violate section 73.1015 of the Commission's regulations¹⁰⁶ and may be punishable by criminal fine and imprisonment under 18 U.S.C. § 1001.¹⁰⁷ The FCC's regulations also warn that the discovery of a willful false statement in an application for a new broadcast station is punishable by appropriate administrative sanctions, including revocation of the broadcast station license.¹⁰⁸

The administrative regulations and sanctions discussed above apply to applicants for new broadcast stations, and generally not to those who assist in preparing the application for a new television or radio broadcast station. If the FCC finds that an attorney who prepared an application for a client knew of the false statement, however, an "appropriate administrative sanction" against the attorney might be disbarment from practice before the Commission.¹⁰⁹ This administrative sanction would be in addition to any other civil or criminal penalty that may be imposed on the attorney. The suspension may be temporary or permanent, depending on the circumstances of the violation. A suspension would be a meaningful sanction against attorneys who practice regularly before the FCC. Inexperience in preparing an application may be a mitigating factor for attorneys who did not know of false statements, but who should have known from the context of the application that a certain representation was false or misleading.

4. Rules of Professional Conduct

In addition to the federal statutes and regulations, state codes of profes-

104. 47 C.F.R. § 73.1015 (1990).

105. See *supra* notes 3-4 and accompanying text for a discussion of the signature requirement.

106. 47 C.F.R. § 73.1015.

107. *Id.* § 73.3515(d).

108. *Id.*; see also 47 U.S.C. § 312(a)(1) (1988) (providing for same).

109. The possibility of disbarment from practice before an administrative agency and the further prospect of professional discipline have been deemed to constitute sufficient security to protect the confidentiality of information released under administrative protective orders. See, e.g., *D & L Supply v. United States*, 12 Ct. Int'l Trade 732, 735 (1988). The FCC may likewise adopt the possibility of disbarment from practice before it as a sanction.

sional responsibility and rules of professional conduct implicate a proper standard of candor toward administrative and judicial tribunals. The ethical rules binding attorneys may vary slightly from jurisdiction to jurisdiction.¹¹⁰ In the District of Columbia, where the Federal Communications Commission is located, Rule 3.3 of the D.C. Rules of Professional Conduct¹¹¹ governs candor toward tribunals.¹¹² Paragraph (a) of the rule provides that a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client; or
- (4) offer evidence that the lawyer knows to be false, except as provided in paragraph (b).¹¹³

These four ethical duties "continue to the conclusion of the proceeding."¹¹⁴ If the attorney is retained only to obtain a new broadcast station license, the "conclusion of the proceeding" would appear to be when the FCC issues a construction permit or new station license. The attorney-client relationship will usually extend beyond that time, however. The attorney may be called upon later in connection with a license renewal. In these circumstances, there may be practically no "conclusion" to the proceedings because another renewal will always be in the future. Furthermore, Rule 3.3(d) of the D.C. Rules of Professional Conduct provides:

A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the

110. Many jurisdictions base their ethical rules on the Model Code of Professional Responsibility, while others base their rules on the Model Rules of Professional Conduct, which the American Bar Association approved on August 2, 1983.

111. The District of Columbia Rules of Professional Conduct entered into effect on January 1, 1991, replacing the prior D.C. Code of Professional Responsibility. D.C. R. PROF. CONDUCT, Preface.

112. For purposes of the D.C. Rules of Professional Conduct, a tribunal is defined as "a court, regulatory agency, commission and any other body or individual authorized by law to render decisions of a judicial or quasi-judicial nature, based on information presented before it, regardless of the degree of formality or informality of the proceedings." *Id.* at xi.

113. *Id.* Rule 3.3(a). Paragraph (b) of Rule 3.3 of the D.C. Rules of Professional Conduct allows a lawyer to permit a client who is a defendant in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner. The exception will not apply in administrative licensing proceedings before the Federal Communications Commission. *Id.* Rule 3.3(b).

114. *Id.* Rule 3.3(c).

tribunal unless compliance with this duty would require disclosure of information otherwise protected by Rule 1.6, in which case the lawyer shall promptly call upon the client to rectify the fraud.¹¹⁵

A comment to Rule 3.3 of the D.C. Rules of Professional Conduct notes that the rule "defines the duty of candor to the tribunal."¹¹⁶ Significantly, the comment also provides that "an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value."¹¹⁷

The lawyer's duty of candor before administrative agencies is thus defined under the D.C. Rules of Professional Conduct by circumstances where the attorney "knows" of a false statement of material fact, or where the attorney receives information "clearly establishing" the perpetration of a fraud upon the tribunal. In neither circumstance is there an express duty in circumstances where an attorney does not know, but reasonably should know, of a false material fact or omission. The comment further implies that there is no affirmative duty upon the attorney to investigate facts presented in, for example, an application for a new radio or television broadcast station.

By way of comparison, the Illinois Rules of Professional Conduct provide that lawyers appearing in a professional capacity before a tribunal may not "make a statement of material fact or law to a tribunal which the lawyer knows or reasonably should know is false."¹¹⁸ The Illinois rules are more explicit than the District of Columbia rules concerning statements that an attorney knows, or reasonably should know, are false. The duty to investigate factual representations made to an attorney thus may be greater under the Illinois ethical rules than under the District of Columbia rules. Additionally, the Illinois Rules list further prohibitions on attorneys who appear before administrative and judicial tribunals. The Illinois rule provides that in appearing in a professional capacity before a tribunal, a lawyer shall not:

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

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

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

(5) participate in the creation or preservation of evidence when the lawyer

115. *Id.* Rule 3.3(d). The referenced Rule 1.6 of the D.C. Rules of Professional Conduct relates to confidential information protected under the attorney-client privilege and "secrets" gained in the professional relationship that either the client has requested be held inviolate or the disclosure of which would be embarrassing or likely be detrimental to the client. *Id.* Rule 1.6.

116. *Id.* Rule 3.3(d) cmt. 1.

117. *Id.*

118. ILL. R. PROF. CONDUCT Rule 3.3(a)(1) (emphasis added).

knows or reasonably should know the evidence is false;

(6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent;

(7) engage in other illegal conduct or conduct in violation of these Rules [of Professional Conduct];

(8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant;

....

(12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do;

(13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce;¹¹⁹

Each jurisdiction has its own ethical rules based on the model codes or rules. The phrasing may be different in each jurisdiction, but common ethical themes will usually emerge on basic questions of client representation. Portions of Nebraska's Code of Professional Responsibility, for example, provide that in representing a client, a lawyer shall not:

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.¹²⁰

Ethical Consideration 8-5 of the Model Code of Professional Responsibility also provides that:

Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to the appropriate authorities any knowledge he may have of such improper conduct.¹²¹

In spite of common ethical themes that run between rules in a jurisdiction's Code of Professional Responsibility or Rules of Professional Conduct, the policies that underlie different ethical rules may sometimes be in tension with each other. For example, the duty to zealously represent a client may conflict with the duty to make no statement of material fact that the lawyer knows (or reasonably should know) is false.¹²² Lawyers are trained to weigh conflicting values and to exercise good judgment in the presentation of a case. At a minimum, lawyers must be sensitive to their ethical duties and must not avoid

119. *Id.* Rule 3.3.

120. NEB. CODE PROF. RESP. DR 7-102 (emphasis added).

121. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-5 (1980).

122. ILL. R. PROF. CONDUCT Rule 3.3(a)(1).

making an ethical decision simply because to do so may be difficult or unpleasant.

Any invocation of ethical rules, however, must place those rules in their proper context. Courts have refused to use ethical codes to define standards of civil liabilities for lawyers, finding that violations of the disciplinary rules should neither give rise to a cause of action nor create any presumption that a legal duty has been breached.¹²³ These cases involve alleged injuries to third parties. The "clear" rationale for these rulings, as explained by the United States Court of Appeals for the Fourth Circuit, is that the drafters of the ethical rules intended them to regulate the conduct of lawyers, "not to create actionable duties in favor of third parties."¹²⁴

This same "clear" rationale may not apply in the context of ex parte proceedings before administrative tribunals. There may not be any third party seeking to create an actionable duty in its favor. The attorney is dealing solely with the agency.

C. *The Public Interest in the Airwaves*

Against the backdrop of the FCC's licensing process and the complex laws, regulations, and disciplinary rules that may arise in the licensing process stands the important public interest in proper distribution of new radio and television broadcast licenses. The Supreme Court has recognized that, given the scarcity of electromagnetic frequencies, the FCC may place restraints on licensees in favor of others whose views should be expressed on radio and television.¹²⁵ The FCC's charge to distribute the limited number of broadcast licenses is more than that of a mere "traffic officer."¹²⁶ To this end, the FCC must administer broadcast licenses considering the rights of the viewing and listening audience.¹²⁷ Indeed, the public interest must be the overriding con-

123. See, e.g., *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991) (holding that an ethical responsibility did not create a corresponding legal duty); *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.*, 655 F. Supp. 1573, 1575 (S.D. Fla. 1987) (holding that a violation of a disciplinary rule created no presumption that a legal duty had been breached), *aff'd mem.*, 846 F.2d 753 (11th Cir.), *cert. denied*, 488 U.S. 854 (1988); *Bickle v. Mackie*, 447 F. Supp. 1376, 1383-84 (N.D. Iowa) (refusing to recognize a violation of the Code of Professional Responsibility as negligence per se), *aff'd mem.*, 590 F.2d 341 (8th Cir. 1978); *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972) (noting that the remedy for an attorney's breach of his oath is a public remedy rather than a private one), *aff'd mem.*, 477 F.2d 598 (6th Cir. 1973); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 271-72 (Cal. Ct. App. 1973) (refusing to hold an attorney civilly liable for violating a rule of professional conduct); *Nagy v. Beckley*, 578 N.E.2d 1134, 1136 (Ill. App. Ct. 1991) (finding that the limited authority in Illinois suggests that the rules of legal ethics do not establish a separate duty or cause of action for their breach).

124. *Schatz*, 943 F.2d at 492.

125. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

126. *Metro Broadcasting*, 110 S. Ct. at 3010 (citing *NBC v. United States*, 319 U.S. 190, 215 (1943)).

127. *Id.* (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

cern in the FCC's licensing of new radio and television broadcast stations. In contrast to activities of some other administrative agencies, such as the United States Customs Service, which collects customs and other duties on imported merchandise, the grant of a license to one person or another does not result in a significant monetary gain to the government.

D. Comparative Agency Experience

The grant of a government license to exclusive use of the public airwaves is, in some ways, comparable to an exclusive government grant in the form of a patent. Patent rights in the United States derive from the Constitution, which empowers Congress "[t]o promote the Progress of Science . . . , by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries."¹²⁸ A patent is thus a "legal monopoly securing to an inventor for a term of years the exclusive right to make, use or sell his invention."¹²⁹ The scheme of patent statutes is in title 35 of the United States Code.¹³⁰

The federal patent process has been described as "relatively unique because it involves the grant of a monopoly by an administrative agency to a typically unopposed party at a time prior to that at which other parties who might wish to contest the grant have the opportunity to be heard."¹³¹ The Patent and Trademark Office's ("PTO's")¹³² administrative process of granting a patent keeps the contents of a patent application secret until the patent issues.¹³³ The contents of the patent application, therefore, may often go unchallenged because of the practical difficulties of expensive and complex litigation to contest the grant of the patent.¹³⁴ Additionally, the patent is presumed to be valid once granted,¹³⁵ and courts will generally defer to agency determinations, especially in highly technical areas.¹³⁶

Recognizing both the practical influence that the initial PTO decision has in determining most patent issues, and the unique position that an applicant has to influence the PTO's initial decision, a strict "duty of candor" is imposed

128. U.S. CONST. art. I, § 8, cl. 8.

129. United States Customs Service, Patent Surveys, Process Patents and Exclusion Orders, Customs Directive 2300-06 (Nov. 21, 1989).

130. 35 U.S.C. §§ 1-376 (1988).

131. ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* 114 (2d ed. 1990).

132. The Patent and Trademark Office is an administrative agency within the United States Department of Commerce.

133. See, e.g., John Crowdsen, *AIDS Blood Test New Target of Probe*, CHI. TRIB., Dec. 29, 1991, § 1, at 1, 17 (describing how patent attorneys for the United States government did not know that patent attorneys for the Pasteur Institute in France had applied less than five months earlier for a United States patent on a blood test for the HIV antibody).

134. See MILLER & DAVIS, *supra* note 131, at 114-15.

135. 35 U.S.C. § 282 (1988).

136. See CARTER ET AL., *supra* note 1, at 90-91 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)); MILLER & DAVIS, *supra* note 131, at 115.

upon patent applicants.¹³⁷ The PTO's administrative patent process is an *ex parte* proceeding, which courts describe as "inherently unreliable."¹³⁸ Because patent procedures are *ex parte*, and because the procedures will inure to the benefit of the patent applicant, the strict duty of candor balances any unfairness that may otherwise occur if the applicant were to enjoy the benefits of an *ex parte* process without any corresponding duty.¹³⁹

The duty of candor in patent proceedings is "enforced with the whip of [patent] invalidity."¹⁴⁰ Specifically,

[a] breach of the duty can result in the striking of an application or in the invalidation of a patent; it can defeat an otherwise valid claim of [patent] infringement; it even can result in a patent being issued to a rival party in an interference proceeding despite priority [in time of the patent application] or other merit lying in the party who violated the duty.¹⁴¹

Additionally, if the breach of the duty of candor amounts to fraud, attorneys' fees may be awarded in later court actions against the defaulting party.¹⁴²

The duty of candor requires the patent applicant to inform the PTO of all material information of which the inventor is aware.¹⁴³ A breach of the duty requires something more than simple negligence, but something less than conscious fraud.¹⁴⁴ Gross negligence may be enough to violate the duty.¹⁴⁵

A person is under the duty of candor only to the extent of his or her actual participation in the patenting process.¹⁴⁶ Commentators note that the duty of candor varies according to a person's actual activities before the PTO:

A different duty might be imposed upon a person who is relatively passive during the process with respect to a prior art reference, for example, *than upon his attorney who may be consciously aware of some pertinent information unearthed during the patent prosecution process*. However, it is not unusual for the sins of the attorney to be visited upon the client.¹⁴⁷

An inventor and his or her lawyers thus have the affirmative duty to disclose material information to the PTO.¹⁴⁸ It is not enough to avoid actively misleading the PTO.¹⁴⁹ Information is material if "there is a substantial likelihood

137. See MILLER & DAVIS, *supra* note 131, at 115 (discussing the duty of candor).

138. *E.g.*, *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578 (Fed. Cir.), *cert. denied*, 464 U.S. 996 (1983).

139. MILLER & DAVIS, *supra* note 131, at 115.

140. *Id.*

141. *Id.*

142. *Id.* at 115-16.

143. *Id.* at 116.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (emphasis added).

148. *Id.* at 117.

149. *Id.*

that a reasonable [patent] examiner would consider it important."¹⁵⁰ Accordingly,

an applicant who knows of information (or who perhaps only, through calculated recklessness, is ignorant of such information) bearing upon patentability that is quite likely to be considered important by an examiner, even if it is not determinative, has the duty of disclosing the information. This objective standard with respect to materiality, in contrast to the relatively subjective state of mind, potentially is quite harsh. Because the applicant may be held in breach merely for the failure to so disclose and because the material information need only be important, the potential impact of the duty of candor is sizeable.¹⁵¹

E. Observations

The FCC's grant of an exclusive government license to use the public airwaves is comparable to the PTO's grant of exclusive rights in a patent. The administrative proceedings for both are also analogous when they are *ex parte*. The clients also share similar financial motivations to obtain a patent and to obtain a broadcast license. The strict duty of candor that applies to proceedings before the PTO, therefore, also should be expressly adopted for written submissions made to the FCC.

The FCC Review Board has found that "[l]ack of candor, unlike misrepresentation, does not arise directly out of the more universal requirement that intentionally false statements not be made in connection with an application or adjudicatory proceeding before any federal agency."¹⁵² Rather, the duty of candor before the FCC arises "out of the 'special status of licensees as trustees of a scarce public resource.'"¹⁵³ The FCC Board also has noted suggestions that the FCC would be derelict if it did not ask federal licensees to be "scrupulous in providing complete and meaningful information" in application forms.¹⁵⁴

What the FCC asks of applicants it must ask also of the applicants' agents. Attorneys who practice before the Commission should be held to the same scrupulous standards. Thus, in preparing applications for new television or radio broadcast stations, attorneys should investigate responses in the FCC forms for factual verification and possible material omissions.

The author believes that as a matter of public policy, lawyers should not be permitted to perpetrate or assist in a fraud without being held responsible for their wrongdoing. Interestingly enough, however, at least one court has ex-

150. *Id.*

151. *Id.*

152. *In re Fox River Broadcasting, Inc.*, 88 F.C.C.2d 1132, 1136 (1982) (denying Fox River's application for an FM radio license).

153. *Id.* at 1136-37 (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980)).

154. *Id.* (quoting *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980) and *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965)).

pressly denied that this is sound public policy. In *Schatz v. Rosenberg*,¹⁵⁵ the United States Court of Appeals for the Fourth Circuit rationalized its rejection of holding attorneys so accountable by stating:

While we sympathize with plaintiff's position and certainly do not condone lawyers making misrepresentations, we find that our public policy counsels against imposing such a duty. Attorney liability to third parties should not be expanded beyond liability for conflicts of interest. Any other result may prevent a client from reposing complete trust in his lawyer for fear that he might reveal a fact which would trigger the lawyer's duty to the third party. Similarly, if attorneys had a duty to disclose information to third parties, attorneys would have an incentive not to press clients for information. The result would not be less securities fraud. Instead, attorneys would more often be unwitting accomplices to the fraud as a result of being kept in the dark by their clients or by their own reluctance to obtain information. The better rule—that attorneys have no duty to “blow the whistle” on their clients—allows clients to repose complete trust in their damaging or problematic information, and the lawyer will more likely be able to counsel his client against misconduct.¹⁵⁶

The lawyers in *Schatz v. Rosenberg* had represented a client who portrayed himself as financially sound in a written financial statement and update letter. After the financial statement was submitted but before the update letter was completed, however, the client's largest business crumbled and the business filed for bankruptcy.¹⁵⁷ The client also filed for personal bankruptcy.¹⁵⁸ The

155. 943 F.2d 485 (4th Cir. 1991).

156. *Id.* at 493 (citations omitted). The court based its opinion in part on decisions from the Fifth and Seventh Circuits. In *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds sub nom.* *Fryar v. Abell*, 492 U.S. 914 (1989), the Fifth Circuit explained that

[i]t is well understood in the legal community that any significant increase in attorney liability to third parties could have a dramatic effect upon our entire system of legal ethics. An attorney required by law to disclose “material facts” to third parties might thus breach his or her duty, required by good ethical standards, to keep attorney-client confidences. Similarly, an attorney required to declare publicly his or her legal opinion of a client's actions and statements may find it impossible to remain as loyal to the client as legal edicts properly require.

Id. at 1124.

Similarly, in the accounting context, the Seventh Circuit refused to impose a duty of disclosure based on public policy reasons in *DiLeo v. Ernst & Young*:

Such a duty would prevent the client from reposing in the accountant the trust that is essential to an accurate audit. Firms would withhold documents, allow auditors to see but not copy, and otherwise emulate the CIA, if they feared that access might lead to destructive disclosure—for even an honest firm may fear that one of its accountant's many auditors would misunderstand the situation and ring the tocsin needlessly, with great loss to the firm.

901 F.2d 624, 629 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

For further background on aspects of the decision that offer aid and comfort to the legal profession, see Milo Geyelin, *Lawyers Can't Be Held Liable for Clients' Lies*, WALL ST. J., Aug. 29, 1991, at B1.

157. *Schatz*, 943 F.2d at 488.

158. *Id.*

lawyers represented both the client and his businesses. The client had personally guaranteed \$1.5 million in promissory notes in order to obtain an eighty percent interest in two other companies.¹⁵⁹ The parties who accepted the promissory notes relied on the financial statement and update letter, which indicated the client had a personal net worth exceeding \$7 million. The promissory notes were never paid, and the injured parties sued the lawyers for, *inter alia*, (1) violating section 10(b)(5) of the Securities Act of 1934 and for aiding and abetting a violation of the securities laws, and (2) knowingly perpetrating or assisting in common law misrepresentation under Maryland tort law.¹⁶⁰

Concerning the securities fraud claims, the court found that a lawyer cannot be held liable for misrepresentation under section 10(b) of the Securities Act of 1934 for failing to disclose information about a client to a third party absent some fiduciary or other confidential relationship with the third party.¹⁶¹ The court distinguished federal securities cases that have held attorneys liable under section 10(b) for failing to disclose misrepresentations made by clients to third parties.¹⁶² It agreed with other cases that held lawyers had no duty of disclosure absent some fiduciary relationship with the third party.¹⁶³ Indeed, the court quoted one ruling that "[n]either lawyers nor accountants are required to tattle on their clients in the absence of some duty to disclose. To the

159. *Id.*

160. *Id.*

161. *Id.* at 492.

162. The *Schatz* court distinguished two cases where attorneys had issued "a reckless and misleading bond opinion letter," in that the only charge against the lawyers here was that they "failed to tattle on their client for misrepresenting his personal financial condition." *Id.* at 491. The distinguished cases were *T.J. Raney & Sons, Inc. v. Fort Cobb, Oklahoma Irrigation Fuel Authority*, 717 F.2d 1330 (10th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984), and *Cronin v. Midwestern Oklahoma Development Authority*, 619 F.2d 856, 862 (10th Cir. 1980). *Schatz*, 943 F.2d at 491. The *Schatz* court also distinguished cases where attorneys were found liable when they made affirmative misrepresentations, such as drafting false prospectuses or other securities documents. *Id.* at 491-92 (distinguishing *Renovitch v. Stewardship Concepts, Inc.*, 654 F. Supp. 353, 359 (N.D. Ill. 1987); *In re Flight Transp. Corp. Sec. Lit.*, 593 F. Supp. 612, 617-18 (D. Minn. 1984); and *Blakely v. Lisac*, 357 F. Supp. 255, 266-67 (D. Or. 1972)).

163. *Schatz*, 943 F.2d at 491 (citing *Renovitch v. Kaufman*, 905 F.2d 1040, 1048 (7th Cir. 1990) (holding that outside of a fiduciary duty to a third-party investor, attorneys had no duty to disclose financial information about the client to the investor); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988) (holding that underwriter's counsel owed bondholders no duty to disclose inaccuracies in an offering statement for the bonds, although counsel had a duty of due diligence to investigate the representations in the statement and although counsel permitted its name to appear on the cover of the offering statement), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989); *First Interstate Bank of Nevada v. Chapman & Cutler*, 837 F.2d 775, 780 n.4 (7th Cir. 1988) (holding bond counsel was not liable to the bond purchaser for a false opinion letter based on a purportedly false assumption); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir. 1986) (noting that, because neither section 10(b) nor Rule 10b-5 imposes a duty to disclose, any duty must arise from a fiduciary relationship outside the securities laws); *Bush v. Rewald*, 619 F. Supp. 585 (D. Haw. 1985) (finding that lawyer owed no duty to investors buying from organization because the organization, and not the investors, was the client); *Quintel Corp. v. Citibank*, 589 F. Supp. 1235 (S.D.N.Y. 1984) (finding that counsel to partnership owed no duty of disclosure to limited partners)).

contrary, attorneys have privileges not to disclose."¹⁶⁴ The court held that, unless there is a relationship of trust and confidence between a lawyer and a third party, the federal securities laws do not impose upon a lawyer a duty to disclose information to a third party.¹⁶⁵ Additionally, as the lawyers owed no duty to disclose the existence of the misrepresentations, the court found that the lawyers could not be held liable as aiders and abettors for failing to disclose this information.¹⁶⁶

Concerning the common law claims asserted against the lawyers, the *Schatz* court found that under Maryland law a lawyer owes a duty only to his clients or third-party beneficiaries of the attorney-client relationship.¹⁶⁷ No duty arose in this case where the injured party was neither a client nor a third-party beneficiary. The court also found that an ethical duty of disclosure did not create a corresponding legal duty under the federal securities laws.¹⁶⁸

The *Schatz* court concluded that the attorneys were not to be held liable for their client's lies. The court considered only the legal issues in a lawyer's knowing incorporation of a client's misrepresentation. Almost apologetically, the court stated that "we do not sit as an ethics or other attorney disciplinary committee, but as a civil court with a duty to interpret the securities laws, and the solution to these legal issues cannot be found in the securities laws."¹⁶⁹

In the context of representing applicants before the Federal Communications Commission for new television and broadcast stations, there is generally no "third party." In this regard, the *Schatz* case, and others like it, contemplated the presence or absence of the attorney's fiduciary relationship to third parties. Attorneys appearing in *ex parte* proceedings before the FCC are not concerned with the rights of third parties—they are seeking an exclusive government grant of a valuable permit or license. They owe a duty of candor to the tribunal as well as a duty of loyalty to the client. These duties may conflict at times, but the attorney must resolve that conflict. In the context of *ex parte* proceedings before an administrative agency, the attorney should resolve that conflict in favor of full disclosure to the agency. Attorneys must also be prepared to withdraw from representation in appropriate cases.

Will unscrupulous clients take advantage of a rule making the attorney personally responsible for the content of applications for new radio and television broadcast licenses? A cynical observer may determine that if clients understand that attorneys may personally serve as potential "whipping boys" for sins of the unprincipled broadcast station applicant, this may perversely increase fraud or misstatements in applications or other papers filed with the

164. *Schatz*, 943 F.2d at 491 (citing *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986)).

165. *Id.* at 492.

166. *Id.* at 495-98.

167. *Id.* at 492 (citing *Flaherty v. Weinberg*, 492 A.2d 618 (Md. 1985)).

168. *Id.* See *supra* notes 123-24 and accompanying text for a discussion of courts' refusals to use ethical codes to define standards of civil liability for lawyers.

169. *Schatz*, 943 F.2d at 498.

administrative agency. Increased deception would indeed be a counterproductive and sorrowful result of a rule imposing increased liability on attorneys. This author hopes and believes, however, that the existence of the enhanced rule itself will not increase the tendency for clients to lie to or hide information from their attorneys. The enhanced rule does not relieve applicants for broadcast licenses from the consequences of their own misstatements; the clients remain ultimately responsible for the truth of statements made in the application.

CONCLUSION

In the abstract, it is easy to recommend a higher standard of care for attorneys who prepare applications for new radio or television broadcast stations. It is easy to discount the costs and inconvenience involved in verification of statements made to the attorney. Attorneys, after all, should not be required to cross-examine their clients on every fact. In the context of obtaining a new broadcast station application, however, the client may have a financial motive to provide false or incomplete information to the attorney. The client may feel that "what my attorney doesn't know won't hurt me." From the attorney's subconscious point of view, it also may be easier to believe the client once the retainer has been paid. In cases where the attorney is working for a flat-rate fee, rather than at an hourly rate, there may also be no incentive to expend extra time and energy to investigate the client's representations.

It is the licensee who is ultimately responsible for identifying and serving the needs and interests of the broadcast audience.¹⁷⁰ It is also the applicant for the broadcast license who is ultimately responsible for the truth of statements made in the application. Yet, if an attorney who assists in the application knows or has reason to know that the application for a new broadcast station contains a false statement of fact or omits a material fact, the attorney also should be personally accountable for the contents of that application. This is especially true for situations implicating a calculated recklessness toward learning the truth, as illustrated in the immigration attorney decisions and in discussions of the duty of candor before the Patent and Trademark Office. Attorneys who know of other attorneys who take part in unethical conduct are under an ethical duty themselves to report that attorney to the proper authorities.¹⁷¹

Imposing potential personal liability upon attorneys who prepare these applications will provide a greater incentive for the attorney to verify any suspicious facts. The possibility of personal liability also may provide some leverage against recalcitrant clients who may try to hide material information from the attorney who prepares the application. The importance of the public interest in

170. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3003 (1990) (quoting FCC MINORITY OWNERSHIP TASK FORCE, REPORT ON MINORITY OWNERSHIP IN BROADCASTING 1 (1978)).

171. *See, e.g., In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (suspending attorney for failure to report another attorney's conversion of client funds).

the airwaves, when viewed against exclusive government grants to individuals, also supports the need for attorneys to exercise only the highest ethical standards in preparing applications for new radio and television broadcast stations.

