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## Green Ethics for Lawyers

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# GREEN ETHICS FOR LAWYERS

TOM LININGER\*

**Abstract:** The ethical rules for lawyers encourage zealous advocacy on behalf of clients, but do not incentivize lawyers to take steps that could minimize harm to the environment. This Article proposes a comprehensive set of amendments to the American Bar Association (“ABA”) Model Rules of Professional Conduct. The goal is to establish not only opportunities, but also obligations, for lawyers to promote environmental health. Certain proposals in this Article represent only a small extension of the present rules, and deserve consideration for immediate adoption, including a proposed liberalization of confidentiality rules to permit disclosures in the case of imminent environmental harm, an expansion of lawyers’ counseling duties, a reconceptualization of third-party harm, an enlarged scope of supervisory responsibility, and a redefinition of pro bono service. The Article goes on to discuss, without necessarily advocating, some more radical ideas for reform. These include a stricter rule against positional conflicts, a more lenient standard for evaluating frivolity of environmental claims, a heightened obligation of candor with respect to environmental harm, and greater accountability for environmental damage caused by lawyers and firms. The Article concludes by addressing foreseeable objections to its proposals. One possible problem is that an expanded whistleblowing duty might alienate clients from their counsel, increasing the risk of environmental harm. The Article also considers the risk of bifurcating the bar into pro-environment and anti-environment factions. Such concerns necessitate caution, but they cannot justify the ABA Model Rules’ currently tepid approach to protection of the environment.

## INTRODUCTION

It is now common to view environmental protection as an ethical issue. According to United Nations Secretary-General Ban Ki-moon, “protecting our environment is an urgent moral imperative and a sacred duty.”<sup>1</sup> Top officials in

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<sup>1</sup> Press Release, U.N. Sec’y-Gen., Protecting Environment Is ‘an Urgent Moral Imperative’, Sacred Duty for All People of Faith, Secretary-General Tells Vatican Workshop on Climate Change (Apr. 28, 2015), <http://www.un.org/press/en/2015/sgsm16710.doc.htm> [<http://perma.cc/7WHW-2QUT>].

the Obama administration speak of a “moral obligation” to reduce carbon emissions, a sentiment also expressed by Pope Francis.<sup>2</sup> Polling indicates that most Americans regard environmental protection as an ethical duty.<sup>3</sup> Several professional codes, including codes for doctors,<sup>4</sup> engineers,<sup>5</sup> planners,<sup>6</sup> landscape architects,<sup>7</sup> business executives,<sup>8</sup> and officials of nonprofit organizations,<sup>9</sup> include provisions that address the importance of environmental stewardship.

Remarkably, however, the American Bar Association (“ABA”) Model Rules of Professional Conduct do not mention the environment once.<sup>10</sup> While

<sup>2</sup> Gina McCarthy & Kenneth Hackett, *Pope Francis’ Call for Climate Action*, EPA CONNECT (July 13, 2015, 11:00 AM), <https://blog.epa.gov/blog/2015/07/pope-francis/> [http://perma.cc/5QFH-TCSM] (referring, on three separate occasions, to a “moral obligation” to reduce pollution).

<sup>3</sup> Among the 2827 respondents, 66% said that world leaders were morally obligated to address the problem of climate change, and 72% said that the respondents themselves were “personally morally obligated” to do what they could in their private lives to reduce carbon emissions. Bruce Wallace, *Most Americans See Combating Climate Change as a Moral Duty*, REUTERS (Feb. 27, 2015, 1:24 AM), <http://www.reuters.com/article/2015/02/27/us-usa-climate-poll-idUSKBN0LV0CV20150227> [http://perma.cc/DU27-W6YN].

<sup>4</sup> WORLD MED. ASSEMBLY, STATEMENT ON THE ROLE OF PHYSICIANS IN ENVIRONMENTAL ISSUES 1 (2006) (“The effective practice of medicine increasingly requires that physicians and their professional associations turn their attention to environmental issues that have a bearing on the health of individuals and populations.”).

<sup>5</sup> CODE OF ETHICS FOR ENG’RS r. III(2)(d) (NAT’L SOC’Y OF PROF’L ENG’RS 2007) (“Engineers are encouraged to adhere to principles of sustainable development in order to protect the environment for future generations.”).

<sup>6</sup> AM. INST. OF CERTIFIED PLANNERS CODE OF ETHICS & PROF’L CONDUCT r. A(1)(g) (AM. PLANNING ASS’N 2009) (“We shall promote excellence of design and endeavor to conserve and preserve the integrity and heritage of the natural and built environment.”).

<sup>7</sup> See generally CODE OF ENVTL. ETHICS (AM. SOC’Y OF LANDSCAPE ARCHITECTS 2006) (setting forth detailed obligations of landscape architects to promote environmental health).

<sup>8</sup> See generally R. EDWARD FREEMAN ET AL., BUS. ROUNDTABLE INST. FOR CORP. ETHICS, ENVIRONMENT, ETHICS, AND BUSINESS (2008) (discussing the necessity for businesses to memorialize ethical duties relating to environmental protection).

<sup>9</sup> E.g., ETHICS RULES AND POLICIES OF THE AM. RED CROSS, ENVIRONMENTAL PROTECTION (AM. RED CROSS n.d.). The Red Cross Ethics Rules state that,

The Red Cross is committed to protecting the environment . . . . The Red Cross requires employees and volunteers to participate actively in local environmental programs, follow specified procedures and notify management of situations that are potentially damaging to the environment. We will conserve natural resources and prevent pollution by reducing waste, reusing and recycling materials, and disposing of all hazardous and other waste in a legal, safe, and responsible manner.

*Id.*

<sup>10</sup> Neither the term “environment” nor any adjectival version of it appears in the black letter text of the ABA Model Rules. The word “environmental,” however, does appear three times in the commentary that accompanies the ABA Model Rules. See MODEL RULES OF PROF’L CONDUCT r. 1.9 cmt. 3 (AM. BAR ASS’N 2013) (providing an example of impermissible side-switching when advocating for a new client might risk revelation of information provided by a former client); *id.* r. 5.7 cmt. 9 (mentioning “environmental consulting” among thirteen examples of “law-related services” that lawyers might perform without being required to follow the ABA Model Rules if lawyers make clear to clients

the ABA Model Rules are extremely thorough, and govern matters as picayune as handling an errant fax<sup>11</sup> or designing a firm's letterhead,<sup>12</sup> the ABA has never seen fit to address the issue of environmental protection in the rules that serve as the boilerplate for state bars throughout the nation. Lawyers in the United States continue to operate under a set of ethical rules that the ABA adopted in the early 1980s<sup>13</sup>—an era when environmental protection ranked low on this country's list of priorities.<sup>14</sup>

The time has come to remedy the conspicuous omission of environmental protection from the list of lawyers' ethical duties. An effort is underway in Oregon—and soon, hopefully, in other states—to elevate the importance of environmental issues in the bar's regulation of lawyers.<sup>15</sup> One aspect of the strategy

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that they are not practicing law); *id.* r. 6.1 cmt. 6 (designating environmental protection to be a second-priority category of pro bono). The commentary has less authority than the black letter rules, so the discussion of environmental issues in the commentary does not necessarily obligate lawyers to protect the environment. (Further, it is interesting to note that the comment to Rule 1.9 criticizes inconsistent environmental advocacy because of its potential harm to the former human client, not because of the potential harm to the environment.)

<sup>11</sup> Model Rule 4.4(b) of the ABA Model Rules provides as follows: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." *Id.* r. 4.4(b).

<sup>12</sup> Model Rule 7.5 of the ABA Model Rules provides, in pertinent part, as follows:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

*Id.* r. 7.5(a)–(b).

<sup>13</sup> The ABA House of Delegates adopted the Model Rules of Professional Conduct in 1983, replacing a significantly different set of rules known as the Model Code of Professional Responsibility. There have been some occasional amendments since 1983, but the basic structure and substance of the rules has remained the same in the following decades. *See id.* at preface.

<sup>14</sup> Although the 1970s saw major steps forward in environmental protection—even during the presidency of Richard Nixon—the early 1980s saw a retrenchment of business interests and a greater ambivalence about environmental protection, particularly to the extent that it might jeopardize the government's attempts to lift the country from an economic recession. *See* GILBERT LAFRENIERE, *THE DECLINE OF NATURE: ENVIRONMENTAL HISTORY AND THE WESTERN WORLDVIEW* 329–30 (2012). Ronald Reagan was more hostile to the cause of environmental protection than was his predecessor Jimmy Carter. *See id.* at 329 ("The conservative backlash of the 1980s 'marked a reversal in the move toward environmental protection.'" (quoting BENJAMIN KLINE, *FIRST ALONG THE RIVER: A BRIEF HISTORY OF THE U.S. ENVIRONMENTAL MOVEMENT* 101 (2d ed. 2000))).

<sup>15</sup> The Sustainable Future Section of the Oregon State Bar has undertaken several initiatives to improve environmental protection, and is presently attempting to involve the state bar in playing a proactive role to help reduce anthropogenic climate change. *See Sustainable Future Section*, OREGON STATE BAR, <http://osbsustainablefuture.org/> [<http://perma.cc/6W7G-29AW>]. The Sustainable Future Section of the Oregon State Bar is the first of its kind in the United States, and received the American

is to present proposals for revisions of ethical rules, either in the ABA's template or in individual states' ethical codes.

This Article suggests amendments that would import "green ethics" to the ABA Model Rules. Each of the amendments proposed herein is suitable for any of the forty-nine states that have modeled their ethics codes after the ABA Model Rules.<sup>16</sup> The proposed reforms fit together, and they are also freestanding; the efficacy of any one amendment does not depend on adoption of the other amendments. A state could adopt some of the proposed amendments or the state might simply revise the commentary accompanying the state's existing rules in order to stress the importance of environmental protection. Even in a state that declines to revise its rules or commentary, the proposals in this Article might hopefully invite reflection on the ways in which lawyers can act voluntarily to protect the environment.

The dearth of pertinent scholarship requires that this Article must begin with first principles.<sup>17</sup> Part I begins by exploring the current conceptual

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Bar Association's State or Local Bar Environment, Energy, and Resources Program of the Year Award in 2013. Press Release, Am. Bar Ass'n, Oregon State Bar's Sustainable Future Section to Receive 2013 State or Local Bar Environment, Energy, and Resources Program of the Year Award from the American Bar Association (July 24, 2013), [http://www.americanbar.org/news/abanews/aba-news-archives/2013/07/oregon\\_state\\_barss.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/07/oregon_state_barss.html) [<http://perma.cc/A7NS-3975>].

<sup>16</sup> All of the state bars in the United States, except for the California Bar, have adopted the basic framework of the ABA Model Rules. See *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) [<http://perma.cc/2FDS-KS8P>]. The bars in the District of Columbia and the Virgin Islands have also adopted the ABA Model Rules. *Id.* Each state's code of professional conduct, however, may differ slightly from the ABA Model Rules. See *Charts Comparing Professional Conduct Rules*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/charts.html](http://www.americanbar.org/groups/professional_responsibility/policy/charts.html) [<http://perma.cc/G85Z-92SP>] (cataloging the differences between the ABA Model Rules and the various ethics codes of each state).

<sup>17</sup> Virtually no scholarship has focused on the possibility of amending the ABA Model Rules of Professional Conduct to impose duties on *all* lawyers in order to protect the environment. Some scholarship has focused on ethical challenges confronting the subset of attorneys who specialize in the practice of environmental law. *E.g.*, J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOYOLA L.A. L. REV. 825, 836–39 (1994) (discussing the general growth of environmental law as a practice area, and briefly mentioning the need for customized ethical rules to guide practitioners of environmental law, but offering no specific proposals); Stanford M. Stein & Jan M. Geht, *Legal Ethics for Environmental Lawyers: Real Problems, New Challenges, and Old Values*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 729, 747 (2002) (addressing some of the particular problems that environmental lawyers might face, but offering no particular solutions to those problems, acknowledging that "[t]his article poses more questions than [sic] it answers"). See generally John French III, *Ethical Issues in the Practice of Environmental Law*, 2 PACE ENVTL. L. REV. 66 (1984) (raising concerns about ethical dilemmas that might arise in the relatively new field of environmental law, but offering no blueprint for reforms to address the issues identified). Some publications addressing ethical challenges in the context of environmental practice have simply explained the application of the current rules rather than urging reform of those rules. See generally Pamela Esterman, *Environmental Law Practitioner's Guide to the Model Rules*, 25 NAT. RESOURCES & ENV'T 12, 12–15 (2011) (explaining how environmental practitioners can comply with the current

framework for the ethical regulation of lawyers.<sup>18</sup> Historically, the highest imperative in the legal profession has been zealous advocacy on behalf of a lawyer's client.<sup>19</sup> This goal began to yield somewhat when the ABA's Ethics 2000 Commission proposed several reforms permitting—but usually not requiring—lawyers to address third-party interests distinct from their clients' priorities.<sup>20</sup> The ABA adopted the Commission's recommendations and also adopted additional reforms to permit whistleblowing in the aftermath of the corporate scandals that led to the passage of the Sarbanes-Oxley Act in 2002.<sup>21</sup> While the cognizance of nonpartisan interests in the updated ABA Model Rules is commendable, the fact remains that only human interests provide a basis for disloyalty to a client.<sup>22</sup> Environmental considerations standing alone cannot trump the duty of partisan advocacy, except to the extent that those considerations translate to financial harm or health risks to humans.<sup>23</sup>

Next, Part II of this Article sets forth proposals that represent only a small departure from the current version of the ABA Model Rules.<sup>24</sup> These proposals are consistent with the rationale that now underlies many of the Model Rules. The proposals simply extend that rationale to incentivize—and in some cases require—attention to environmental concerns. Examples of such reforms include new exceptions to confidentiality requirements, a heightened duty of disclosure in evaluations a lawyer creates for use by a third party, an expanded duty of client counseling, a wider conception of third-party harm, an extension of supervisory liability, a redefinition of pro bono service, a relaxation of the conflict rules for service on the boards on nonprofit organizations, and a new standard for evaluating conduct that could raise questions about fitness to practice law.<sup>25</sup>

Part III offers ideas for more radical changes.<sup>26</sup> Admittedly, these reforms are not ready for present inclusion in the ABA Model Rules. The point of raising these ideas is to provoke a discussion that might eventually lead to proposals suitable for future adoption. Among the ideas discussed in this Part is a prohibition of positional conflicts, a new standard for evaluating frivolity of claims, a higher duty of candor to the tribunal, a liberalization of the ban on

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rules). All of the above-listed articles did a commendable job addressing the topics they sought to address, but none has aspired to provide a comprehensive set of reforms to the ABA Model Rules in order to make sure that all lawyers will play a role in protecting the environment.

<sup>18</sup> See *infra* notes 33–41 and accompanying text.

<sup>19</sup> See *infra* notes 33–41 and accompanying text.

<sup>20</sup> See *infra* notes 42–56 and accompanying text.

<sup>21</sup> See *infra* notes 42–56 and accompanying text.

<sup>22</sup> See *infra* notes 57–70 and accompanying text.

<sup>23</sup> See *infra* notes 57–70 and accompanying text.

<sup>24</sup> See *infra* notes 85–138 and accompanying text.

<sup>25</sup> See *infra* notes 94–138 and accompanying text.

<sup>26</sup> See *infra* notes 139–182 and accompanying text.

for-profit solicitation, and a systematic evaluation of firms and lawyers based on their conduct with respect to the environment.<sup>27</sup>

Finally, Part IV addresses foreseeable objections.<sup>28</sup> Some critics may argue that the proposals in this Article go too far, creating a schism between lawyers and clients, polarizing the bar, and inviting onerous regulation of lawyers outside the context of environmental protection.<sup>29</sup> On the other end of the spectrum, some critics might argue that the proposals offered in this Article do not go far enough, relying too heavily on voluntarism and missing opportunities to impose more meaningful whistleblowing requirements.<sup>30</sup> All of the above-listed objections deserve attention, but they do not justify inaction.

In the end, the promise and shortcomings of “green ethics” for lawyers are comparable to the benefits and drawbacks of all proposals for environmental protection. The market has clearly failed, but the incremental reforms that seem innocuous are unlikely to be sufficient, while more potentially efficacious proposals might necessitate an intolerable transformation of the market-based system. The best course for the bar may be difficult to discern at present, but one thing is clear: lawyers should not sit idly by while other professions earnestly take on the challenge of protecting the environment. We must do our part.

## I. THE CONCEPTUAL FRAMEWORK OF THE ABA MODEL RULES

For the last several decades, the ABA, embracing the adversary model, has presumed that the aggressive interplay of highly partisan, client-centered advocates will achieve results approximating justice.<sup>31</sup> While this system may have performed certain functions well—the allocation of costs between parties, the protection of parties’ procedural rights, the efficient disposition of cases—

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<sup>27</sup> See *infra* notes 144–182 and accompanying text.

<sup>28</sup> See *infra* notes 183–214 and accompanying text.

<sup>29</sup> See *infra* notes 185–206 and accompanying text.

<sup>30</sup> See *infra* notes 207–214 and accompanying text.

<sup>31</sup> See Anthony D’Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 764–70 (1983) (critiquing the “autonomy model” and its emphasis on pursuing the interests of clients at the expense of other interests; this model is the “mainstream position of the practicing bar” and is the foundation for the ABA Model Rules adopted in 1983); Andrew Pearlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1643 (2015). As one scholar noted,

Traditionally, the partisanship principle has been understood as one aspect of the dominant view of legal ethics—that lawyers should, “within the established constraints of professional behavior, maximize the likelihood that the client’s objectives will be attained.” Put more simply, a lawyer should pursue a client’s cause to the full extent the law allows.

*Id.* (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 12 (1988)).

there can be little doubt that the client-centered paradigm has marginalized the importance of extrinsic environmental concerns.<sup>32</sup>

### A. *The Primacy of Partisanship*

Our legal system is unapologetically adversarial. Each lawyer represents one interest—that of his or her client—and bears little obligation to attend to interests distinct from the client’s interest.<sup>33</sup> This approach comports with the libertarian philosophy that weighs individual rights more heavily than collective obligations. Even from a utilitarian perspective, the interplay of aggressive, self-interested actors presumably improves the efficiency of the judicial system in the same way it improves the economy.<sup>34</sup> The “invisible hand” that guides the laissez-faire economy presumably guides the justice system even when each individual attorney seeks only to advance the interests of that attorney’s client.<sup>35</sup>

Lord Brougham was an early proponent of the partisan ideal. When King George IV of England attempted to divorce his wife because of her alleged adultery, Lord Brougham represented the Queen.<sup>36</sup> Lord Brougham contemplated whether he could ethically defend the Queen by threatening to reveal damaging information about the King, to wit, the King’s own adultery and secret marriage to a Catholic. These facts, if known to the English public, threatened to plunge the country into chaos.<sup>37</sup> Yet Lord Brougham concluded that the threat to reveal this damaging information was not only permissible, but oblig-

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<sup>32</sup> E.g., Irma Russell, *Unreasonable Risk: Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 119 (1998) (noting that “rules of ethics created by the American Bar Association provide little guidance to the attorney facing the dilemma posed by client secrets that can harm third parties,” especially when the client is engaged in conduct that might present the risk of environmental harm).

<sup>33</sup> Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976) (arguing that “it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client’s interests,” and “that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest”).

<sup>34</sup> Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 151, 151–52 (Donald T. Weckstein ed., 1970) (arguing that the best way to discover the truth is for the lawyers of both parties to engage in aggressive partisan advocacy).

<sup>35</sup> D’Amato & Eberle, *supra* note 31, at 765 (“[T]he ‘invisible hand’ theory, popularized by Adam Smith, [holds] that individual entrepreneurs acting selfishly will nevertheless in the aggregate promote maximum economic well-being for all through a competitive market. Thus, by ‘championing’ a client’s interests ‘against’ society, a lawyer . . . is serving the true interests of society as a whole.”).

<sup>36</sup> Albert Alschuler at the University of Chicago has drawn a parallel between Lord Brougham’s advocacy and the tactics used by the defense team in the 1995 prosecution of O.J. Simpson. Albert Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 291–92 (1998).

<sup>37</sup> *Id.*



atory, because it would advance the interests of his client—the only person to whom he owed loyalty.<sup>38</sup>

Leading modern scholars extol Lord Brougham's characterization of lawyers' ethical duties. Geoffrey Hazard, a professor at the University of Pennsylvania and the reporter for the ABA Model Rules, described Lord Brougham's bromide as "the classic vindication of the lawyer's partisan role," and said that "[this] basic narrative has been sustained over two centuries, notwithstanding pervasive changes in American society and in the profession itself."<sup>39</sup> Charles Fried at Harvard Law School declared that the lawyer must "put the interests of his client above some idea, however valid, of the collective interest."<sup>40</sup> Monroe H. Freedman at Hofstra Law School, recognized among the top scholars of legal ethics, has discussed the value of partisanship in discovering the truth, remarking, "[T]he most effective means of determining truth is to place upon a skilled advocate for each side the responsibility of investigating and presenting the facts from a partisan perspective."<sup>41</sup>

### *B. An Emerging Cognizance of Nonpartisan Interests*

Consistent with the highly partisan conception of the lawyer's role, the version of the ABA Model Rules adopted in 1983 established few exceptions to the overriding duty to promote a client's interests. One striking example is the original version of ABA Model Rule 1.6, which set forth the duty of confidentiality and its exceptions. As originally adopted, Rule 1.6 only included two exceptions.<sup>42</sup> The strong commitment to confidentiality in the original version

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<sup>38</sup> *Id.* Lord Brougham explained:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty. In performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

*Id.* (quoting 2 J. NIGHTINGALE, *THE TRIAL OF QUEEN CAROLINE* 8 (1821)).

<sup>39</sup> Geoffrey Hazard, *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1244 (1991).

<sup>40</sup> Fried, *supra* note 33, at 1066.

<sup>41</sup> Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 *CHAP. L. REV.* 57, 78–79 (1998).

<sup>42</sup> The originally adopted version of ABA Model Rule 1.6 provided as follows:

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

of the ABA Model Rules followed logically from the notion that client-centered duties were paramount in lawyers' ethics.<sup>43</sup>

In time, however, the ABA and state bars began to acknowledge that exceptions to partisanship might be appropriate in limited circumstances. One such circumstance is child abuse. By the year 2000, many state legislatures had adopted statutes that imposed reporting obligations on various professionals.<sup>44</sup> Lawyers assumed the duty, too, in 2002,<sup>45</sup> although the ABA Model Rules and their state counterparts generally provided for permissive rather than mandatory disclosure.<sup>46</sup> In the context of child abuse, an exception to confidentiality seemed appropriate because of the uniquely compelling circumstances: children are vulnerable to severe harm, they are defenseless against that harm, they are unlikely to report the abuse themselves, and reporting by lawyers could expose harm that might otherwise escape notice.<sup>47</sup>

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(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 99–104 (2006) [hereinafter ABA LEGISLATIVE HISTORY]. When it adopted the original version of Model Rule 1.6, the ABA House of Delegates rejected a recommendation by the Kutak Commission that would have added two more exceptions: an exception for disclosure “to rectify the consequences of the client's criminal or fraudulent act in furtherance of which the lawyer's services had been used” and an exception for disclosure “to comply with other law.” See *History—Rule 1.6, ABA Model Rules of Professional Conduct (pre-2002)*, LEGAL INFO. INST., <https://www.law.cornell.edu/ethics/aba/2001/history.htm> [<http://perma.cc/9UMC-GNGK>].

<sup>43</sup> D'Amato & Eberle, *supra* note 31, at 769 (observing that the “the autonomy model places an extremely high value on total confidentiality in the attorney-client relationship”).

<sup>44</sup> E.g., Robin A. Rosencrantz, *Rejecting “Hear No Evil Speak No Evil”: Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327, 339–45 (briefly summarizing the evolution of statutes relating to reporting child abuse).

<sup>45</sup> The ABA House of Delegates adopted the recommendation of the Ethics 2000 Commission to include an exception to confidentiality allowing, but not requiring, lawyers to disclose information necessary to “comply with other law or a court order” such as state statutes concerning the reporting of child abuse. See Katharyn I. Christian, Student Commentaries, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse*, 32 J. LEGAL PROF. 215, 222–25 (2008) (explaining the evolution of confidentiality exceptions under Rule 1.6 and their effect on lawyers' reporting of child abuse).

<sup>46</sup> Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 246–54 (1987) (discussing the proliferation of mandatory reporting statutes and explaining that state bars tended to make reporting permissive rather than mandatory); see also Christian, *supra* note 45, at 218–20 (noting that some states made lawyers mandatory reporters of child abuse).

<sup>47</sup> E.g., Rosencrantz, *supra* note 44, at 329–40 (analyzing the unique circumstances that necessitate imposing a reporting duty on attorneys, including the tremendous risk of harm to children and the inability of children to stop the abuse); Stuart, *supra* note 46, at 245–47 (emphasizing harm, vulnerability, and lack of other means for authorities to gain information about child abuse); Christian, *supra* note 45, at 222 (discussing the rationale for exceptions to the duty of confidentiality in cases involving child abuse, and highlighting the vulnerability of children along with the potential gravity of harm).

In 2003, the ABA recognized another circumstance that might suspend the ordinary duty of loyalty to the client. In the wake of several corporate scandals in 2002,<sup>48</sup> the ABA House of Delegates established new exceptions to Rule 1.6,<sup>49</sup> as well as stronger language in Rule 1.13,<sup>50</sup> authorizing lawyers to act as whistleblowers upon discovering evidence of financial crime or fraud by clients (or, in the case of organizational clients, by the clients' employees). While the amendments included conditions that made disclosure unlikely,<sup>51</sup> they signaled a further erosion of the loyalty required in the original version of the ABA Model Rules. The reforms of 2003 followed shortly after Congress passed the Sarbanes-Oxley Act, which imposed reporting duties on accountants and lawyers who discovered evidence of fraud by clients.<sup>52</sup> The disclosure

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<sup>48</sup> Susan Koniak, a law professor at Columbia Law School, has written a detailed account of lawyers' complicity in the Enron scandal. Susan Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239–43 (2003); see also Scott Harshbarger & Goutam Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1, 33–34 (2007) (excerpting a speech by Scott Harshbarger, former Attorney General of Massachusetts). Harshbarger stated,

[W]hat also leaps out at me is that in nearly every single transaction at WorldCom, Enron, Global Crossing, Adelphia, Tyco, Qwest, and any of the other leading examples of serious corporate problems involving crime, fraud, schemes, and malfeasance, in all those cases, there was a lawyer who, at some level, saw, heard, reviewed, analyzed, and billed for legal services rendered.

*Id.* (alteration in original) (quoting Scott Harshbarger, *Strengthening Democracy: The Challenge of Public Interest Law*, 56 ME. L. REV. 211, 221 (2004)).

<sup>49</sup> In 2001, the ABA House of Delegates adopted many of the reforms proposed by the Ethics 2000 Commission, but declined to adopt the proposed exceptions to confidentiality for ongoing or past client fraud involving the lawyers' services. E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. CIN. L. REV. 731, 737–38 (2003). The Enron scandal provided the impetus for the ABA to adopt those two amendments in 2003. See *id.* at 737. For the text of ABA Model Rules 1.6(b)(2) and 1.6(b)(3), see *infra* notes 94–102 and accompanying text.

<sup>50</sup> Lawrence Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the ABA Model Rules of Professional Responsibility*, 17 GEO. J. LEGAL ETHICS 35, 40–47 (2003) (explaining the evolution of the 2003 amendments to ABA Model Rule 1.13, which sought to increase the efficacy of whistleblowing provisions relating to fraud and other malfeasance by constituents of organizational clients).

<sup>51</sup> For example, amended Rules 1.6(b)(2), 1.6(b)(3), and 1.13 indicate that disclosure and/or whistleblowing will only be permissible as to matters relating to the lawyers' services or representation of a client—a limitation that might make lawyers more reluctant to report for fear of exposing their own misconduct or negligence—as opposed to authorizing lawyers to disclose fraudulent conduct in which the lawyers had no involvement. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3), 1.13.

<sup>52</sup> Section 307 of the Sarbanes-Oxley Act requires the SEC to adopt rules

setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to

rules for fraud, like the disclosure rules for child abuse, seem to rest on a rationale of exceptional urgency: when lawyers have access to what is otherwise nonpublic information, lawyers should speak up in order to avoid significant harm to vulnerable third parties.<sup>53</sup>

The ABA continues to consider the possibility of adding new duties to reduce harm to third parties. The latest example is a proposed amendment to ABA Model Rule 8.4 that would require lawyers to refrain from speech or conduct that would show disrespect for third persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.<sup>54</sup> A total of twenty-four state bars have already adopted a similar requirement.<sup>55</sup> The rationale seems to be that lawyers need to avoid causing harm to the above-listed groups, many of which are vulnerable because of historical mistreatment and prejudice, even if such harm might be advantageous to the lawyers' clients.<sup>56</sup>

### C. Lingerin Anthropolentrisin

In theory, at least, the principle of minimizing collateral harm could extend to nonhuman environmental interests. But the ABA Model Rules have remained anthropocentric since their passage in 1983.<sup>57</sup> No black letter rule<sup>58</sup>

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the evidence . . . requiring the attorney to report the evidence . . . to the board of directors . . . .

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7245 (2012)).

<sup>53</sup> See MODEL RULES OF PROF'L CONDUCT *rr.* 1.6(b)(2)–(3), 1.13.

<sup>54</sup> The amendment would change Model Rule 8.4 to read, in pertinent part, as follows: "It is professional misconduct for a lawyer to: (g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged in [conduct related to] [in] the practice of law." ABA Standing Comm. on Ethics & Prof'l Responsibility, Amendment to Model Rule 8.4 and Comment [3], at 1 (July 5, 2015) (working discussion draft) (alteration in original), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/draft\\_07082015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/draft_07082015.authcheckdam.pdf) [<http://perma.cc/QH8L-WRR5>].

<sup>55</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility, Revisions to Model Rule 8.4 Language Choice Narrative 1 (July 16, 2015) (working discussion draft), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/language\\_choice\\_narrative\\_with\\_appendices\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf) [<http://perma.cc/FKV3-69X4>].

<sup>56</sup> *Id.* at 3–5 (stressing that members of these groups deserve to be treated with "dignity and respect," even though the proposed rule might constrain lawyers' freedom of expression).

<sup>57</sup> Anthropocentrism is the notion that human interests take precedence over nonhuman interests. See THE OXFORD AMERICAN DICTIONARY AND THESAURUS 56 (2d Am. ed. 2003); see also Elizabeth Dodson Gray, *Come Inside the Circle of Creation*, in ETHICS & ENVIRONMENTAL POLICY: THEORY MEETS PRACTICE 25 (1994) ("This *anthropocentric illusion* about the human species and our place on planet Earth has unfortunately been the basis of Western science and technology. We never ask whether a particular invention or scientific advance fits in, because we have conceptualized ourselves as above, never as within.").

in the ABA Model Rules has ever mentioned the environment or nonhuman interests.<sup>59</sup> The commentary to the Rules also focuses almost exclusively on human interests.<sup>60</sup> The Rules insist that lawyers must advocate zealously on behalf of their clients except when such advocacy might jeopardize an extrinsic human interest, for example, by risking physical or financial harm to humans.<sup>61</sup> Although advocates for the biotic and abiotic environment have struggled mightily to gain standing in court,<sup>62</sup> the ABA Model Rules continue to regard nonhuman environmental interests as virtually irrelevant to lawyers' ethical duties.<sup>63</sup>

There are several reasons for this anthropocentrism. First, the ABA House of Delegates adopted the Model Rules in the early 1980s, when environmental advocacy was a relatively low priority in this country.<sup>64</sup> The revisions to the

<sup>58</sup> In this context, the term "black letter" refers to the language of the rule itself, as opposed to the commentary and other interpretive notes. *E.g.*, Charles Sivler & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1474 (1998) (using the term "black letter" to refer to the express language of a particular rule in the ABA Model Rules, as opposed to interpretative authority).

<sup>59</sup> *Supra* note 10 and accompanying text (discussing the absence of references to the environment in the text of the Model Rules).

<sup>60</sup> The commentary only refers to the environment three times, and two of these references are noteworthy for their subordination of environmental interests to human interests. *Supra* note 10 and accompanying text.

<sup>61</sup> For example, the grounds for whistleblowing pursuant to Model Rules 1.6 and 1.13 relate to harm that could befall third parties who are human, and the third-party harm addressed in Model Rule 4.4(a) seems to be human as well. MODEL RULES OF PROF'L CONDUCT *rr.* 1.6, 4.4(a), 1.13.

<sup>62</sup> Steven Wise offers a provocative argument for animal rights and, ultimately, animal standing. *E.g.*, Steven Wise, *Nonhuman Rights to Personhood*, 30 PACE ENVTL. L. REV. 1278, 1280–84 (2013) (laying out a conceptual basis for extending personhood and legal rights to animals). Wise and his colleagues at the Nonhuman Rights Project have made important strides toward the goal of establishing standing for nonhuman creatures. On July 30, 2015, they failed to persuade a New York court to extend habeas corpus rights to chimpanzees held on the State University of New York's Albany campus, but the court acknowledged that such an argument might one day have merit. *In re Nonhuman Rights Project ex rel. Hercules v. Stanley*, No. 152736/2015, 2015 BL 252279, at \*19 (N.Y. Sup. Ct. July 29, 2015) (indicating that "[e]fforts to extend legal rights to chimpanzees are . . . understandable; some day they may even succeed").

<sup>63</sup> Jedediah Purdy, a professor at Duke Law School, has made a compelling argument against anthropocentrism in general ethics, although his work has not focused particularly on the rules of professional conduct for lawyers. In particular, he has inveighed against the conception that environmental protection only matters to the extent that it is instrumentally valuable to humans. Jedediah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 DUKE L.J. 857, 871–74 (2013); see Misha Mitchell, *Cries from the Cafos: A Case for Environmental Ethics*, 39 J. LEGAL PROF. 67, 68 (2014) ("Today, the field of environmental law is primarily normative in nature and dependent on the utilization of cost-benefit analysis to determine the value of the natural world to our anthropocentric needs.").

<sup>64</sup> *Supra* note 14 and accompanying text (discussing the lack of progress on environmental concerns in the 1980s).

ABA Model Rules since 1983 have mostly involved fine-tuning.<sup>65</sup> It is not surprising that an ethics code born in the Reagan era would accord little attention to environmental protection.

Second, the notion that lawyers should consider nonhuman interests poses practical difficulties. How can lawyers gauge such interests? While the concerns of humans are easy to discern, the nonhuman environment cannot communicate with lawyers, and there is no easy way to assess what a nonhuman creature is thinking or feeling.<sup>66</sup> Disagreements sometimes arise about the occurrence or extent of environmental harm. For example, despite the mounting evidence of anthropogenic climate change, there remains a striking lack of consensus on this matter among people who lack scientific expertise.<sup>67</sup> Most lawyers are not professional scientists. Without specialized scientific knowledge, lawyers have been more comfortable with an anthropocentric orientation in their ethical code.

Third, the downturn in the U.S. legal economy over the last ten years has reduced interest in amendments to the ethical rules that might impose additional economic burdens on lawyers.<sup>68</sup> If lawyers could lose business or face extra costs as a result of new duties to nonhuman interests, such duties might seem an ill fit during a time of austerity in the legal market.<sup>69</sup> Zealous partisanship, and an exclusive focus on human interests, has seemed to align better with lawyers' economic interests.<sup>70</sup>

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<sup>65</sup> *Supra* note 13 and accompanying text; see *ABA Model Rules of Professional Conduct*, LEGAL INFO. INST., <https://www.law.cornell.edu/ethics/aba/> [<http://perma.cc/SV5Y-6E7X>] (providing a comparison of the 2013 version of the Model Rules with the 1983 version).

<sup>66</sup> *But see* Cass Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 400 (2003) (arguing that science could eventually do a better job of discerning the interests of nonhumans, or at least attempting to assess the suffering of animals; suggesting that the difficulty of discerning animals' interests should not justify the continuation of ancient prejudice against animals).

<sup>67</sup> *See generally* JENNIFER R. MARLON ET AL., YALE PROJECT ON CLIMATE CHANGE COMM'C'N, SCIENTIFIC AND PUBLIC PERSPECTIVES ON CLIMATE CHANGE (2013), <http://environment.yale.edu/climate-communication/article/scientific-and-public-perspectives-on-climate-change> [<http://perma.cc/DU5T-JZLC>] (noting that while the vast majority of the scientific community has recognized an anthropogenic role in causing climate change, only 41% of the American public agrees).

<sup>68</sup> In fact, the recent trend has been to *reduce* ethical constraints so that lawyers can seek additional business opportunities. One example is the 2009 amendment to Rule 1.10 relaxing the imputation of conflicts arising from an associate's representation of conflicting private interests. *See* Erik Wittman, *A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10*, 22 GEO. J. LEGAL ETHICS 1211, 1226–27 (2009) (observing that economic considerations provided part of the rationale for liberalizing imputation under Rule 1.10).

<sup>69</sup> *Cf.* Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 518–23 (1996) (generally discussing the interrelationship between law firm economics and the bar's approach to duties of professionalism).

<sup>70</sup> D'Amato & Eberle, *supra* note 31, at 769 (noting that the highly partisan paradigm "seems to be in the best economic self-interest of lawyers").

### D. The Case for a Duty of Environmental Protection

Notwithstanding the above-listed reasons—perhaps better characterized as rationalizations—for the present disregard of nonhuman interests, there are strong reasons to add environmental considerations to lawyers' ethical duties. Indeed, environmental interests are similar to the third-party interests that lawyers must presently consider.<sup>71</sup> The environment is analogous to an abused child who is defenseless to protect against that abuse, and who is incapable of summoning aid without the assistance of the lawyer.<sup>72</sup> The environment is also analogous to the pensioners and investors who are protected from client fraud by amended Model Rules 1.6 and 1.13; while they stand to suffer catastrophic losses if the fraud occurs, they have no means of protecting themselves against it, and they would benefit if conscientious lawyers could help them avert the harm before it spirals out of control.<sup>73</sup> Environmental protection is arguably just as urgent as the harm to third parties' dignitary interests, which the ABA seeks to avert with the proposed amendment to Rule 8.4 (although, of course, there is no reason to pit environmental protection against protection of human groups that have suffered discrimination).<sup>74</sup> The ABA has begun to recognize that duties to avoid collateral harm make sense in many contexts, especially when lawyers are uniquely situated to prevent such harm,<sup>75</sup> and it is but a small extension of this philosophy to accord similar concern to environmental protection.

The anthropocentric orientation of legal ethics no longer provides a reason to ignore environmental protection. To the contrary, modern science has shown that environmental harm threatens human health. For example, studies indicate that climate change causes over 100,000 human deaths each year.<sup>76</sup>

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<sup>71</sup> See MODEL RULES OF PROF'L CONDUCT *rr.* 1.6, 1.13.

<sup>72</sup> *Supra* notes 45–47 and accompanying text (discussing reporting requirements for lawyers who are aware of child abuse).

<sup>73</sup> *Supra* notes 49–52 and accompanying text (discussing reporting requirements for lawyers who are aware of a client's fraud involving the financial interests of a third party).

<sup>74</sup> *Supra* notes 54–56 and accompanying text (discussing a proposed amendment to Model Rule 8.4).

<sup>75</sup> For example, ABA Model Rule 8.3(a) imposes a duty on lawyers to report certain categories of misconduct by other lawyers: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES OF PROF'L CONDUCT *r.* 8.3. The justification for this reporting duty seems to rest, at least in part, on a lawyer's unique ability to discern such misconduct and report it without fear of reprisal by the respondents.

<sup>76</sup> The Climate Vulnerability Monitor, a study commissioned by twenty of the world's governments whose nations are most threatened by climate change, indicated that 400,000 annual deaths are attributable to anthropogenic climate change. See *generally* DEV. ASSISTANCE RESEARCH ASSOCS., CLIMATE VULNERABILITY MONITOR: A GUIDE TO THE COLD CALCULUS OF A HOT PLANET (2d ed. 2012), <http://www.daraint.org/wp-content/uploads/2012/09/CVM2ndEd-FrontMatter.pdf> [<http://perma.cc/GU4M-RDE8>] (reporting findings of fifty scientists and policy experts from around the world).

The very first version of the ABA Model Rules recognized the need for disclosure to avoid “death or substantial bodily injury.”<sup>77</sup> While environmental protection does not fit easily within the early exceptions to confidentiality, the duty to protect the environment is a logical extension of these early exceptions.

Even from the dispassionate vantage point of economics, the need for lawyers to protect the environment is manifest. American economists generally prefer to let the market operate freely, but they recognize the need for regulation when there is a market failure.<sup>78</sup> Scholars of legal ethics have noted the predominance of a *laissez-faire*, market-oriented approach, but they too recognize the need for regulation when the “invisible hand” cannot adequately address harmful externalities.<sup>79</sup> Pollution and other environmental harms are the sorts of externalities that economists would generally regard as providing strong grounds to depart from a *laissez-faire* approach.<sup>80</sup>

Another reason for lawyers to accept environmental responsibilities is to keep up with similar professions that are assuming such duties. When doctors, engineers, business executives, and a wide range of other professionals are embracing their ethical obligation to protect the environment,<sup>81</sup> the failure of lawyers to do so is conspicuous. This contrast portends more significant problems than mere shame for lawyers. The legal profession enjoys a valuable quasi-monopoly<sup>82</sup> and the right of self-regulation due to the forbearance of state

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Ten years ago, the World Health Organization (“WHO”) estimated that climate change caused approximately 150,000 human deaths and five million human illnesses per year. Juliet Ellperin, *Climate Shift Tied to 150,000 Fatalities*, WASH. POST (Nov. 17, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602197.html> [<http://perma.cc/R9LF-PZWK>] (reporting findings by WHO, which predicted that the toll could double by the year 2030).

<sup>77</sup> The original version of Model Rule 1.6(b)(1) only allowed disclosure of a “criminal act . . . likely to result in imminent death or substantial bodily harm.” ABA LEGISLATIVE HISTORY, *supra* note 42, at 102. The current version of Model Rule 1.6(b)(1) has extended this language to cover non-criminal acts and to transform the requirement of temporal proximity to one of reasonable certainty. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1); *infra* notes 94–102 and accompanying text.

<sup>78</sup> *E.g.*, DIRK MATEER & LEE COPPOCK, PRINCIPLES OF MICROECONOMICS 212–19 (2013) (discussing the U.S. government’s general response to market failure).

<sup>79</sup> D’Amato & Eberle, *supra* note 31, at 768–69 (recognizing that the economic principles of Adam Smith, and the notion of the “invisible hand,” underlie the current approach to legal ethics, but pointing out that even in the nineteenth century, regulators abandoned the “invisible hand” to protect against harms caused by the uninhibited pursuit of selfish economic interests).

<sup>80</sup> Paul Krugman, an economics professor at Princeton and a regular columnist in the *New York Times*, has explained that, “Externalities like pollution are one of the classic forms of market failure, and Econ 101 says that this failure should be remedied through [government regulation].” Paul Krugman, *Markets Can Be Very, Very Wrong*, N.Y. TIMES (Sept. 30, 2011, 10:30 AM), <http://krugman.blogs.nytimes.com/2011/09/30/markets-can-be-very-very-wrong/> [<http://perma.cc/F2L9-MY6B>].

<sup>81</sup> *Supra* notes 4–9 and accompanying text (noting that other professions have incorporated environmental protection into their ethical codes).

<sup>82</sup> Technically, lawyers do not have a monopoly over the practice of law because laypeople can represent themselves pro se, but lawyers have a quasi-monopoly in the sense that it is difficult for laypeople to provide legal representation of others. See David McGowan, *Is There a Utilitarian Case*



supreme courts and legislatures,<sup>83</sup> but the justices and legislators who have tolerated lawyers' autonomy in the past may grow frustrated with it when lawyers lag behind other professions in taking action to address environmental harm. Perhaps lawyers' refusal to protect the environment could lead state supreme courts and state legislatures to reconsider whether lawyers deserve to regulate themselves.<sup>84</sup>

## II. PROPOSALS FOR NEAR-TERM REFORMS OF THE ABA MODEL RULES

Some proposals to reform the ABA Model Rules are appropriate for immediate adoption. These proposals entail only a modest extension of duties that exist in the Rules already. Section A proposes a change to Rule 1.6 in order to permit revelation of imminent environmental harm.<sup>85</sup> Section B recommends clarifying lawyers' counseling duties with respect to environmental matters.<sup>86</sup> Section C then calls for a higher duty of candor in evaluations lawyers create for use by third parties.<sup>87</sup> Section D continues by proposing a duty to minimize pollution, waste and other environmental harms that are incidental to lawyers' day-to-day activities.<sup>88</sup> Next, section E suggests new training obligations for lawyers with supervisory duties.<sup>89</sup> Section F recommends a redefinition of pro bono service to include work on environmental causes.<sup>90</sup> Section G proposes new conflicts rules for lawyers serving on the boards of environmental advocacy groups.<sup>91</sup> Finally, section H calls for changes to the catch-all rules governing lawyers' conduct outside of their professional activities.<sup>92</sup>

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for *Mandatory Pro Bono?*, LEGAL ETHICS F. (Apr. 19, 2007, 2:52 PM), [http://www.legalethicsforum.com/blog/2007/04/mandatory\\_pro\\_b.html](http://www.legalethicsforum.com/blog/2007/04/mandatory_pro_b.html) [<http://perma.cc/GPS9-FBNN>] (arguing that lawyers do not have a monopoly over the practice of law).

<sup>83</sup> State supreme courts and state legislatures have the power to regulate lawyers or to let lawyers regulate themselves. In addition, both have the power to forbid the unauthorized practice of law and to enforce that prohibition. Thus state supreme courts and legislatures have the discretion to continue or limit the autonomy of the legal profession. See Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3080–83 (2014) (describing the ways in which state supreme courts and state legislatures could, and currently do, regulate lawyers).

<sup>84</sup> Cf. Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2611 (2014) (“The U.S. legal profession’s so-called monopoly on the practice of law is under siege. . . . In some ways, the surprise is not that the monopoly is eroding, but rather, that it has taken so long.”).

<sup>85</sup> See *infra* notes 94–102 and accompanying text.

<sup>86</sup> See *infra* notes 103–109 and accompanying text.

<sup>87</sup> See *infra* notes 110–114 and accompanying text.

<sup>88</sup> See *infra* notes 115–116 and accompanying text.

<sup>89</sup> See *infra* notes 117–119 and accompanying text.

<sup>90</sup> See *infra* notes 120–127 and accompanying text.

<sup>91</sup> See *infra* notes 128–133 and accompanying text.

<sup>92</sup> See *infra* notes 134–138 and accompanying text.

*A. New Exceptions to the Duty of Confidentiality (Rule 1.6)*

The ABA should amend Model Rule 1.6<sup>93</sup> to read as follows<sup>94</sup>:

**Rule 1.6: Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

~~(2)~~ ~~(4)~~ to prevent reasonably certain death or substantial bodily harm;

(3) to prevent imminent, substantial and irreparable environmental damage;

~~(4)~~ ~~(2)~~ to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

~~(5)~~ ~~(3)~~ to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

~~(6)~~ ~~(4)~~ to secure legal advice about the lawyer's compliance with these Rules;

~~(7)~~ ~~(5)~~ to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

~~(8)~~ ~~(6)~~ to comply with other law or a court order; or

~~(9)~~ ~~(7)~~ to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

<sup>93</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013).

<sup>94</sup> Following convention in legislative drafting, this Article will show proposed additions with underlining and proposed deletions with overstriking.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The proposed amendments to Rule 1.6 would provide new opportunities for lawyers to disclose client information in order to prevent ongoing or future environmental harm. While the new version of Rule 1.6 would not treat environmental harm identically to human harm, the amendments would improve the present version in two significant ways.

First, the new Rule 1.6(b)(1) would follow an approach adopted in many states that allows lawyers to reveal client information where necessary to prevent the commission of any crime, even a misdemeanor.<sup>95</sup> States are adding new environmental crimes to their statute books every year,<sup>96</sup> and when a legislature has expressed its judgment that environmental harm is so grave as to warrant a criminal sanction, lawyers should not need to second-guess the urgency of that harm in evaluating whether disclosure is appropriate. Some environmental crimes do not threaten human health, so the new version of Rule 1.6(b)(1) would ensure that lawyers are able to report any imminent criminal act by a client that could harm the environment. The new version of Rule 1.6(b)(1) would apply to all crimes, not just environmental crimes, because there is no principled reason to single out environmental crimes for special treatment under the confidentiality rule.

Second, the new version of Rule 1.6(b)(3) would add a mechanism for reporting noncriminal environmental damage that is “imminent, substantial and irreparable.” The ABA has already recognized that the risk of noncriminal collateral harm to humans should provide a basis for disclosure;<sup>97</sup> the proposed Rule 1.6(b)(3) would extend that same reasoning to noncriminal environmental harm. Just as the current Rule 1.6(b)(1) limits reporting to the most urgent subset of harm to human health—“reasonably certain death or substantial bodily harm”—the proposed Rule 1.6(b)(3) limits reporting to the most urgent subset

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<sup>95</sup> See generally CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2015), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_6.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.authcheckdam.pdf) [<http://perma.cc/EB5N-ZZA6>] (comparing state bars' disclosure grounds under their various analogs to ABA Model Rule 1.6(b)).

<sup>96</sup> *Energy and Environmental Database*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 9, 2015), <http://www.ncsl.org/research/energy/energy-environment-legislation-tracking-database.aspx> [<http://perma.cc/C7PE-BUTQ>] (providing a searchable database of new state legislation related to the environment).

<sup>97</sup> The original version of ABA Model Rule 1.6(b)(1) only permitted disclosure of criminal acts that were “likely to result in imminent death or substantial bodily harm.” ABA LEGISLATIVE HISTORY, *supra* note 42, at 99–104. The current version of ABA Model Rule 1.6(b)(1) extends the exception to cover both criminal and noncriminal acts that are “reasonably certain” to cause death or substantial bodily harm. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1).

of environmental harm. Of course, it will not always be easy to discern when a course of conduct might result in environmental damage that is “imminent, substantial and irremediable,” but lawyers need to make such judgment calls in other contexts, such as the risk of future physical and financial harm to human third parties, and there is no reason to believe that the necessity for speculation will be uniquely onerous in the context of environmental harm. Continuing legal education programs could improve lawyers’ ability to recognize imminent and serious environmental risks. Further, illustrations in the commentary to new Rule 1.6(b)(3) could provide helpful guidance to lawyers.<sup>98</sup>

Some might ask why it is insufficient to rely on lawyers to persuade clients to report environmental risks voluntarily, instead of amending the Model Rules. The answer is that many clients presented with this choice would choose not to report, especially if aware that lawyers had no independent ability to hold clients accountable.<sup>99</sup> By contrast, if lawyers were able to inform clients that lawyers’ ethical rules require disclosure of serious environmental harm, clients might self-report more often.<sup>100</sup>

Admittedly, some lawyers might feel uncomfortable playing the role of environmental whistleblower. But it is important to bear in mind that all the disclosure grounds under Rule 1.6(b), including the proposals set forth in this

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<sup>98</sup> Examples of client conduct warranting disclosure might include the following: (1) a client planning to develop land in another country intends to eradicate habitat and thereby risk extinction of a species; (2) a client intends to deplete a nonrenewable resource in the United States; or (3) a client intends to market a chemical despite in-house studies predicting devastation of certain wildlife populations not protected under the Endangered Species Act.

<sup>99</sup> Elizabeth Glass Geltman, *Environmental Ethics in an Era of Fiscal Austerity*, SB52 ALI-ABA 749, 752 (1997). In fact,

Environmental lawyers are frequently confronted with the situation in which a client is unwilling to report an environmental incident or in which the lawyer believes the client is either morally or legally required to report. The obvious solution to this problem is, of course, for the lawyer to try to convince the client to report. . . . Nonetheless, despite the best efforts of certain lawyers, some clients will err on the side of not reporting.

*Id.*

<sup>100</sup> At a minimum, the addition of environmental harm to the list of consequences permitting disclosures affords the lawyer a stronger bargaining position in negotiations with a client contemplating an environmentally destructive course of conduct. Admittedly, a requirement of mandatory disclosure would go too far, leaving the lawyer only two extreme options: obtain the client’s full compliance in halting all dangerous behavior, or disclose otherwise-confidential information. A permissive rule, however, allows the lawyer to negotiate for, and accept, a compromise solution with the client. *See* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 484 (2006). As one scholar explained,

[A] lawyer who threatens to disclose because an ethics rule says she must should not be able to be persuaded to forego disclosure on any basis other than that the client will correct the problem to the lawyer’s satisfaction. If the rule is discretionary, however, the lawyer arguably is authorized to accept a compromise solution . . . .

*Id.*

Article, are permissive rather than mandatory. In other words, Rule 1.6(b) does not require a lawyer to disclose when one of the circumstances identified under Rule 1.6(b) arises. The possibility of third-party suits may create added pressure when lawyers are aware that a client could harm humans,<sup>101</sup> but such pressure would be much lower in the context of environmental harm due to limitations on nonhuman standing.<sup>102</sup> In sum, this Article's proposed modifications to Rule 1.6(b) would equip conscientious lawyers to report imminent environmental harm, but would not create any new obligations for lawyers who are reluctant to play that role.

### *B. Expanded Duty of Counseling (Rules 2.1 and 2.2)*

The ABA should amend Model Rule 2.1<sup>103</sup> to read as follows:

#### Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, ~~and~~ political, and environmental factors, that may be relevant to the client's situation.

In addition, the following language should appear in ABA Model Rule 2.2, which is presently just a placeholder with no text:

#### Rule 2.2: Counseling Regarding Environmental Risks

When a lawyer has knowledge that the lawyer's client is engaged, has engaged, or plans to engage in a course of conduct that is likely to result in imminent, substantial and irreparable environmental damage, the lawyer shall promptly inform the client of this risk and of any alternative courses of action that could avoid or significantly mitigate the risk. The client's unwillingness to pay for such counseling shall not relieve the lawyer of the obligation to provide at least a brief written statement to the client in compliance with this Rule.

The two proposed changes would improve environmental counseling in two ways. First, the proposed amendment to Rule 2.1 would make clear that lawyers may bring up environmental considerations in their counseling of clients. To be sure, the present version of Rule 2.1 might very well allow lawyers to voice their environmental concerns under the rubric of "moral," "social," or

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<sup>101</sup> Cf. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 353 (Cal. 1976) (holding that mental health professionals have a duty to protect third parties whom a client has indicated he may imminently harm).

<sup>102</sup> Wise, *supra* note 62, at 1280–84.

<sup>103</sup> See MODEL RULES OF PROF'L CONDUCT r. 2.1.

“political” considerations, but the express inclusion of environmental issues among the list of permissible topics for counseling would increase the likelihood that such issues are on the checklist of every lawyer who counsels a client.

The more significant change is the addition of proposed Rule 2.2. Interestingly, this new rule would occupy a void resulting from the deletion of former Rule 2.2, which regulated lawyers who acted as intermediaries between their clients and third parties.<sup>104</sup> The ABA deleted that version of Rule 2.2 because it did not comport with the longstanding ideal of loyalty to a single client.<sup>105</sup> Now that the ABA has begun to reduce its insistence on partisanship,<sup>106</sup> it is fitting to restore a version of Rule 2.2 that takes account of extrinsic duties to the environment.

The new Rule 2.2 would require that lawyers counsel their clients concerning a course of conduct likely to result in imminent, substantial and irreparable environmental harm. The imposition of such a counseling duty would make sense if the ABA were to adopt the proposed version of Rule 1.6(b)(3), which would allow lawyers to disclose client information in order to prevent this category of environmental harm. Stated another way, the rules should require lawyers to give fair warning to their clients before lawyers disclose client information.

Some critics of the proposal might protest the asymmetry between mandatory discussions under Rule 2.2 and permissive disclosure under Rule 1.6(b)(3), but the same asymmetry now exists for lawyers representing organizational clients under Rule 1.13. These lawyers have a mandatory duty to report evidence of certain misconduct to supervisory personnel within the organization, but Rule 1.13 makes external disclosure permissive rather than mandatory.<sup>107</sup> The proposed Rule 2.2 may seem unusually burdensome in that it re-

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<sup>104</sup> The former version of Rule 2.2 set forth the duties of a lawyer acting as an intermediary between clients. See *ABA Model Rules of Professional Conduct*, *supra* note 65 (providing the text of former Rule 2.2).

<sup>105</sup> ETHICS 2000 COMM’N, AM. BAR ASS’N, MODEL RULE 2.2 REPORTER’S EXPLANATION OF CHANGES, available at [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule22rem.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule22rem.html) [<http://perma.cc/63QW-A5S7>] (recommending deletion of ABA Model Rule 2.2 because lawyers’ duties of loyalty to clients fit better under partisan rules such as 1.7).

<sup>106</sup> *Supra* notes 42–56 and accompanying text (discussing the ABA’s changing view of a lawyer’s roles as a partisan).

<sup>107</sup> Model Rule 1.13 provides, in pertinent part, as follows:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the law-

quires lawyers to counsel clients about environmental harm even if the clients refuse to pay for that counseling, but the same type of discussions are necessary under Rule 1.13, even when organizational clients have fired their lawyers.<sup>108</sup> In any event, counseling about environmental harm could take the form of a letter based on a template supplied by the ABA, so the task would not entail a significant commitment of a lawyer's time.<sup>109</sup>

### *C. Heightened Candor in an Evaluation for Use by a Third Party (Rule 2.3)*

The ABA should amend Model Rule 2.3<sup>110</sup> as follows:

#### Rule 2.3: Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

yer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

MODEL RULES OF PROF'L CONDUCT r. 1.13(b)–(c).

<sup>108</sup> Model Rule 1.13(e) provides as follows:

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

*Id.* r. 1.13(e).

<sup>109</sup> *E.g.*, *Center for Professional Responsibility*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility.html](http://www.americanbar.org/groups/professional_responsibility.html) [<http://perma.cc/AVE5-HWTQ>] (providing various resources for practitioners); *see also LP Forms Bank*, AM. BAR ASS'N, [http://www.americanbar.org/groups/law\\_practice/resources/forms\\_bank.html](http://www.americanbar.org/groups/law_practice/resources/forms_bank.html) [<http://perma.cc/2W4U-HUHJ>] (selling forms and templates for use in legal practice).

<sup>110</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 2.3.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

(d) When a lawyer provides an evaluation for use by a third person, all representations in such an evaluation concerning the occurrence or potential occurrence of environmental harm shall be deemed material for purposes of Rule 4.1.

In its present form, Rule 2.3 is highly partisan. The rule stresses the duties that the lawyer owes to the client paying for the evaluation, but the rule imposes no duties with respect to the audience for the evaluation. In many cases, the default duties owed to the audience are simply those set forth in the notoriously permissive Rule 4.1, which forbids deceit as to “material” matters.<sup>111</sup> The commentary to 4.1 exempts from the definition of “material” any statement regarding the value of something under negotiation.<sup>112</sup> In sum, the present version of Rule 2.3 imposes a high duty of loyalty to the client for the report, and a low duty of candor to the third party reading the report.

The partisanship reflected in the current Rule 2.3 is problematic with respect to evaluations regarding the potential for environmental contamination. For example, if a corporation is selling former industrial land to a party with more limited resources, the seller might prepare a report indicating that the site has high value. Because estimates of value are per se immaterial under Rule 4.1,<sup>113</sup> the lawyer authoring the report arguably would not violate the current version of Rule 2.3 even if the report underestimated the risk of environmental contamination. The unwary buyer would bear cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act

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<sup>111</sup> Model Rule 4.1, titled “Truthfulness in Statements to Others,” provides as follows:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

*Id.* r. 4.1.

<sup>112</sup> Comment 2 to Model Rule 4.1 provides as follows:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

*Id.* r. 4.1 cmt. 2.

<sup>113</sup> *Id.* r. 4.1.



("CERCLA") and might very well go bankrupt,<sup>114</sup> which could delay or even thwart remediation of the environmental contamination at the property.

The proposed amendment to Rule 2.3 would necessitate heightened care by lawyers otherwise tempted to neglect or minimize the disclosure of environmental harm in reports to third parties. The revised version of Rule 2.3 would also make clear that all representations relating to environmental harm are necessarily material and are therefore subject to the candor requirements in Rule 4.1. Currently, a lawyer who purposefully makes a false or misleading statement pertaining to environmental contamination would be able to raise the defense that reasonable people do not ordinarily rely on such statements. To the contrary, the new rule would provide that reliance on lawyers' representations concerning environmental harm is reasonable.

#### *D. Reconceptualization of Third-Party Harm (Rule 4.4)*

The ABA should amend Model Rule 4.4<sup>115</sup> to read as follows:

Rule 4.4: Respect for the Environment and for the Rights of Third Persons

(a) A lawyer shall not engage in conduct that entails the consumption of resources, the generation of waste, the discharge of pollution or any other degradation of the environment in a manner that is grossly disproportionate to the importance of the conduct in advancing a client's interests or otherwise promoting the interests of justice.

(b) ~~(a)~~ In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(c) ~~(b)~~ A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

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<sup>114</sup> See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675). Kathleen Segerson at the University of Connecticut has pointed out that, under CERCLA, any owner of contaminated property, including the most recent purchaser, could potentially be required to bear all the costs of remediating historical contamination, although the current owner could bring a lawsuit to seek contribution from a prior owner who caused the problem. See KATHLEEN SEGERTON, REDESIGNING CERCLA LIABILITY: AN ANALYSIS OF THE ISSUES 11–13 (1995), <http://reason.org/files/aea662eb74beed0ef17df16a50cac3e4.pdf> [<http://perma.cc/ETU4-GP5Y>] (discussing joint and several liability and the right of contribution).

<sup>115</sup> See MODEL RULES OF PROF'L CONDUCT r. 4.4.

As presently written, Rule 4.4 addresses collateral harm to humans. The ABA is currently contemplating additional requirements under Rule 8.4 that would forbid verbal or written advocacy by lawyers offending the dignitary interests of human third parties.<sup>116</sup> Such rules are a welcome addition to the ethics code, but they should not be the full extent of the ethical regulations forbidding collateral harm.

As part of the comprehensive amendments that promote a lawyer's cognizance of environmental harm, it is appropriate to amend Model Rule 4.4 so that a lawyer's conduct that leads to unnecessary environmental degradation is off limits to the same extent as conduct that harms human third parties. The language in the proposed Rule 4.4(a) extends beyond the terminology used in the above-listed amendments to Rule 1.6—"imminent, substantial and irreparable environmental damage"—to cover a much wider range of environmental harm, including excessive consumption of resources, generation of waste, and discharge of pollution. This wider coverage reflects the comparatively wider scope of impermissible human harm under the current Rule 4.4(a) as opposed to the current Rule 1.6(b). Third-party harm justifying abrogation of confidentiality is generally more urgent than the third-party harm cognizable under the current Rule 4.4(a), which is basically just a balancing test inquiring into the necessity for legal tactics that cause collateral damage.

*E. New Training Obligations for Supervisors (Rules 5.1 and 5.3)*

The ABA should amend Model Rule 5.1<sup>117</sup> to read as follows:

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct, and that all the lawyers in the firm minimize the consumption of resources, the generation of waste, the discharge of pollution, or any other degradation of the environment.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct, and that the other lawyer minimizes the consumption of resources, the generation of

<sup>116</sup> *Supra* notes 54–56 and accompanying text (discussing the ABA's proposed amendments to Model Rule 8.4).

<sup>117</sup> See MODEL RULES OF PROF'L CONDUCT r. 5.1.

waste, the discharge of pollution, or any other degradation of the environment.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Additionally, the ABA should amend Model Rule 5.3<sup>118</sup> to read as follows:

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer, and that the person minimizes the consumption of resources, the generation of waste, the discharge of pollution, or any other degradation of the environment;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer, and that the person minimizes the consumption of resources, the generation of waste, the discharge of pollution, or any other degradation of the environment; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time

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<sup>118</sup> See *id.* r. 5.3.

when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The necessity for these two amendments is self-evident. As part of the overhaul promoting a lawyer's sensitivity to environmental interests, it is important to require training and supervision that comports with the new expectations. The proposed amendments to Model Rule 5.1 set forth duties for supervisors of lawyers. Amendments to Model Rule 5.3 are also appropriate so that nonlawyers working at firms receive the training and guidance necessary to improve environmental protection. Lawyers and law firms are capable of causing a great deal of environmental damage through excessive photocopying, overconsumption of power, failure to recycle, and unnecessary travel that results in a high volume of carbon emissions.<sup>119</sup> Lawyers involved in supervision and training should be mindful of these potential risks as they set the expectations for subordinates' conduct.

#### *F. Redefinition of Pro Bono Service (Rule 6.1)*

The ABA should amend Model Rule 6.1<sup>120</sup> to read as follows:

##### Rule 6.1: Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay, and to provide legal services that improve the protection of the environment. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) assist persons of limited means; ~~or~~
- (2) assist with protecting the environment; ~~or~~
- (3) ~~(2)~~ support the work of charitable, religious, civic, community, governmental and educational organizations in matters that are de-

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<sup>119</sup> Although the ABA has not attempted to quantify the extent of wasteful practices by law firms, the ABA's Law Practice Division has stressed the importance of implementing sustainable practices in firms. In 2010, the Law Practice Division adopted a Model Policy on Sustainability. COUNCIL OF THE ABA SECTION OF ENV'T, ENERGY & RES., AM. BAR ASS'N, FINAL ABA SEER SUSTAINABILITY FRAMEWORK FOR LAW ORGANIZATIONS 1 (2010), <http://apps.americanbar.org/environment/committees/climatechange/ModelLaw/ModelSustainabilityPolicy.pdf> [<http://perma.cc/4LJT-F9PL>]. The ABA also has helped to nurture a Law Firm Sustainability Network, through which leaders of firms share tips and best practices. Joe Dysart, *Going Green: Network Grows Even More Ecological Ideas*, ABA J., Feb. 2014, at 30, 30 ("The network holds monthly webinars focusing on tactics to foster a specific facet of green consciousness . . ."). So far, however, the ABA has focused on precautionary strategy and has not proposed to elevate the principle of sustainability to the black letter provisions of the Model Rules.

<sup>120</sup> See MODEL RULES OF PROF'L CONDUCT r. 6.1.

signed primarily to address the needs of persons of limited means, or to protect the environment; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means or that provide legal services for the purpose of protecting the environment.

The problem with the current version of Model Rule 6.1 is that it relegates environmental advocacy to the second tier of pro bono work. The ABA exhorts lawyers to provide at least fifty hours of pro bono service per year, and indicates that lawyers should devote the "substantial majority" of these hours to direct representation of poor people or assistance to organizations that represent the poor. The commentary to Model Rule 6.1 mentions environmental work as a category of pro bono service, but says that this work falls into the disfavored category that lawyers should attend to only after fulfilling their minimum obligation of twenty-six hours to assist indigent clients.<sup>121</sup>

There is no statistical evidence indicating whether this bifurcation of pro bono service has reduced pro bono work on behalf of the environment, but such an inference is reasonable. Firms that aspire to satisfy Rule 6.1 will naturally steer their lawyers toward legal work that assists low-income clients rather than environmental causes. Some lawyers still choose to focus their volunteer work on environmental issues, but they face the disincentive that this work is not cognizable under Rule 6.1 to the extent that it exceeds twenty-four hours per year. A lawyer who wants to devote fifty hours of pro bono service will need to add an extra twenty-six hours of service to the indigent if that lawyer wants to meet the targets set forth in Rule 6.1. The rule is aspirational, of

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<sup>121</sup> Comment 6 to ABA Model Rule 6.1 provides, in pertinent part: "[I]ssues that may be addressed under [paragraph (b)(1)] include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups." *Id.* r. 6.1 cmt. 6.

course, but to the extent that lawyers feel bound to follow it, the rule imposes a twenty-six hour “tax” on environmental pro bono work.

The ABA’s preference for poverty-related pro bono work is understandable, but it is no longer appropriate for several reasons. First, the government currently pays for legal assistance to the poor in both criminal<sup>122</sup> and civil<sup>123</sup> cases, and the government should pay for more,<sup>124</sup> just like the government pays for medical assistance to the poor.<sup>125</sup> There is, however, no government program that pays for legal representation of environmental interests. To the contrary, state governments have threatened to withhold funding from public law schools’ housing clinics that advocate for the environment.<sup>126</sup> Furthermore, environmental problems harm poor people much more than middle-class and wealthy people.<sup>127</sup> The notion that advocacy for the poor is distinct from advo-

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<sup>122</sup> The federal and state governments have borne the expense of indigent defense in criminal prosecutions for felonies since the U.S. Supreme Court’s ruling in *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963) (holding that the right to a fair trial, applicable to the states under the Fourteenth Amendment, requires the government to provide legal representation to the poor in criminal matters).

<sup>123</sup> The Legal Services Corporation (“LSC”), funded by an appropriation from Congress, allocates this revenue to local legal aid organizations that help needy clients in civil cases. See *How We Work*, LEGAL SERVS. CORP., <http://www.lsc.gov/what-legal-aid/how-we-work> [<http://perma.cc/7573-74ZU>]. To be sure, even the LSC acknowledges that the funding it provides is insufficient to meet the demand for such services. *White House Forum on Increasing Access to Justice: Remarks by U.S. Attorney General Eric Holder*, LEGAL SERVS. CORP. (Apr. 14, 2015), <http://www.lsc.gov/media-center/galleries-multimedia/video/white-house-forum-increasing-access-justice-remarks-us> [<http://perma.cc/GD53-7TRP>]. The fact remains, however, that government funding is presently available for the representation of the poor, while government funding is not generally available for the representation of environmental interests. Of course, the progressive community does not need an internecine conflict between advocates for the poor and advocates for the environment; the preferable solution would be to provide adequate funding for both categories of cases.

<sup>124</sup> See generally Bernice K. Leber, *The Time for Civil Gideon Is Now*, 25 TOURO L. REV. 23 (2009) (offering a compelling argument in favor of a “Civil Gideon”).

<sup>125</sup> Tom Lininger, *Deregulating Public Interest Law*, 88 TULANE L. REV. 727, 770 (2014). As this author has noted elsewhere,

The legal needs of the poor are not solely the problem of lawyers, any more than the medical needs of the poor are solely the problem of doctors. Just as Congress decided to pay for Medicare and Medicaid from general tax revenues, so should Congress take concerted action to ensure that all poor people have reasonable access to publicly funded attorneys who specialize in poverty law.

*Id.*

<sup>126</sup> Robert Kuehn & Peter Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1981–90 (2003) (discussing attempts by state officials to dissuade law school clinics from representing environmental issues, and indicating that such interference has discouraged proactive environmental advocacy at other schools’ clinics even in the absence of direct interference by state officials).

<sup>127</sup> For example, experts agree the problem of anthropogenic climate change will have much more severe consequences for populations in developing countries than for populations in the developed world. *E.g.*, J. Samson et al., *Geographic Disparities and Moral Hazards in the Predicted Impacts of Climate Change*, 20 GLOB. ECOLOGY & BIOGEOGRAPHY 532, 537–38 (2011); see also Frances Moore et al., *Temperature Impacts on Economic Growth Warrant Stringent Mitigation Policy*, 5 NATURE CLIMATE

cacy for the environment is a relic from the 1980s that does not make sense in modern times.

*G. Relaxed Conflict Rule for Board Service (Rule 6.3)*

The ABA should amend Model Rule 6.3<sup>128</sup> to read as follows:

Rule 6.3: Membership in Legal Services Organization

(a) A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(1) ~~(a)~~ if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or  
(2) ~~(b)~~ where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

(b) For purposes of this rule, the term "legal services organization" includes any nonprofit organization that represents clients in order to promote the public interest, but does not include a law reform organization, which is addressed in Rule 6.4.

Rule 6.3 encourages lawyers to serve on the boards of nonprofit organizations, notwithstanding the possibility that a lawyer's "nine-to-five" work might create, or might appear to create, occasional conflicts vis-à-vis the clients of the organization.<sup>129</sup> Rule 6.3 makes clear that conflicts will not arise solely be-

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CHANGE 127–31 (2015) (finding that the disparity in impact on rich and poor countries will be much greater than originally estimated). Similarly, the environmental justice movement in the United States has demonstrated that environmental problems such as harmful emissions by industry or leaching of toxins from hazardous waste dumps are more likely to occur in close proximity to low-income populations than to middle-class or wealthy populations. Bill Chameides, Dean of Duke University's Nicholas School of the Environment, has commented on the disproportionate hazards to non-white, poor Americans. Bill Chameides, *A Look at Environmental Justice in the United States Today*, HUFFINGTON POST (Jan. 20, 2014, 3:52 PM), [http://www.huffingtonpost.com/bill-chameides/a-look-at-environmental-j\\_b\\_4633223.html](http://www.huffingtonpost.com/bill-chameides/a-look-at-environmental-j_b_4633223.html) [http://perma.cc/2QMZ-25LG].

<sup>128</sup> See MODEL RULES OF PROF'L CONDUCT r. 6.3.

<sup>129</sup> ABA CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 504 (6th ed. 2007). As the Annotated Rules explain,

To encourage lawyers to serve as members, officers, and directors of legal services organizations, Rule 6.3 specifies that such service is not to be used as ammunition to disqualify lawyers from representing clients in the normal course of their practices. Otherwise, membership in legal services organizations would expose lawyers to so many disqualifying conflicts that recruitment would become very difficult.

cause of board service, because clients of the nonprofit organization are not necessarily clients of a lawyer serving on the nonprofit's board.<sup>130</sup>

Unfortunately, the present version of Rule 6.3 seems to limit its scope to legal services organizations that represent indigent clients. Although the black letter language does not mention such a limitation, interpretations by the ABA suggest that the rule only applies to organizations serving the poor.<sup>131</sup> As a result, lawyers who serve on boards of nonprofit groups that advocate for the environment, or that promote the public interest in other ways, cannot be sure they are safe from conflicts of interests arising from their board service and their representation of clients whose interests may be contrary to those of the nonprofit organization.

Extending Rule 6.3 to a broader range of nonprofit organizations is important because those organizations need to recruit board members who are able to represent clients with conflicting interests. Such board members may help to legitimize a nonprofit in the eyes of the public. Board members who work primarily as attorneys for business clients might be valuable fundraisers. Indeed, the fact that some board members may occasionally represent adversarial interests could provide the nonprofit boards with general insights that could guide the formulation of general policy for dealing with such interests (although, of course, any board member with a direct conflict as to a particular policy matter would need to recuse himself or herself pursuant to Rule 6.3(a)(2)).

The proposed amendment to Rule 6.3 attempts to realize the promise of this rule as a general incentive for service on nonprofit boards. The amendment would not simply extend the rule's coverage to environmental nonprofits, but also to all other nonprofits that promote the public interest. No amendment to the parallel Rule 6.4<sup>132</sup> is necessary, however, because that rule does not use the term "legal services organization."

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*Id.* See generally DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS (2005) (arguing that calibration of conflict rules might encourage pro bono service by lawyers).

<sup>130</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (holding that for conflicts purposes, only the organization's staff lawyers represent the organization; board members do not interact directly with the clients of the organization and therefore do not represent them).

<sup>131</sup> ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 129, at 503 ("The Model Rules do not define 'legal services organization,' but the phrase seems to mean pro bono organizations that provide legal services to the disadvantaged."). For example, comment 4 to Model Rule 1.0 (the glossary for the Model Rules) uses the term "legal aid" interchangeably with the term "legal services organization." See MODEL RULES OF PROF'L CONDUCT r. 1.0 cmt. 4.

<sup>132</sup> Model Rule 6.4 provides as follows:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client



The wider application of Rule 6.3 should not cause a division of loyalty that impairs lawyers' work for their clients. The residual conflicts provision in Rule 1.7(a)(2) would still serve as a safeguard for such lawyers, preventing them from representing any client if their loyalty to another interest—including to a nonprofit organization—would create a “significant risk of material limitation” with respect to the client.<sup>133</sup>

*H. New Standard for Conduct Unbecoming a Lawyer (Rule 8.4)*<sup>134</sup>

The ABA should amend Model Rule 8.4<sup>135</sup> to read as follows:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a ~~criminal act~~ tort or violation of civil or criminal law that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

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may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

MODEL RULES OF PROF'L CONDUCT r. 6.4.

<sup>133</sup> Model Rule 1.7(a) provides as follows:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

*Id.* r. 1.7(a).

<sup>134</sup> Of course, the phrase “conduct unbecoming a lawyer” does not appear anywhere in the ABA Model Rules. This phrase derives from Article 133 of the Uniform Code of Military Justice, which penalizes “conduct unbecoming an officer and a gentleman.” UNIFORM CODE OF MILITARY JUSTICE art. 133, 10 U.S.C. § 933 (2012). In the instant context, the phrase “conduct unbecoming a lawyer” is a useful shorthand for the much more cumbersome language in Rule 8.4(b) (indicating that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects”) and Rule 8.4(c) (indicating that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”). MODEL RULES OF PROF'L CONDUCT r. 8.4(b)–(c).

<sup>135</sup> See MODEL RULES OF PROF'L CONDUCT r. 8.4.

- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The current version of Model Rule 8.4(b) mentions criminal acts that might necessitate review of a lawyer's fitness to practice law. The ABA should expand the language of Rule 8.4(b) to cover common law torts and violations of civil law that might also cast doubt on the lawyer's worthiness to continue in the profession. Intentional and severe degradation of the environment might very well raise questions about fitness to continue as a lawyer—a position of public trust, and a position that is tantamount to service as an officer of the court. Due to the underdevelopment and infrequent enforcement of criminal environmental law,<sup>136</sup> many categories of environmental degradation are presently only actionable as torts or as violations of civil law.<sup>137</sup> A lawyer who evades criminal sanctions should not be able to also dodge accountability for his or her misdeeds under Rule 8.4(b). The most important consideration should be the extent of the misjudgment demonstrated by the attorney, not the particular forum of the legal action seeking remedy or punishment for the lawyer's misconduct.

Some might question whether the proposed version of Rule 8.4(b) would capture too much conduct. The proposed language would apply not only to environmental torts and violations of civil environmental law, but also to any other category of tort or civil violation. This more general application is necessary because there is no principled reason to take account of noncriminal mis-

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<sup>136</sup> See STUART BELL ET AL., ENVIRONMENTAL LAW 311 (8th ed. 2013) (mentioning that, within the European Union, environmental criminal law is “relatively underdeveloped in comparison with other areas of environmental law”); Charles Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L.J. 1, 2 (2004) (indicating that criminal prosecutions are still fairly novel among the range of possible legal responses to environmental harm); Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental Law and Criminal Law Theory*, 71 TULANE L. REV. 487, 488 (noting that “environmental crime is relatively new”).

<sup>137</sup> For example, a nuisance action in tort, or a suit for violating a civil statute, may be the only response to a brazen and egregious act of environmental contamination such as repeated dumping of hazardous waste on the property of another. Even if a criminal statute—such as the state analog to the Resource Conservation and Recovery Act—might apply in such a case, local prosecutors might exercise discretion to refrain from filing charges, perhaps due to their inexperience with environmental matters or their desire to prosecute other categories of crime that they deem more urgent. See Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2012)). See generally Babbitt et al., *supra* note 136, at 4–10 (observing that prosecutorial discretion has played a very significant role in determining whether environmental harm results in criminal charges). In theory, the current version of Rule 8.4(b) might potentially apply to uncharged conduct that technically violates a criminal statute, but in that context unconvicted conduct is less likely to come to the attention of state bars and will require more investigative work by bar officials.

conduct that involves mistreatment of the environment while ignoring other noncriminal conduct involving mistreatment of children, intimate partners, the elderly, and others. In any event, a tort suit or alleged civil law violation will only lead to discipline under the revised Rule 8.4(b) if the conduct at issue “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Apparently the filter provided by this quoted clause has operated reliably enough over the last three decades while the coverage of Rule 8.4(b) has extended to *any* criminal act—even misdemeanors.<sup>138</sup> Surely there are torts and civil law violations that deserve consideration under Rule 8.4(b) to the same extent as misdemeanors.

Additionally, the commentary to Model Rule 8.4 should indicate that a lawyer who commits a tort or violates civil law and thereby causes substantial environmental harm might deserve discipline under Rule 8.4(b). The environment, like some abused children or senior citizens, cannot speak up to end the victimization, and that is precisely why the lawyer, as an officer of the court, bears a unique duty to act for the protection of the defenseless. Abdication of that duty could indicate unfitness to continue in the practice of law.

### III. MORE RADICAL IDEAS FOR CHANGES TO THE MODEL RULES

Admittedly, none of the ideas set forth below is presently ready for adoption. The goal in presenting these more inchoate ideas here is to spur discussion that might eventually culminate in viable proposals. Section A considers the possibility of banning positional conflicts.<sup>139</sup> Section B next examines whether a more lenient rule against frivolous claims would be appropriate.<sup>140</sup> Section C then contemplates the possibility of imposing a duty on lawyers to report environmental risks to the tribunal.<sup>141</sup> Section D evaluates the possible benefits of permitting for-profit solicitation.<sup>142</sup> Finally, section E considers the potential value of environmental scorecards for firms.<sup>143</sup>

#### *A. A Ban on Positional Conflicts (Rule 1.7)*

Consider the possible benefits (and harms) of amending Model Rule 1.7<sup>144</sup> to read as follows:

Rule 1.7: Conflict of Interest: Current Clients

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<sup>138</sup> Rule 8.4(b) has existed in its current form since 1983. *ABA Model Rules of Professional Conduct*, *supra* note 65 (providing the 1983 and 2013 versions of Model Rule 8.4(b)).

<sup>139</sup> *See infra* notes 144–154 and accompanying text.

<sup>140</sup> *See infra* notes 155–164 and accompanying text.

<sup>141</sup> *See infra* note 165 and accompanying text.

<sup>142</sup> *See infra* notes 166–175 and accompanying text.

<sup>143</sup> *See infra* notes 176–182 and accompanying text.

<sup>144</sup> *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by any the following: the lawyer's responsibilities to another client, a former client or a third person; ~~or~~ by a personal interest of the lawyer; or by the lawyer's past or present advocacy of a position inconsistent with the position that the lawyer would foreseeably need to take if the lawyer represented one or more clients in the instant matter.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Arguably, there might be some benefit in requiring lawyers to take consistent positions in their advocacy activities, especially in a relatively new field such as environmental law. The dearth of case law in such a field heightens the precedential significance of each new ruling, and may create an incentive for a lawyer to skew advocacy on behalf of one client in order to establish a precedent favorable to another client with different interests. For example, when a lawyer does pro bono work for a plaintiff seeking strict enforcement of environmental laws, and the lawyer generally does paid work for defendants seeking to weaken enforcement of these laws, that lawyer might perhaps have stronger loyalty to the paying clients. Therefore, the lawyer might approach the plaintiff's work with diminished zeal or might forego certain strategies that could eventually redound to the detriment of the paying clients. Even a lawyer who does not feel such a division of loyalty might lose credibility when arguing that a judge should adopt a different position from the one that the lawyer advocated in a prior hearing before the same judge. For example, if a lawyer usually works for industrial polluters, that lawyer might seem disingenuous when bringing a lawsuit on behalf of a neighbor of a factory (not represented by the same lawyer) emitting the same type of pollution emitted by the law-

yer's clients. Perhaps lawyers would be better advocates for their clients if the ABA adopted an amendment to Rule 1.7(a)(2) as proposed herein.<sup>145</sup>

Beyond the benefit of ensuring the "purity" of advocacy, there might be some benefit in imposing costs for side-switching: lawyers and firms might not want to commit permanently to opposing the cause of environmental protection.<sup>146</sup>

Although there is some intuitive appeal to the argument for substantive consistency, the argument has several flaws. First, Rule 1.7(a)(2) already extends to any circumstances that could give rise to a "significant risk" of material limitation, and positional conflicts are cognizable under—if not explicitly recognized by—the present version of Rule 1.7(a)(2).<sup>147</sup> Second, there is little

<sup>145</sup> The proposed requirement of greater consistency in advocacy is not necessarily inconsistent with the proposal in Part II, section G, to liberalize the conflict-of-interest rule for a lawyer who generally represents defendants in a certain category of cases but wants to serve on the board of directors for a legal services organization that generally represents plaintiffs in the same category of cases. See *supra* notes 129–133 and accompanying text. As noted previously, the ABA has issued an ethics opinion indicating that a lawyer who serves on a board of directors for an organization is not representing the clients of that organization, and in any event, that lawyer would need to recuse himself or herself from the organization's discussion of matters in which the lawyers' clients might have material interests. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 334 (1974); *supra* note 130 and accompanying text.

<sup>146</sup> Among other problems, a firm that must commit to representing only defendants in environmental litigation might have trouble recruiting idealistic law students. Cf. John E. Bonine, *The Divergent Paths of Environmental Law Practice: A Reply to Professor Manaster*, 28 PACE ENVTL. L. REV. 265, 276 (2010) (suggesting that firms might not want to reveal to prospective job applicants that the firms "generally and habitually refuse to offer their services to citizen groups on significant environmental matters").

<sup>147</sup> Comment 24 to ABA Model Rule 1.7 includes language indicating that a positional conflict might possibly rise to a level that could require disqualification under Rule 1.7(a)(2):

A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 24. As one scholar explained,

[A] positional conflict is not a per se ethical violation, but may become a conflict of interest if the issue is important enough to the clients and there is a risk that one representation will materially limit the other; for example, by leading to precedent from one case that will adversely control the other . . . .

Helen Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: "A Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 3 (2006).

need for a stricter ethical rule on positional conflicts because firms have a self-ish economic interests in avoiding such conflicts.<sup>148</sup> Third, if an express rule against positional conflicts led to the disqualification of more potential pro bono lawyers, the representation of environmental plaintiffs would dwindle.<sup>149</sup> Fourth, the ABA generally does not impute to lawyers the positions that their clients take,<sup>150</sup> so strict enforcement of a rule against positional conflicts would be inconsistent with the overall tenor of the current rules. Fifth, there could be many harmful consequences if the ABA penalized side-switching based on substantive positions taken by lawyers rather than based on the representation of particular parties: lawyers would only be able to handle a narrow range of cases, the compartmentalization of the bar might cause greater acrimony between lawyers,<sup>151</sup> and the conflicts rules might constrain lawyers' freedom of expression.<sup>152</sup>

Perhaps the most prudent near-term approach would be to retain the present black letter language in Rule 1.7, but amend the commentary to draw more attention to the potential harm that positional conflicts could cause. The present language in comment 24 to Model Rule 1.7 seems too dismissive of

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<sup>148</sup> Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2393 (2010) (indicating that firms take far fewer environmental pro bono cases than other categories of pro bono cases due to concerns about alienating present and future business clients); see Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2448 (2010) (noting that firms representing business clients rarely take on environmental pro bono matters); Bonine, *supra* note 146, at 273–74 (contending that the reason why business law firms decline environmental pro bono work is not “an ethical judgment but a business judgment”); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *STAN. L. REV.* 1395, 1414 (1998) (indicating that environmental matters are among the categories of pro bono work that private firms refuse to do).

<sup>149</sup> There is a longstanding debate about whether the quantity or quality of pro bono representation is more important. See, e.g., Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 *NW. U. L. REV.* 1343, 1356 (2007) (arguing that increasing the quantity of pro bono hours is more important than ensuring that all pro bono attorneys perform their duties optimally).

<sup>150</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”); Spaulding, *supra* note 148, at 1422 (noting that in the traditional conception of legal representation, it is the client who takes a position, and the lawyer is a mere conduit for the client’s position).

<sup>151</sup> For further development of this point, see *infra* notes 196–199 and accompanying text.

<sup>152</sup> Sande L. Buhai, *Lawyers and the First Amendment: Conflict Between Former Clients and Personal Speech*, 83 *U. CIN. L. REV.* 73, 75 (2014). This can happen, for example,

If an attorney with a multinational law firm is barred from speaking publicly as a citizen about any issue in which one of the firm’s many clients has an interest—such as abortion, global warming, tax policy, or defense spending—she runs a disciplinary risk if she speaks as a citizen about anything. Indeed, such rules, if expansively enforced, might effectively silence most big-firm attorneys for life.

positional conflicts. The first two sentences of comment 24 to Model ABA Rule 1.7, however, provide as follows:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.<sup>153</sup>

Rather than indicate at the outset that positional conflicts are generally inconsequential, the commentary should indicate that positional conflicts, like the third-party interests listed in the black letter language of Rule 1.7(a)(2), will require disqualification whenever they create a significant risk of material limitation. The commentary should also list the factors that are relevant to assessing whether such a risk exists to provide necessary guidance.<sup>154</sup>

#### *B. A More Lenient Rule Against Frivolous Claims (Rule 3.1)*

Consider the possible benefits (and harms) of amending Model Rule 3.1<sup>155</sup> to read as follows:

##### Rule 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. A lawyer in an environmental proceeding does not violate this rule by asserting a claim on behalf of a nonhuman interest even though that interest presently lacks standing under the current procedural rules of the jurisdiction in which the lawyer asserts the claim, if the lawyer is arguing in good faith for modification of the standing rules.

Attorneys who seek to protect the environment sometimes find that present law—especially the rules regarding standing—are inhospitable to their claims. The risk of sanctions for frivolous claims may seem particularly daunting for attorneys operating in a field as new and dynamic as environmental

<sup>153</sup> MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 24.

<sup>154</sup> See *supra* note 147 and accompanying text (discussing comment 24 to Model Rule 1.7).

<sup>155</sup> See MODEL RULES OF PROF'L CONDUCT r. 3.1.

law.<sup>156</sup> For example, attorneys who aspire to represent nonhuman environmental interests,<sup>157</sup> or who want to represent humans who would suffer future harm from climate change,<sup>158</sup> often find that current law denies standing to such claimants. Perhaps an amendment to Rule 3.1 should clarify that arguments to extend standing in environmental cases are not frivolous, so long as the attorney is making a good-faith argument. After all, an argument that seems novel today might become the law of the land a decade later.<sup>159</sup>

On the other hand, there are a number of legitimate arguments against amending Rule 3.1 to reduce the inhibition of environmental attorneys presenting novel standing arguments. First, it appears that the current rules against frivolous claims have not significantly limited the ability of environmental plaintiffs to present novel standing arguments.<sup>160</sup> Second, there may be a risk

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<sup>156</sup> See Monica Dias, *Morris-Smith v. Moulten Niguel Water District: The Double Standard for Attorney Fees Under the Clean Water Act*, 27 N. KY. L. REV. 549, 563–64 (2000). As such,

[T]he frivolous standard appears troublesome for unsuccessful plaintiffs in environmental litigation because they have no solid definition of “frivolous” to gauge, before filing their claim, whether their case will be deemed legitimate. Courts have used the term “frivolous” without defining it. Standard definitions of “frivolous” as “fictitious or unfounded litigation” or “groundless lawsuit with little prospect of success” do not provide much help for plaintiffs trying to determine whether their claim is strong enough to withstand a ruling of “frivolous.”

*Id.*; see also Geltman, *supra* note 99, at 755 (“A related ethical problem environmental lawyers routinely face is the duty to pursue novel or unpopular theories of law. There is a fine line between ‘pushing the law for change’ and bringing a frivolous lawsuit.”).

<sup>157</sup> Christopher Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 2–7 (1985) (renewing a proposal that the non-human environment could be a plaintiff and a human advocacy group could be a guardian ad litem for that plaintiff; noting that advocates have attempted to file claims on behalf of nonhuman interests with generally unsuccessful results). See generally Wise, *supra* note 62 (discussing the difficulty faced by the Nonhuman Rights Project in attempting to establish standing for chimpanzees).

<sup>158</sup> Patrick McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENVTL. L. 7, 10 (2013) (noting that young plaintiffs have attempted in several states to invoke the public trust doctrine in order to prevent ongoing climate change that could be disastrous in the future; “[s]everal cases have been dismissed on standing”).

<sup>159</sup> The U.S. Supreme Court’s decision in *Obergefell v. Hodges* in 2015, acknowledging the right to same-sex marriage, demonstrates that the legal system benefits when attorneys “push the envelope” with an argument that is initially contrary to prevailing law. Compare *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006) (holding that a same-sex couple lacked standing to protest the Defense of Marriage Act), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.”).

<sup>160</sup> David Sive, *Particular Ethical Problems in Environmental Litigation*, SM028 ALI-ABA 419, 431 (2006). As one scholar noted,

There is now a considerable body of environmental case law involving Rule 11 and the question of whether a particular argument is frivolous or nonfrivolous. They, in general, follow the rule of non-environmental cases, that the test is one of “reasonability.” Reasonability, however, as suggested in earlier issues of these materials, may provide in



that a more lenient rule for the frivolousness of claims in environmental litigation could lead to greater indulgence of counterclaims and suits by defendants attempting to retaliate against plaintiffs.<sup>161</sup> Third, the liberalization of standing requirements in environmental cases might lead to a lower standard in other categories of litigation, perhaps emboldening attorneys to seek standing for, for example, unborn fetuses who would sue to prevent abortions or ancestors offended by the removal of Confederate flags from state property.<sup>162</sup> Alternately, even if Rule 3.1 plainly applied only to standing for environmental claims, the amendment might have a pernicious effect in implying that no other category of public interest lawyer could invoke the exception to Rule 3.1 allowing good-faith advocacy for extension of the standing requirements.<sup>163</sup> This consequence might hinder efforts to extend the standing rules for potential claimants

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environmental cases a more liberal standard of what is nonfrivolous, owing to the newness of the relevant body of law.

*Id.* Thus,

[P]laintiffs who are unsuccessful in their claims can conclude that, as long as their claims pose a novel question or have some reasonable basis, courts will tend to be generous in finding that those claims are not frivolous. Thus, plaintiffs appear to face a low risk of a court finding their environmental lawsuits frivolous, which should dispel any fears that the “frivolous” standard will create an atmosphere in which plaintiffs are discouraged from filing suits.

Dias, *supra* note 156, at 566; Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 437–38, 469–73 (1992) (noting that courts have rarely deemed environmental claims to be frivolous). *But see* Tobias, *supra*, at 482 (considering the possibility that current rules against frivolous claims have led environmental plaintiffs to exercise self-restraint in order to avoid offending those rules).

<sup>161</sup> To be sure, the rule proposed at the start of this section would not directly assist such counterclaims. But a judge who gives greater leniency to plaintiffs might be inclined to liberalize the highly discretionary standards for evaluating the frivolousness of counterclaims. Litigation by defendants against plaintiffs can have a significant chilling effect on environmental claims to advance the public interest. *See* David J. Abell, *Exercise of Constitutional Privileges: Detering Abuse of the First Amendment—“Strategic Lawsuits Against Political Participation,”* 47 SMU L. REV. 95, 115–16 (1993) (observing that environmental litigants rarely invoke Rule 11 to protest frivolousness of claims, but expressing concern that “SLAPP suits are preferred over other” means of “control[ling]” environmental claims; these SLAPP suits expose “citizen activists to ‘liability which is orders of magnitude larger than Rule 11’” (quoting Tobias, *supra* note 160, at 489)).

<sup>162</sup> The United States currently stands at odds with most countries in the western hemisphere in declining to accord full standing to unborn fetuses. Article 4(1) of the American Convention on Human Rights establishes that governments must protect life “from the moment of conception.” American Convention on Human Rights art. 4(1), Nov. 22, 1969, 1144 U.N.T.S. 123. If the United States adopted such an approach, the result might be a significant effect on the availability of abortion.

<sup>163</sup> According to the principle of *expressio unius est exclusio alterius*, the express mention of one or more things of a particular class may be regarded as impliedly excluding others. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–11 (2012) (discussing the negative implication canon, whereby “[t]he expression of one thing implies the exclusion of others”).

such as illegal aliens or future students in a school district with inadequate funding.<sup>164</sup>

In the near term, the most prudent course might be to retain the current black letter language in Rule 3.1, while perhaps clarifying in the commentary that novel theories of standing in environmental lawsuits have rarely offended this rule. As public interest attorneys continue to push the boundaries of standing rules in the future, the ABA should evaluate whether any amendment to Rule 3.1 is necessary to accommodate such litigation.

*C. A Duty to Inform the Tribunal of Environmental Risks (Rule 3.3)*

Consider the possible benefits (and harms) of amending Model Rule 3.3<sup>165</sup> to read as follows:

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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; ~~or~~

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; ~~or~~

(4) fail to disclose to the tribunal that a witness called by the attorney is engaged, has engaged or plans to engage in a course of conduct that is likely to result in imminent, substantial, and irreparable environmental damage, if the witness has taken the stand and given contrary testimony.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has

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<sup>164</sup> Throughout U.S. history, many have benefited from attempts by public interest attorneys to expand standing rules and related laws. "Children, slaves, women, Native Americans, racial minorities, aliens, fetuses, endangered species—all have been the beneficiaries of this drive to give legal voice and legal rights to those who once lacked both voice and rights." Joseph J. Perkins, *Christopher Stone and the Evolution of Environmental Justice*, PRINCETON INDEP. (2003), <http://www.princetonindependent.com/issue01.03/item10d.html> [<http://perma.cc/3PL3-SYM7>].

<sup>165</sup> See MODEL RULES OF PROF'L CONDUCT r. 3.3.

engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

In other words, the amendment to Rule 3.3(a)(4) would be a *per se* rule of materiality. Rule 3.3(a)(1) currently requires correction of material statements that the lawyer comes to learn are false, but does not require correction of past immaterial statements. The amendment would eliminate any doubt that statements regarding imminent, substantial and irremediable environmental damage are material even if they might appear collateral to the issues arising in a particular case. The language of the amendment differs from the existing Rule 3.3(a)(3) in that disclosure to the tribunal would be the only remedy—as opposed to other avenues of recourse, such as entreating the witness to revise his or her testimony—because the revelation of the information is so urgently important. The amendment would arguably assist the effort to bring environmental harm to light, and would comport with the current ABA Model Rules' heightened obligation of candor to the tribunal. Courts and attorneys would rarely face the need to enforce the proposed rule, because attorneys would probably advise their witnesses about the rule before the witnesses testify.

One significant drawback of this amendment is that judges are not in a position to take action in order to avert the imminent harm that a witness might identify. Another possible concern is that the amendment might lead to settlement of claims that deserve to be aired in court, because defendants would be fearful that the ethical rules would necessitate disclosure of environmental harm collateral to the pending litigation. Finally, there might be some reservations about a rule that requires lawyers to slow trials down with cumbersome disclosures.

Perhaps a better version of this amendment would channel information about environmental harm to a government agency capable of remediating or averting that harm. Or perhaps a preferable approach would be to change the materiality standard so that more harm to third parties in general (including nonhuman third parties) might be just as important as centrality to the pending litigation. In any event, it should be more difficult to mischaracterize imminent environmental harm when giving sworn testimony in a trial.

*D. A Relaxation of the Ban on For-Profit Solicitation (Rule 7.3)*

Consider the possible benefits (and harms) of amending Model Rule 7.3<sup>166</sup> to read as follows:

Rule 7.3: Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; ~~or~~

(2) has a family, close personal, or prior professional relationship with the lawyer; ~~or~~

(3) is a claimant or prospective claimant in an environmental matter, and a significant motive for the lawyer's solicitation is the desire to protect the environment.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

More lenient treatment of solicitation<sup>167</sup> in environmental cases would arguably further the public interest. Plaintiffs' attorneys specializing in environ-

<sup>166</sup> See MODEL RULES OF PROF'L CONDUCT r. 7.3.

<sup>167</sup> In this context, the term "solicitation" refers to an attorney's direct communication with a person known to need legal services, where the attorney seeks to provide representation to that person. Since 1978, for-profit solicitation has been illegal when the attorney uses the most intrusive means of

mental law reach out to prospective clients by various means that could conceivably offend the current rule against solicitation, including methods as innocuous as marketing by means of websites.<sup>168</sup> Solicitation can be more important in environmental cases than in other categories of cases: whereas personal injury cases, for example, are fairly straightforward, and prospective claimants are likely to understand the nature of their legal rights, the complexity of environmental law increases the value of the attorney who educates the prospective client while proposing to represent that client.

At first blush, the current ban on for-profit solicitation might appear to exempt attorneys for environmental plaintiffs, whose work arguably has the “political” character that the U.S. Supreme Court has distinguished from for-profit solicitation. The problem, however, is that environmental suits can sometimes result in substantial fees when plaintiffs prevail,<sup>169</sup> so it may be difficult for plaintiffs’ counsel to judge whether the ban on for-profit solicitation applies to these lawyers’ interactions with prospective environmental plaintiffs.

The draft language provided herein offers one possible means of softening the ban against solicitation by plaintiffs’ counsel in environmental cases. Even when financial gain might be a significant motive for plaintiffs’ counsel in an environmental case, the amendment would allow solicitation to proceed if the goal of environmental protection was also a significant motive. This reform seems sensible because the solicitation rules should incentivize lawyers to take public interest cases,<sup>170</sup> and environmental protection is in the public interest, even if a plaintiffs’ attorney manages to collect a substantial fee. Moreover, due to the complexity of environmental litigation and the contingency of success upon many variables, an attorney is rarely able to determine if the case will yield a substantial fee before meeting with a prospective client, so a lenient rule permitting first meetings would seem to foster a better marketplace for representation.

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approaching the prospective client (i.e., face-to-face contact, live telephonic contact, or real-time electronic communication).

<sup>168</sup> Pamela Esterman, *Ethical Considerations for the Environmental Lawyer*, SU026 ALI-CLE 297 (2013) (noting that environmental lawyers’ use of blogs for marketing could run afoul of certain ethical rules, including the rule against solicitation, to the extent that lawyers use this tool for targeted appeals to prospective clients).

<sup>169</sup> See, e.g., A.H. Barnett & Timothy D. Terrell, *Economic Observations of Citizen-Suit Provisions of Environmental Litigation*, 12 DUKE ENVTL. L. & POL’Y F. 1, 11–12 (2001) (noting that prevailing plaintiffs’ attorneys may find environmental suits to be lucrative).

<sup>170</sup> See generally *Evans v. Jeff D.*, 475 U.S. 717, 743–51 (1986) (Brennan, J., dissenting) (discussing the importance of providing financial incentives for private plaintiffs’ counsel to bring lawsuits in the public interest); *Orahlík v. Ohio State Bar Ass’n*, 436 U.S. 469, 470–72 (1978) (Marshall, J., concurring) (arguing that while the respondent in this case engaged in improper conduct, a per se ban on for-profit solicitation goes too far, because the willingness of attorneys to approach potential claimants promotes access to justice, especially in historically marginalized communities).

Admittedly, however, there are reasons to approach reform of the solicitation rules with caution. First, plaintiffs' lawyers are already able to solicit for profit by less intrusive means, such as mailing a letter, so it is not clear that more permissive rules are necessary for environmental lawyers to reach all prospective claimants.<sup>171</sup> Second, solicitation via face-to-face contact can be very unpopular with the public—the “ambulance-chasing lawyer” is a common target for opprobrium—and the liberalization of solicitation rules might provoke a backlash that could prove costly for environmental lawyers or for the bar in general.<sup>172</sup> Third, an amendment that expressly permits solicitation for profit in environmental cases might imply a ban on such solicitation in other categories of public interest cases that could yield substantial fees, such as civil rights cases.<sup>173</sup> One additional drawback of allowing environmental attorneys to solicit for profit is that these attorneys might feel less pressure to maintain a large docket of pro bono cases in order to lend credibility to their claim that ideology motivates most of their solicitations. Finally, the attempt to address the restrictive standing requirements by recruiting human plaintiffs more aggressively might reduce momentum for extending the standing rules to non-human plaintiffs.<sup>174</sup>

Rather than overhaul Rule 7.3 in the near future, the best approach might be to slightly revise its commentary. New language could make clear that the presence of both financial and political motives should not necessarily defeat a finding that the solicitation has a political character, especially in an environmental case. The commentary should include guidance and illustrations that help lawyers distinguish circumstances in which political motivations are sufficient to avoid the per se ban, even when financial gain is possible.<sup>175</sup>

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<sup>171</sup> Model Rule 7.3(a) bans solicitation by in-person, live telephone, or real-time electronic contact when financial interests are a significant part of the lawyer's motivation, but Model Rule 7.3(b) indicates that less intrusive means of solicitation by profit-seeking lawyers are permissible as long as they do not involve coercion, exploitation of duress, or persistence after a prospective client indicates that further contact is unwelcome. See MODEL RULES OF PROF'L CONDUCT r. 7.3(a)–(b).

<sup>172</sup> In 1977, in *In re Primus*, Justice Rehnquist contended that solicitation by a politically motivated attorney is no less onerous from the standpoint of the prospective client. 436 U.S. 412, 440–46 (1978) (Rehnquist, J., dissenting). If an increase in solicitation were to cause general public consternation, the effect could be harmful for environmental plaintiffs' counsel or perhaps for the bar as a whole, especially if elected officials in the state legislature or on state supreme courts felt that lawyers were no longer trustworthy enough to regulate themselves. See Tom Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?*, 39 WILLAMETTE L. REV. 1031, 1042–43 (2003) (discussing the risk that elected officials might not want to continue allowing self-regulation by lawyers if it appears to be contrary to the public interest).

<sup>173</sup> For a discussion of the principle *expressio unius est exclusio alterius*, see *supra* note 163 and accompanying text.

<sup>174</sup> See *supra* note 157 and accompanying text for a discussion of the need to liberalize standing requirements so that nonhumans can be plaintiffs.

<sup>175</sup> The current commentary to Rule 7.3 provides no such guidance.

### *E. Environmental Scorecards for Firms (Rule 7.7)*

Consider the possible benefits (and harms) of adding a new Rule 7.7 at the end of the rules concerning marketing.

#### Rule 7.7: Environmental Scorecards

Every firm, and every lawyer practicing separately from a firm, shall complete and timely submit to the Bar an annual questionnaire seeking information about firms' and lawyers' activities and initiatives relevant to environmental protection, including pro bono work, continuing legal education, minimization of waste, reduction of carbon emissions, and compliance with building or remodeling standards. The Bar shall compile this information, along with relevant information concerning results of disciplinary proceedings, and will make this information available for review by the public.

The purpose of an environmental scorecard would be to hold firms and lawyers publicly accountable for their performances on certain criteria measuring their efforts to protect the environment. The precise criteria might vary from year to year, and might depend on then-prevailing views of sustainable practices. The ABA<sup>176</sup> and state bars in California,<sup>177</sup> Massachusetts,<sup>178</sup> Oregon,<sup>179</sup> and Pennsylvania<sup>180</sup> have established guidelines for law offices seeking to minimize their environmental impact. The existing programs are hortatory

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<sup>176</sup> The ABA's Section on Environment, Energy and Resources has created a website with various resources for law firms that are interested in improving sustainability. *Law Firm Sustainability Framework*, AM. BAR ASS'N, [http://www.americanbar.org/groups/environment\\_energy\\_resources/public\\_service/model\\_law.html](http://www.americanbar.org/groups/environment_energy_resources/public_service/model_law.html) [<http://perma.cc/5CQC-GVCQJ>].

<sup>177</sup> The website of the State Bar of California includes information concerning a "Voluntary Eco-Pledge" and a "Voluntary Law Office Sustainability Policy," along with the names of firms that have signed the pledge. *Voluntary State Bar of California Lawyers Eco-Pledge and Voluntary Law Office Sustainability Policy*, STATE BAR OF CAL., <http://environmental.calbar.ca.gov/EnvironmentalLaw/Sustainability.aspx> [<http://perma.cc/ZX32-P2Z3>].

<sup>178</sup> The Massachusetts Bar Association ("MBA") established "Green Guidelines" and offered to publicize a list of firms that pledged to "do their best to adhere" to the guidelines and other relevant protocols published by the MBA. At the present time, the list of firms, organizations, and lawyers that signed the pledge totals over 100. *The MBA Lawyers Eco-Challenge*, MASS. BAR ASS'N, <http://www.massbar.org/for-attorneys/lawyers-eco-challenge> [<http://perma.cc/YUW9-8BCA>].

<sup>179</sup> The Sustainable Future Section of the Oregon State Bar has established criteria for law firms that want to qualify for recognition as "partners in sustainability." *Partners in Sustainability*, OR. STATE BAR, <http://osbsustainablefuture.org/home/partnerships-in-sustainability/> [<http://perma.cc/4XEP-Z2H7>]; see also LAWYERS FOR A SUSTAINABLE FUTURE, <http://www.sustainablelawyers.org> [<http://perma.cc/4VU3-XYAX>] (offering tools for firms that want to strengthen their commitment to sustainability).

<sup>180</sup> *Pennsylvania Lawyers United for Sustainability (PLUS) Program*, PA. BAR ASS'N, <http://www.pabar.org/public/sections/envco/plusprogram.asp> [<http://perma.cc/G3AD-YR3L>] (providing information on an initiative that gives attorneys and law firms an opportunity to publicly demonstrate their commitment to environmental sustainability in their professional practices).

and offer to provide recognition to firms that strive to improve sustainability, but do not require all firms to report on their progress.<sup>181</sup>

The question remains whether a mandatory reporting system would advance the cause of environmental protection. Firms might have an incentive to earn public admiration—or avoid public embarrassment—when state bars automatically publish the environmental scorecards every year.<sup>182</sup> For example, firms seeking employment by government agencies, universities, nonprofits, or other clients concerned about environmental issues would attend carefully to their scorecards in order to project a favorable image to this audience of potential clients. The scorecards might also have an influence on a firm’s appeal to prospective employees, especially law students and recent graduates who may feel strongly about the importance of environmental protection.

On the other hand, the use of environmental scorecards could cause harmful inequities if large firms are able to use their superior resources to “game” the system. Larger firms might be able to assign one employee to undertake superficial sustainability initiatives and thereby garner accolades for environmental sensitivity even when the firm’s substantive work does not align with the public interest. If the scorecards were little more than window dressing, they would be counterproductive, hindering the ability of the public to discern which firms are truly champions of the environment. Additionally, the state bars would need to devote time and resources to evaluating firms on environmental criteria, detracting from other priorities such as matching attorneys with pro bono opportunities. Finally, there is a risk that the compulsory nature of the scorecards might prompt resentment toward initiatives that increase environmental protection, and might diminish lawyers’ enthusiasm for voluntary service to help the environment.

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<sup>181</sup> For example, the ABA and the Environmental Protection Agency teamed up to issue a “Law Office Climate Challenge” that offered to recognize firms implementing a set of guidelines in order to reduce their impact on the climate and the environment. Participation in this program was completely voluntary, and there was no effort to draw attention to firms that declined to participate. *ABA-EPA Law Office Climate Challenge*, AM. BAR ASS’N, [http://www.americanbar.org/groups/environment\\_energy\\_resources/public\\_service/aba\\_epa\\_law\\_office\\_climate\\_challenge.html](http://www.americanbar.org/groups/environment_energy_resources/public_service/aba_epa_law_office_climate_challenge.html) [<http://perma.cc/DFP3-JQ6J>].

<sup>182</sup> The use of environmental scorecards is arguably just a small extension of existing programs for reporting lawyers’ pro bono work. According to a survey by the ABA in June 2015, a total of nine state bars now mandate reporting of pro bono hours, while another thirteen state bars have established voluntary reporting regimes. *Pro Bono Reporting Links*, AM. BAR ASS’N, <http://apps.americanbar.org/legalservices/probono/reporting/pbreporting.html> [<http://perma.cc/H9NW-34J5>]. The states that mandate reporting of pro bono hours are Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, and New York. *Id.* The state bars that have set up voluntary reporting systems are Arizona, Connecticut, Georgia, Kentucky, Louisiana, Michigan, Montana, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington. *Id.*



## IV. FORESEEABLE OBJECTIONS

This Part considers possible objections to the proposals discussed previously. One category of potential objections, discussed in section A, faults the proposals for imposing burdens disproportionate to the benefits the proposals might achieve.<sup>183</sup> Specifically, these objections predict that the reforms would alienate clients from attorneys, would cause an internecine rivalry within the bar, and would create a precedent leading to other more onerous regulation of attorneys. On the other hand, section B considers the possible critique that the proposals in this Article do not go far enough.<sup>184</sup> According to this critique, the proposals rely too heavily on permissive rather than mandatory disclosure, and the proposals miss a chance in declining to expand whistleblowing duties under Rules 1.13 and 4.1. Each of these potential objections will be discussed in turn below.

*A. Objections That These Proposals Go Too Far*

## 1. Creation of Wedge Between Clients and Lawyers

The conventional rationale for attorney confidentiality insists that clients share secrets with their attorneys because they believe their attorneys will never reveal these secrets to third parties.<sup>185</sup> Perhaps clients would not repose trust in their attorneys to the same degree if they could not count on that near-ironclad guarantee of confidentiality.<sup>186</sup> Indeed, attorneys might even advise clients to refrain from discussing matters that could fall within the scope of whistleblowing provisions. The ironic result would be that reforms designed to enhance environmental protection would lead clients to shun their lawyers when questions arise about compliance with environmental laws.<sup>187</sup>

This criticism is overblown. To begin with, clients do not share information with lawyers merely to keep it secret. Clients speak to lawyers because

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<sup>183</sup> See *infra* notes 185–206 and accompanying text.

<sup>184</sup> See *infra* notes 207–214 and accompanying text.

<sup>185</sup> D’Amato & Eberle, *supra* note 31, at 769 (“Clearly, if the clients believe that whatever they tell their attorneys will be kept in strict confidence, clients will be more encouraged to utilize the services of attorneys.”).

<sup>186</sup> Patrick Casey & Richard Dennison, *The Revision of ABA Rule 1.6 and Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 574 (2003) (“If the client fears that the lawyer may, should, or must disclose client’s confidences and secrets . . . honesty and full candor will not be an element of that attorney client relationship.” (quoting Memorandum from David L. Praver, Co-Founder and Co-Chair, Ventura Cty. Ethics & Prof’l Responsibility Comm. to ABA Comm’n on Evaluation of Rules of Prof’l Conduct (n.d.), [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/praver.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/praver.html) [<http://perma.cc/5HJZ-TDAS>])).

<sup>187</sup> See *id.* (“If there is full disclosure, the attorney can counsel the client and perhaps convince the client not to pursue the stated course of conduct. Without the confidentiality, the client doesn’t disclose and the attorney is removed from the process of counseling the client.” (quoting Memorandum from David L. Praver, *supra* note 186)).

they need legal services. In some cases, the confidentiality rules are not necessary for such communication,<sup>188</sup> in some cases, the confidentiality rules are not sufficient for such communication.<sup>189</sup> But in any event, it is naïve to assume that lawyers and clients only speak with one another to the extent that the ethical rules hold the secrecy of their communication inviolate.<sup>190</sup> Patients confide in doctors and businesspeople confide in accountants even though communications with such professionals are subject to weaker confidentiality rules than communication with lawyers.<sup>191</sup> As a general matter, clients will share their information with professionals who can provide unique help if clients need that help.

It is also important to bear in mind that lawyers will continue to have strong loyalty to clients, due in part to ethical requirements and in part to their economic self-interests.<sup>192</sup> The amendments proposed in this Article consist largely of new exceptions allowing—but not requiring—disclosure and other remedial actions under certain circumstances. Lawyers are unlikely to invoke these exceptions unless truly urgent circumstances exist. A lawyer inclined to invoke a disclosure ground would probably counsel the client to change course so that such disclosure is not necessary.<sup>193</sup> Greater cognizance of environmental risks does not necessarily entail disloyalty.

Finally, the “wedge” theory finds little support in history. Over the last three decades, the ABA has gradually expanded the circumstances that might necessitate whistleblowing or other precautions in order to avoid harm to third

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<sup>188</sup> DEBORAH L. RHODE ET AL., *LEGAL ETHICS* 245 (6th ed. 2013) (collecting evidence that some categories of clients are candid with lawyers even without the assurance of confidentiality).

<sup>189</sup> *Id.* (indicating that some clients are not candid with lawyers even when assured of confidentiality).

<sup>190</sup> As long as clients need lawyers to accomplish a particular task, and no alternative to consultation with lawyers will suffice, then clients will need to proceed on the terms that the ABA and state bars set for confidentiality. The argument about alienation has arisen in various contexts, but the concern seems less worrisome when there is a continuing need for a lawyer’s assistance. *E.g.*, Tom Linger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 *IOWA L. REV.* 1201, 1274–75 (2004) (arguing that federal investigators would not cease to interact with federal prosecutors even if the prosecutors assumed new ethical duties that officers considered to be a nuisance, because consultation with prosecutors would still be necessary to obtain access to certain investigative tools).

<sup>191</sup> Ashley Saunders Lipson, *Know Your Testimonial Objections*, *TRIAL*, July 2005, at 70, 71–72 (characterizing attorney-client privilege as very strong, physician-patient privilege as weak, and accountant-client privilege as very weak).

<sup>192</sup> D’Amato & Eberle, *supra* note 31, at 769–70 (“No practicing attorney would want to scare away a client by informing the client that if he tells her certain things she will ‘blow the whistle’ on him—if the practicing attorney wants to maximize her own income.”).

<sup>193</sup> Indeed, the proposed Rule 2.2, discussed in Part II, section B, would require that lawyers counsel clients about the need to avoid “imminent, substantial and irremediable harm.” *See supra* notes 104–109 and accompanying text. The proposed Rule 1.6(b)(3), discussed in Part II, section A, would allow disclosure of clients’ secret information if they do not desist. *See supra* notes 94–102 and accompanying text.

parties.<sup>194</sup> This gradual erosion of the partisan paradigm has not estranged clients from their lawyers. If anything, the growing complexity of the law necessitates greater interaction between lawyers and clients.<sup>195</sup> In sum, there is little reason to believe that great attention to environmental protection will alienate clients from their lawyers.

## 2. Polarization of the Bar

Another possible concern is that the reforms proposed in this Article might divide the bar into pro-environment and anti-environment factions. At present, it is possible for lawyers to argue in favor of environmental protection one day and against environmental protection the next day, so long as lawyers are not taking inconsistent positions in the same proceeding or causing harm to their clients.<sup>196</sup> Because the current ethical rules do not require rigid compartmentalization of the bar into ideological factions, attorneys for both sides may interact more collegially, may appreciate the work of their opponents more, and may take a more holistic view of societal problems such as the need for environmental protection.

How would the amendments proposed in this Article change the fluidity of roles in the present system? Lawyers who invoke the whistleblowing provisions may find difficulty working for business clients in the future. Lawyers who give uninvited counseling about potential environmental harm may become less popular with certain clients while attracting more progressive clients that value such advice. Firms that expand their environmental pro bono work might lose clients who find such work objectionable. Some of the more controversial ideas discussed in Part III, including a ban on positional conflicts, might segregate the bar based on ideology. The polarization of the bar might be harmful because it could heighten acrimony in litigation, reduce the likelihood of settlement, and cause lawyers to experience less career satisfaction because they would have a narrower range of professional opportunities. It might also reduce the total number of environmentally conscious lawyers to a minority of

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<sup>194</sup> See *supra* notes 42–56 and accompanying text (discussing bar associations' growing cognizance of obligations to third parties).

<sup>195</sup> For example, the demand for environmental lawyers has increased steadily throughout the period in which the ABA's ethics code has added new third-party duties. See, e.g., *Future Bright for Environmental Lawyers, Panel Says*, UNIV. OF VA. SCH. OF LAW (Feb. 26, 2008), [http://www.law.virginia.edu/html/news/2008\\_spr/enviro\\_n\\_career.htm](http://www.law.virginia.edu/html/news/2008_spr/enviro_n_career.htm) [<http://perma.cc/9H6R-EWEH>].

<sup>196</sup> Model Rule 1.7(a) does not allow an attorney to take a position that is directly adversarial to a present client, and does not allow an attorney to represent a client when any circumstance creates "a significant risk" of material limitation. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2013). Further, Rule 1.7(b) does not allow an attorney to represent two clients simultaneously if that representation would entail conflicting duties in the same proceeding. *Id.* r. 1.7(b); see *supra* notes 145–154 and accompanying text (discussing proposed changes to Model Rule 1.7).

the bar, in which case the governing bodies in state bars might decide to roll back the reforms advocated in this Article.

Again, these criticisms are unduly alarmist. Marketing considerations and the need for specialization have already led most practitioners of environmental law to focus on representing one side or the other. Even if the reforms advocated in this Article caused a greater division of environmental lawyers into camps that consistently opposed one another, that result would not necessarily be undesirable. Lawyers who play certain roles consistently are generally better at those roles. In the criminal justice system, prosecutors and criminal defense attorneys typically practice only one side, but they have collegial relations, settle a huge number of cases,<sup>197</sup> and experience high levels of career satisfaction.<sup>198</sup> The concern that the reforms suggested in this Article might provoke a feud between pro-environment and anti-environment partisans seems ironic in that the critics of third-party duties usually extol the value of extreme partisanship.<sup>199</sup>

### 3. Snowball Effect Leading to Other Duties for Lawyers

Critics might argue that while the proposals in Part II are not themselves objectionable, they would create a dangerous precedent for saddling lawyers with responsibilities to extrinsic interests. Once lawyers have the duty to police clients' environmental harm, why wouldn't a state bar impose similar duties such as policing clients' inequitable pay for men and women or clients' failure to meet benchmarks for hiring minorities? According to such reasoning, the imposition of more duties to serve outside interests would create a slippery slope that would eventually cause lawyers to function more as auditors than as advocates for their clients.

This argument is a familiar refrain sounded by various professions that instinctively resist any regulatory changes. In the 1940s, the American Medical Association strenuously resisted the early proposals for Medicare and Medicaid, contending that any such program would open the door to the eventual

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<sup>197</sup> Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), [http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?\\_r=0](http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0) [<http://perma.cc/T4F8-WQF3>] (noting that 90% of criminal cases settle without trial).

<sup>198</sup> A survey of lawyers in four states found that prosecutors and public defenders reported high rates of satisfaction. Debra Weiss, *Lawyers in Prestige Positions Aren't as Happy as Those in Public Interest Jobs, Study Finds*, ABA J. (Mar. 17, 2014), [http://www.abajournal.com/news/article/lawyers\\_in\\_prestige\\_positions\\_arent\\_as\\_happy\\_as\\_those\\_in\\_public\\_service-job/](http://www.abajournal.com/news/article/lawyers_in_prestige_positions_arent_as_happy_as_those_in_public_service-job/) [<http://perma.cc/U7PD-XZNF>].

<sup>199</sup> See *supra* notes 33–41 and accompanying text (discussing the partisan paradigm that has begun to yield somewhat to a recognition of third-party concerns).

socialization of medicine.<sup>200</sup> Like doctors in the 1940s, lawyers naturally oppose change because their familiar routine is both comfortable and lucrative.

Another possible objection is that additional duties to the environment would lead to a vast amount of future regulation. The recent history of amendments to the ABA Model Rules suggests that such a fear is groundless. Since the ABA adopted the Model Rules in 1983, the ABA has sporadically added incremental reforms, but the cumulative effect of these reforms over three decades has been fairly innocuous.<sup>201</sup> The occasional fine-tuning of the Model Rules has not led to their wholesale transformation; it has simply led to more fine-tuning every ten years or so.<sup>202</sup>

Ironically, lawyers may be more vulnerable to onerous regulation if they make no effort to address environmental problems through self-regulation. The ABA's tepid approach to corporate fraud in 2002 provides a cautionary tale. The ABA House of Delegates eschewed any amendments to the Model Rules that would have imposed substantial whistleblowing duties on lawyers.<sup>203</sup> A few months later, the highly publicized problems at corporations including Enron, Global Crossing, Adelphia, and Tyco led the public to conclude that lawyers were "sleeping at the switch."<sup>204</sup> Congress responded to this public outrage by passing the Sarbanes-Oxley Act, establishing new whistleblowing duties for lawyers and accountants.<sup>205</sup> This legislation represented the first major incursion by Congress into the heretofore-autonomous realm of lawyers. The ABA House of Delegates quickly realized that the Sarbanes-Oxley Act was a shot across the bow. In the summer of 2003, the ABA adopted the stricter amendments that the House of Delegates had rejected only a year before.<sup>206</sup> The lesson was clear: if the ABA will not set high enough standards for itself, Congress might step in to set those standards.

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<sup>200</sup> Kenneth T. Walsh, *The Politics of Medicare and Medicaid, 50 Years Later*, U.S. NEWS & WORLD REP. (July 30, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/07/30/the-politics-of-medicare-and-medicaid-50-years-later> [<http://perma.cc/BJ8Z-B4NL>].

<sup>201</sup> *Supra* notes 13, 65 and accompanying text (discussing revisions to the Model Rules).

<sup>202</sup> *Supra* notes 13, 65 and accompanying text.

<sup>203</sup> See generally Hamermesh, *supra* note 50 (discussing proposed revisions to Model Rule 1.13 with regards to whistleblowing).

<sup>204</sup> *Supra* notes 48–49 and accompanying text (discussing revisions to Model Rules 1.6 and 1.13 that were initiated as a result of several high-profile corporate scandals).

<sup>205</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7245 (2012)); *supra* note 52 and accompanying text.

<sup>206</sup> *Supra* notes 49–50 and accompanying text (discussing amendments to Model Rule 1.13).

## *B. Objections That These Proposals Do Not Go Far Enough*

### 1. Preference for Permissive Rather Than Mandatory Reporting

Some critics might argue that the reforms proposed in this Article would not make enough progress in protecting the environment. For example, critics might complain that the proposals settle for permissive, rather than mandatory, reporting of imminent environmental harm. According to this perspective, lawyers are too partisan to take permissive reporting obligations seriously, and a regulatory approach that simply exhorts lawyers to report their clients' indiscretions would never succeed.

There are several reasons why a hortatory approach is more appropriate. The most important is that virtually all of the current disclosure rules are permissive.<sup>207</sup> If ethical rules mandated disclosure to protect the environment while merely permitting disclosure to prevent murder and large-scale financial fraud, this incongruity would provoke dissent in the bar and might cause a general backlash against environmental duties in the ethics code. Another potential problem is that mandatory disclosure rules might have a chilling effect on lawyer-client communication,<sup>208</sup> whereas lawyers and clients currently understand that permissive rules allow space for discretion and permit an opportunity for lawyers to urge self-reporting by clients. Finally, rules that mandate disclosure are easy to circumvent, because the outside world rarely has access to the information that a lawyer obtains from a client. Due to the difficulty of enforcement, the practical reality is that a mandatory rule probably would not result in more disclosure than a permissive rule.

### 2. Failure to Propose Reforms of Rules 1.13 and 4.1

This Article has not suggested any reforms to Rule 1.13, which prescribes whistleblowing duties for lawyers representing organizational clients, or Rule 4.1, which requires candor in negotiations under certain circumstances. Critics might argue that amendments to these two rules are necessary in order to promote environmental protection.

Why not amend Rule 1.13 so that it incorporates obligations to promote environmental health? The simple answer is that Rule 1.13 has never included any duties to outside entities. Rule 1.13 obligates attorneys to protect their clients from "outsiders" (i.e., the constituents who work for, but are distinct from, the organizational clients), rather than protecting outsiders from clients.<sup>209</sup> The current version of Rule 1.13 does address violations of environmental law that

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<sup>207</sup> *E.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.6(b).

<sup>208</sup> Casey & Dennison, *supra* note 186, at 574.

<sup>209</sup> MODEL RULES OF PROF'L CONDUCT r. 1.13; *supra* note 107 and accompanying text.

could redound to the detriment of the organizational client,<sup>210</sup> but any extension of that language to value the environment intrinsically would be inconsistent with the role that Rule 1.13 has played since its inception. The rules that protect outsiders from clients are Rules 1.6 and 4.4—rules that the above-listed proposals would amend.<sup>211</sup>

Relatedly, there are several reasons why this Article has not proposed to amend Rule 4.1, which requires truthfulness in statements to others. First, the current version of Rule 4.1 already requires candor as to material representations, and materiality depends on the extent of reliance,<sup>212</sup> so the audience can dial up the materiality standard by announcing an intention to rely heavily on a lawyer's representations concerning environmental matters. Second, formal discovery is available when verification of claims about the environment seems important. Third, this Article has proposed amending the rule governing candor in evaluations for use by third parties,<sup>213</sup> so one solution for dubious candor in negotiations would be to request such an evaluation. Fourth, negotiations in litigation must culminate in the presentation of a settlement to the court, at which point a heightened obligation of candor will apply,<sup>214</sup> so lawyers have an incentive to make careful representations in negotiating a settlement of a lawsuit. Finally, enforcement of Rule 4.1 is difficult because it is hard to establish the information that a lawyer has at the time of a particular negotiation, so this Article would not necessarily improve environmental protection by proposing to tighten the requirements under Rule 4.1.

## CONCLUSION

Lawyers should join other professions in assuming ethical duties to protect the environment. This Article has offered proposals for amendments that would fit well within the current framework of the ABA Model Rules for Professional Conduct and their state analogs. This Article has also considered ideas for more radical reforms that are not presently ready for adoption, but that deserve further consideration.

Some readers might believe that lawyers' historical partisanship cannot abide the addition of new duties to promote environmental health. Such an objection underestimates the extent to which the rules of legal ethics have already

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<sup>210</sup> MODEL RULES OF PROF'L CONDUCT r. 1.13; *supra* note 107 and accompanying text.

<sup>211</sup> *Supra* notes 94–102 and accompanying text (discussing proposed revisions to Model Rule 1.6); *supra* notes 115–116 and accompanying text (discussing proposed revisions to Model Rule 4.4).

<sup>212</sup> MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (linking materiality to likelihood of reliance).

<sup>213</sup> *Supra* notes 111–114 and accompanying text (discussing proposed revisions to Model Rule 2.3).

<sup>214</sup> *Supra* note 165 and accompanying text; *see Spaulding v. Zimmerman*, 116 N.W.2d 704, 710–11 (Minn. 1962) (noting that requirements for candor in court are more strict than in negotiations).

begun to address considerations extrinsic to the lawyer-client relationship. So far those extrinsic matters have generally related to human interests, but the environment now deserves inclusion on this list.

With the adoption of the ethical rules proposed in this Article, lawyers can be powerful allies in the campaign to reduce environmental degradation. This is not an endeavor that lawyers should watch from the sidelines. The ethics code for lawyers should not lag behind the codes for doctors, engineers, businesspeople, and other professionals who have realized the moral duty to protect the environment.

The purpose of an ethics code is to ensure that practitioners attend to issues of transcendent importance—issues that practitioners might neglect if they focused narrowly on their day-to-day tasks. Scientists have informed us that environmental protection is one of the most urgent challenges facing humanity today. It should not be a distraction from lawyers' ordinary ethical duties; it should be a central part of those duties.



