

# The Duty to Advise the Lorax: Environmental Advocacy and the Risk of Reform

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# THE DUTY TO ADVISE THE LORAX: ENVIRONMENTAL ADVOCACY AND THE RISK OF REFORM

KEITH W. RIZZARDI\*

## ABSTRACT

Lawyers have an ethical duty to advise their clients on moral, economic, social, and political matters. When applied to the changing field of environmental law, this abstract notion becomes provocative. Lawyers should advise their environmental advocacy clients of the possibility that their efforts to apply statutes or rules might initially succeed, but subsequent legislative reactions might defund, reform, or repeal the laws the client's case relied upon. As a client's sophistication decreases, or as the risk of adverse reactions to the client's environmental advocacy increases, the lawyer's duty to advise the client of these risks can shift from discretionary to mandatory.

Accordingly, to fulfill their duty as advisor, and to protect their clients from harm, lawyers should be sure to assess their clients' sophistication, objectives, risk tolerance, and advocacy tone. In addition, to prepare for the potential reactions of third parties, lawyers may also need to advise their clients to obtain further assistance from other professionals. While clients will ultimately choose their goals, the failure to ask hard questions could mean that the lawyer fails to obtain informed consent and, in some cases, could even constitute misconduct.

|    |   |    |
|----|---|----|
| I. | IN THEORY: THE DISCRETIONARY DUTY AS ADVISOR . . . . .                    | 28 |
| A. | <i>The Model Rules of Professional Conduct</i> . . . . .                  | 29 |
| B. | <i>The Restatement (Third) of the Law<br/>Governing Lawyers</i> . . . . . | 35 |

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|      |  |    |
|------|--|----|
| II.  | IN FACT: ACTIONS AND REACTIONS IN ENVIRONMENTAL<br>ADVOCACY . . . . .    | 38 |
|      | A. <i>Citizen Suits and the Defunding of Implementation</i> . .          | 39 |
|      | B. <i>The Advocacy Tone, and Its Echo</i> . . . . .                      | 48 |
|      | C. <i>The Risk of Statutory Reform or Repeal</i> . . . . .               | 53 |
| III. | IN PRACTICE: WHEN THE DUTY TO ADVISE BECOMES<br>MANDATORY . . . . .      | 61 |
|      | A. <i>The Hard Questions an Advisor Must Ask</i> . . . . .               | 66 |
|      | 1. Looking Inward: Should a Client Exercise<br>Self-Restraint? . . . . . | 66 |
|      | 2. Looking Outward: What Happens When<br>Others React? . . . . .         | 68 |
|      | B. <i>The Consequences of Failing to Advise</i> . . . . .                | 70 |
|      | CONCLUSION . . . . .   | 75 |

In *The Lorax*, a Dr. Seuss story, the Once-ler and his Super-Ax-Hacker chop down every Truffula tree to manufacture Thneeds (“a Fine-Something-That-All-People-Need”).<sup>1</sup> The Lorax keeps warning the Once-ler to stop, but eventually, the Brown Bar-ba-loots, Swomee-Swans, Humming-Fish, and the Lorax all leave behind a treeless and polluted gray landscape. Environmental advocates identify with the Lorax, who “speaks for the trees, for the trees have no tongues.”<sup>2</sup> But their literary alignment can be re-envisioned. If the body of environmental law is a forest of Truffula trees, have environmental advocates become the Once-ler? Environmental advocates, in their historic and passionate quest to save the trees, must avoid Once-ler-like tendencies to over-exploit their own resources by filing too many controversial lawsuits. Unless . . . .<sup>3</sup>

Budgetary pressures and underlying philosophical disputes threaten to reshape environmental law. Lawyers who practice in this field, especially those who represent the environmental advocates, should take notice. In fact, they have an ethical duty to do so, and to advise their clients accordingly.

Environmental law can be a daunting interdisciplinary field,<sup>4</sup> in which complex statutory and regulatory schemes govern equally complex

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<sup>1</sup> THEODOR SEUSS GEISEL, *THE LORAX* (1971).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> In academia, environmental law is often part of an interdisciplinary program. See, e.g., *Pace Academy for the Environment*, PACE UNIVERSITY, <http://www.pace.edu/student>

scientific matters,<sup>5</sup> requiring the lawyers to be negotiators, litigators, economists,<sup>6</sup> business visionaries,<sup>7</sup> crisis managers,<sup>8</sup> and even media managers.<sup>9</sup> To some, environmental law is like history: “just one damn thing after another.”<sup>10</sup> Given the scope of the practice area, the duty as advisor has endless permutations. This Article focuses on how these lawyers should advise their clients of how their advocacy actions can produce unwanted reactions.

As a legal matter, lawyers have a duty to advise their clients of the moral, economic, social and political factors related to the scope of their representation. Although a lawyer possesses substantial discretion regarding how and when to advise clients on non-legal issues, every lawyer also has a duty to ensure the client’s informed consent. If a client’s desired legal action may, in the long term, prove contrary to the client’s self-interests, then the lawyer has a duty to ensure that the client understands the risks.

As a factual matter, current events suggest that environmental advocacy groups are enduring challenging times. They may win the litigation, but lose the larger policy debate, because what Congress and the state legislatures giveth, they can taketh away.<sup>11</sup> For both budgetary and

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-handbook/pace-academy-environment (last visited Nov. 15, 2012); *Water Institute*, UNIVERSITY OF FLORIDA, <http://waterinstitute.ufl.edu/> (last visited Nov. 15, 2012); *Environmental Law, Science & Policy Program*, UNIVERSITY OF PITT., <http://www.law.pitt.edu/academics/juris-doctor/specialized-areas-of-study/environmental> (last modified Sept. 28, 2011); *Interdisciplinary Environmental Studies at Vanderbilt*, VANDERBILT UNIVERSITY, <http://law.vanderbilt.edu/academics/academic-programs/environmental-law/interdisciplinary-environmental-studies/index.aspx> (last visited Nov. 15, 2012).

<sup>5</sup> See Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 190–91, 193 (1997).

<sup>6</sup> David M. Driesen, *The Economic Dynamics of Environmental Law: Cost-Benefit Analysis, Emissions Trading, and Priority-Setting*, 31 B.C. ENVTL. AFF. L. REV. 501, 501, 506–07 (2004).

<sup>7</sup> See Andrew W. Savitz, *What U.S. Environmental Lawyers Need to Know About Sustainability*, 17 NAT. RESOURCES & ENV’T 98, 98, 99, 101 (2002).

<sup>8</sup> Jonathan Berstein, *Crisis Management: Responding to Activism*, 35 AZ ATT’Y 20 (1999).

<sup>9</sup> Zygmunt J.B. Plater, *Law, Media, & Environmental Policy: A Fundamental Linkage in Sustainable Democratic Governance*, 33 B.C. ENVTL. AFF. L. REV. 511, 548 (2006) (“A significant increase in environmental lawyers’ media sophistication may help resolve some of the media realm’s shortcomings. Environmental lawyers at the macro and micro level are not doing enough, or are not doing well enough, in conveying their issues into public opinion. Environmentalists can and should work to improve their ability to communicate important public interest facts and analysis to the public and influence the governance process.”).

<sup>10</sup> Daniel A. Farber, *Annual Review of Environmental and Natural Resources Law: Foreword*, 32 ECOLOGY L.Q. 383, 386 (2005).

<sup>11</sup> “The LORD gave, and the LORD hath taken away. . . .” *Job* 1:21 (King James).

philosophical reasons, legislatures are defunding, reforming, or repealing environmental laws.

In practice, as a client's sophistication decreases, and the potential consequences increase, the lawyer's duty to advise becomes less discretionary and more mandatory. The lawyer who adheres to the duty as advisor must ensure that the client acknowledges dollars, sense, and professionalism. Otherwise, the lawyer's representation of the client, whether in litigation or other advocacy, could have consequences.<sup>12</sup>

This Article is not an ethical assault on the environmental advocate, who serves an important role in our system of environmental law.<sup>13</sup> Rather, this Article offers a word of *realpolitik* guidance to their lawyers, and attempts to demonstrate the significance of those lawyers' duty to serve as advisor. Given the current political landscape, environmental lawyers should advise their clients to be cautious about their advocacy and judicious about engaging the judiciary.

## I. IN THEORY: THE DISCRETIONARY DUTY AS ADVISOR

The legal profession has long acknowledged the need for lawyers to serve not just as advocates, but also as advisors.<sup>14</sup> In his *Fifty Resolutions in Regard to Professional Deportment* (1836), David Hoffman considered the duty as advisor in the traditional context of litigation, pronouncing that he would advise his clients *not* to pursue certain types of cases.<sup>15</sup>

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<sup>12</sup> See, e.g., Scott D. Laufenberg, *Every Lawyer's Choice: Representing Repugnant Clients*, 22 GPSOLO 22, Oct. 2005, at 22, 24 (describing the consequences that can follow from taking on a difficult client).

<sup>13</sup> Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 417–18 (2002).

<sup>14</sup> See, e.g., DAVID HOFFMAN, A COURSE OF LEGAL STUDY 755 (2d ed. 1846) (containing Resolution 14, which states that: “[m]y client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go”).

<sup>15</sup> Resolution 11 states:

If, after duly examining a case, I am persuaded that my client's claim or defence (as the case may be) cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means, in order to gain a portion of that, the *whole* of which I have reason to believe would be denied to him both by law and justice.

*Id.* at 754.

The *Canons of Ethics* (1908) later distinguished between the duty as advocate and duty as advisor,<sup>16</sup> and eventually, the *Model Code of Professional Responsibility* (1969) recognized that the duty as advisor transcends litigation. Canon 7-3 of the *Model Code* explicitly acknowledged the different roles of the lawyer as both advocate and advisor:

Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships.<sup>17</sup>

Canon 7-5 further emphasized the need for the lawyer, as advisor, to consider the practical effects of legal actions: “[a] lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.”<sup>18</sup>

A. *The Model Rules of Professional Conduct*

Currently, the American Bar Association’s Model Rule 2.1 codifies the lawyer’s duty as advisor, and reinforces the distinction between the lawyer’s advisory and advocacy roles. In fact, recognizing the broad role that lawyers play in advising their clients, the Model Rules address the need for the lawyer, as advisor, to consider *non-legal* matters when providing advice related to legal representation of a client. “In representing

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<sup>16</sup> Canon 31, regarding “Responsibility for Litigation,” provides that “[n]o lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client.” *Canons of Ethics*, 32 ANN. REP. A.B.A. 1159, 1168 (1909); see James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2458 (2003).

<sup>17</sup> The ABA Model Code of Professional Responsibility continues:

While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (1980).

<sup>18</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 7-5 (1980).

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 factors that may be relevant to the client's situation."<sup>19</sup>

This rule allows lawyers to advise clients on a broad range of non-legal concepts.<sup>20</sup> Scholars have applied Rule 2.1 to suggest that lawyers should advise banks of fiduciary risks.<sup>21</sup> Others have used it to suggest that in-house corporate lawyers should temper zealous advocacy with realistic assessments of liability<sup>22</sup> and idealistic assessments of ethical aspirations.<sup>23</sup> A few creative thinkers even used the duty as advisor to support a moral obligation to protect the environment.<sup>24</sup> But with a few scholarly exceptions calling for mandatory duties to advise clients of dispute resolution

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<sup>19</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

<sup>20</sup> Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 389 (2005).

<sup>21</sup> Christopher G. Sablich, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 532 (1992) ("In a bank's situation, it is critical that the attorney's advice be as broad as possible. . . . This is not to say that the attorney must identify and advise on every possible unsafe and unsound banking practice or potential breach of duty. Rather, the attorney must identify any such improprieties or imprudent practices to which she has reasonably been put on notice.").

<sup>22</sup> See Paula Schaefer, *Harming Business Clients With Zealous Advocacy: Rethinking The Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251, 264 (2011).

<sup>23</sup> Ben G. Pender II, *Invigorating the Role of the In-House Legal Advisor as Steward in Ethical Culture and Governance at Client-Business Organizations: From 21st Century Failures to True Calling*, 12 DUQ. BUS. L.J. 91, 108 (2009) ("Model Rules 1.13(a), 2.1, 1.4(a), 1.13(b), and 1.2(d) represent the in-house legal advisor's bare-minimum ethical obligation as legal counsel to the client-business organization.").

<sup>24</sup> Some creative scholars have offered alternative interpretations of Model Rule 2.1, suggesting that it serves as a basis for lawyers to advocate for the environment as a moral responsibility. See Joshua E. Hollander, *Fee Shifting Provisions in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter*, 23 GEO. J. LEGAL ETHICS 633, 637-38 (2010); Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENVTL. L. & POL'Y 215, 260, 266 (1996) (proposing a pledge of "allegiance to the Earth and to the Life it sustains"); Julie Anne Ross, *Citizen Suits: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F. L. REV. 809, 827 (1995) ("Attorneys who bring citizen suits [under environmental statutes] are fiduciaries of the public interest."); Sanford 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, 746 (2002). But by this reasoning, Model Rule 2.1 would also require lawyers to recognize other perspectives. In other words, if advising clients on moral and social factors means reminding clients about environmental values—promoting ideas such as the intrinsic value of life, the preservation of creation, or the need for the sustainability of earth, then it must also mean that the lawyers must advise of the potential strong opposition from countervailing philosophies such as property rights.



options<sup>25</sup> and non-discrimination laws,<sup>26</sup> Rule 2.1 is largely reduced to discretionary and aspirational guidance for lawyers.

The language of Model Rule 2.1 begins with a duty to exercise judgment, using the term “shall,” but when discussing the duty to render advice on non-legal matters, the Model Rule twice uses the discretionary term “may.” The Commentary<sup>27</sup> like the Model Rule, also contains many layers of conditional language, leaving substantial discretion to the attorney. Presumably, such discretion allows the lawyer to adapt to the client’s needs. After all, some clients might not want to hear non-legal advice from a lawyer. Yet, Comment 1 to Rule 2.1 is quite clear in acknowledging the lawyer’s duty to render unpleasant advice:

*Scope of Advice*

[1] A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as

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<sup>25</sup> Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 457 (2000) (“Despite the risks, many believe that an ADR consultation rule is worth explicit wording. They want to move ADR from a good idea that might be useful in some circumstances to a normative requirement of legal practice. The question then becomes whether the profession wants to go so far in our civil justice system as to make ADR the default mode for litigation? Will we have to ‘force’ recalcitrant, old-fashioned attorneys to incorporate ADR into their practices?”); Kristin L. Fortin, *Reviving the Lawyer’s Role as Servant Leader: The Professional Paradigm and a Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 625 (2009) (noting that in Georgia, the duty as advisor is a mandate with respect to alternative dispute resolution).

<sup>26</sup> Samuel A. Marcossou, *Client Counseling as an Ethical Obligation: Advising Employers Before They Discriminate*, 33 N. KY. L. REV. 221, 233–34 (2006) (These rules strongly urge attorneys to refer to “‘moral, economic, social, and political factors’ and to try to lead their clients to a decision that is ‘morally just.’ Of course, these rules are stated in the permissive, for the attorney ‘may’ do this, and it will ‘often be desirable,’ but it is not required. In the context of compliance with employment discrimination laws, however, I believe that the nature of the laws themselves has the effect of transforming the permissive into the required, or—at the very least—has altered the permissive ‘may’ to the recommended ‘should.’”).

<sup>27</sup> Although the text of Model Rule 2.1 is authoritative in most states, the comments are a guide to interpretation. See CPR Policy Implementation Comm., *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, AMERICAN BAR ASSOCIATION (May 23, 2011), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf> (showing repeated use of the statement that comments “are intended as guides to interpretation, but the text of each rule is authoritative” for all states except Texas and Virginia).



acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

So, pursuant to this comment, a lawyer “may” provide advice as honesty permits. Some discretion is understandable: advising a drunk driver to seek alcoholism treatment is entirely appropriate,<sup>28</sup> whereas threatening a client with the wrath of God is not.<sup>29</sup> But in general, a lawyer is not mandated to give unwelcome advice.<sup>30</sup>

Like the Code and Canons before it, the Model Rule Commentary also discusses the lawyer’s duty to advise of “practical” considerations, such as costs and consequences. Comments 2 and 3, for example, state as follows:

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Again, Comment 2 and Comment 3 empower the lawyer to exercise judgment and to assess the degree to which practical considerations should be discussed. Comment 2 focuses on whether the non-legal concerns are “predominant,” and how those considerations might affect others. Comment 3 emphasizes the need to consider the desires and experience of the client, noting that an inexperienced client may need more advice. Comment 4 (discussed later in this Article) notes the potential need to advise a client

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<sup>28</sup> *Friedman v. Comm’r. of Pub. Safety*, 473 N.W.2d 828, 834–35 (Minn. 1991).

<sup>29</sup> Indeed, lawyers can be disciplined for giving improper or abusive non-legal advice. *See, e.g., Fla. Bar v. Johnson*, 511 So.2d 295, 295 (Fla. 1987) (lawyer disciplined for threatening clients with fear of godly misfortune); *Tenn. Formal Op. 96-F-140* (1996) (lawyer cannot pressure client to forego right not to discuss abortion with her parents).

<sup>30</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. (1983).

to consult members of another profession.<sup>31</sup> Comment 5 then repeats the overall theme, acknowledging the discretion of the lawyer to decide whether and when to advise the client:

*Offering Advice*

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 [duty of communication] *may* require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it *may* be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer *may* initiate advice to a client when doing so appears to be in the client's interest.<sup>32</sup>

Given the potential breadth and scope of non-legal issues, codifying the lawyer's duty as advisor presents a difficult task. Furthermore, lawyers have limitations on the extent to which they can seek compensation for their "non-legal" advice, so they have little financial incentive to consider these matters.<sup>33</sup>

But the purely discretionary phrasing of Comment 5 frustrates the ultimate purpose of Rule 2.1.<sup>34</sup> The first sentence tells the lawyer not to

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<sup>31</sup> Comment 4 states as follows:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

*Id.*

<sup>32</sup> *Id.* (italics added).

<sup>33</sup> Gantt, *supra* note 20, at 397.

<sup>34</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. (1983).

give advice unless asked.<sup>35</sup> In the second sentence, even if a lawyer *knows* that the legal action is *likely* to result in substantial adverse legal consequences, then the lawyer still only *may* be required to offer advice.<sup>36</sup> The third sentence notes that dispute resolution *may* be available as a litigation alternative.<sup>37</sup> And according to the fourth sentence, an attorney *ordinarily* has *no* duty to offer advice, and *may* advise a client “when doing so appears to be in the client’s interest.”<sup>38</sup> The emphasis placed upon a lawyer’s discretion probably goes too far.<sup>39</sup>

In any exercise of the duty as advisor, a lawyer must consider the greater goals of the *Model Rules of Professional Responsibility*. It is a fundamental duty of the lawyer to ensure that the client has granted informed consent.<sup>40</sup> As even Comment 1 to Rule 2.1 makes clear, a lawyer cannot hide behind simplistic technical advice about whether a client can pursue a given course of action.<sup>41</sup> Nor should the lawyer rely solely on Rule 2.1 to decide what is, or what is not, required, because the lawyer also possesses duties of competence,<sup>42</sup> diligence,<sup>43</sup> and communication. Model Rule 1.4, governing communication—cross-referenced in the third sentence of Comment 5—states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>44</sup> The notion of informed consent is also

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<sup>35</sup> *Id.*

<sup>36</sup> On the other hand, it is hard to believe that a lawyer can truly *know*, with certainty, what moral, economic, social and political factors may be relevant to a client’s situation. The advisory duty is, by definition, forward looking and uncertain; no lawyer can “know” how politics will affect a legislature, or how global macroeconomics might affect the availability of budgeted funds to pay for the implementation of a proposed remedy. Then again, the definition of knowing, under the Model Rules, also allows for knowledge to be inferred under the circumstances. For example, *Connecticut Formal Opinion 49*, commented on a lawyer’s duty to advise a client (and to request permission to reveal confidential information) when the lawyer believes that their client is going to commit suicide. Although the lawyer did not *know* that the client would commit suicide, the ethics committee still recommended that the lawyer advise the client to consult with a mental health professional. 74 CONN. BAR J. 238, 243 (2000).

<sup>37</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. (1983).

<sup>38</sup> *Id.*

<sup>39</sup> As suggested in Part III.B, this comment should be revised, in part, because at some point, the Model Rule should be deemed a mandate. *See infra* Part III.B.

<sup>40</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4(a)–(b) (1983).

<sup>41</sup> *Id.* at R. 2.1 cmt. 1.

<sup>42</sup> *Id.* at R. 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

<sup>43</sup> ABA MODEL RULES OF PROF’L CONDUCT R. 1.3 (1983) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

<sup>44</sup> *Id.* at R. 1.4.

defined by the *Model Rules* as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>45</sup>

All in all, even though it repeatedly uses discretionary terms, Model Rule 2.1 draws a connection between the lawyer’s advisory duties and the essential and mandatory duty to obtain informed consent from the client. That connection is made more explicitly in the American Law Institute’s *Restatement (Third) of the Law Governing Lawyers*.

B. *The Restatement (Third) of the Law Governing Lawyers*

*The Restatement (Third) of the Law Governing Lawyers* (“*Restatement (Third)*”), § 20 (2000), the closest counterpart to Model Rule 2.1, does not use the term advisor, but states that a lawyer has a “Duty to Inform and Consult with a Client”:

- (1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under §§ 21–23.
- (2) A lawyer must promptly comply with a client’s reasonable requests for information.
- (3) A lawyer must notify a client of decisions to be made by the client under §§ 21–23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.<sup>46</sup>

On its face, this provision emphasizes the need for clients to make “informed decisions.” And, informed decisions require understanding of non-legal matters, a concept also noted in the Restatement commentary supporting §20, stating as follows:

e. *Matters calling for a client decision.* When a client is to make a decision . . . a lawyer must bring to the client’s attention the need for the decision to be made, unless the client has given contrary instructions . . . . In addition to legal considerations, advice properly may include economic, social, political, and moral implications of the courses of action

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<sup>45</sup> *Id.* at R. 1.0(e).

<sup>46</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20(1)–(3) (2000).

open to the client . . . . The lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.<sup>47</sup>

Although the language of the *Restatement (Third)* commentary, like Model Rule 2.1, acknowledges lawyer discretion, the rationale behind the lawyer's duty to consult and advise suggests that the lawyer's duty to some clients may be greater than to others, depending upon the client's sophistication:

Legal representation is to be conducted to advance the client's objectives . . . but the lawyer typically has knowledge and skill that the client lacks and often makes or implements decisions in the client's absence. The representation often can attain its end only if client and lawyer share their information and their views about what should be done. Articulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them. *The need to communicate and consult is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing . . . .* That need may also be present even in matters the lawyer is to decide . . . because the lawyer's decision must seek the objectives of the client as defined by the client . . . . Discussion may cause both participants to change their beliefs about what should be done. In any event, the client may wish to take into account the lawyer's estimate of the probable results of a course of action.<sup>48</sup>

The next paragraph of the *Restatement (Third)* commentary recognizes that the lawyer's advice to a client may be of critical importance in shaping the cause of action that would actually be pursued, because the client may wish to refrain from at least some available options:

The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate,

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<sup>47</sup> § 20 cmt. e (2000).

<sup>48</sup> § 20 cmt. b (2000) (emphasis added).

inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. A lawyer should not necessarily assume that a client wishes to press all the client's rights to the limit, regardless of cost or impact on others.<sup>49</sup>

Moreover, in some circumstances, a lawyer should provide advice to clients even when the client told the lawyer they do not want it:

The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information (see Comment d) or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes. Even if a client fails to request information, a lawyer may be obligated to be forthcoming because the client may be unaware of the limits of the client's knowledge. Similarly, new and unforeseen circumstances may indicate that a lawyer should ask a client to reconsider a request to be left uninformed.<sup>50</sup>

Ultimately, the *Restatement (Third)* states that the lawyer's decision as to whether and when to provide additional advice to the client should be based upon a reasonableness test:

To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume.<sup>51</sup>

Thus, pursuant to the *Restatement (Third)* and the *Model Rules*, it is clear that lawyers can and in some cases should discuss non-legal

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<sup>49</sup> § 20 cmt. c (2000).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

matters with their clients.<sup>52</sup> The ultimate objectives of the relationship will be defined by the client. But the lawyer must ensure that the client's decisions are based upon informed consent, and the lawyer's discussion with the client can shape or alter the client's decisions, especially in the context of evaluating risks, consequences and alternatives.<sup>53</sup>

The importance of informed consent, and the duty to advise a client on non-legal issues, can be vividly demonstrated by applying the duty as advisor to actual circumstances.<sup>54</sup> For example, some scholars and courts have discussed the duty as advisor as it affects aspirational notions of racial harmony<sup>55</sup> or theology.<sup>56</sup> Others have discussed the duty as advisor in the context of health law.<sup>57</sup> In the context of environmental advocacy, current events demonstrate a circumstance in which the lawyers have a mandatory duty to advise. Specifically, if a lawyer knows that an environmental advocacy client's proposed legal action is likely to trigger a legislative response and the risk of defunding, reform, or repeal, then the lawyer has a duty to so advise the client, and cannot stay silent without violating the duty to obtain informed consent.<sup>58</sup>

## II. IN FACT: ACTIONS AND REACTIONS IN ENVIRONMENTAL ADVOCACY

In the corporate context, lawyers often play a role in advising their clients about how their legal controversies will evolve, not only in the

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<sup>52</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 cmt. e (2000); MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

<sup>53</sup> See generally DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 153 (1974); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 316–18 (1980); see also MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . .”). Maryland included this concept in its own version of Rule 2.1. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980) (“In the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client . . .”); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 21 (2000) (Allocating the Authority to Decide Between a Client and a Lawyer).

<sup>54</sup> See MODEL RULES, *supra* note 40.

<sup>55</sup> Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 904, 916 (1995).

<sup>56</sup> Gordon J. Beggs, *Laboring Under the Sun: An Old Testament Perspective on the Legal Profession*, 28 PAC. L.J. 257, 264–65, 271 (1996).

<sup>57</sup> See, e.g., *infra* Part III.B.

<sup>58</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 cmt. e (2000); MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).



courtroom, but also in the court of public opinion, and even in the halls of Congress.<sup>59</sup> Environmental advocacy lawyers, like their corporate counterparts, need to be equally sophisticated when advising their clients. And sophistication means, in part, understanding the simple principle that actions trigger reactions.

Fundamentally, environmental advocacy relies on two types of actions to achieve influence. One is the citizen suit, through which the environmental advocacy community has used litigation, the rule of law, and the authority of the judiciary to shape public policy. In those judicial forums, and everywhere else, environmental advocates rely on their words and images, the art of communication, and attempts to influence and persuade.<sup>60</sup> Both tools have been successfully used, but not without consequence.

#### A. *Citizen Suits and the Defunding of Implementation*

In the 1960s, creative environmental advocacy lawyers began using litigation to shape environmental policy.<sup>61</sup> In the 1970s, the U.S. Congress passed an array of federal environmental laws, and states experienced similar eras of environmental awareness.<sup>62</sup> Scholars famously advocated for trees to have standing to sue.<sup>63</sup> Over time, environmental litigants have effectively used citizen suits to break entirely new legal ground,<sup>64</sup>

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<sup>59</sup> Michele Destefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1301, 1304 (2009).

<sup>60</sup> Joseph H. Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A. J. 479, 479 (1954).

<sup>61</sup> One of the first environmental cases to be brought by conservation interests was *Scenic Hudson Preservation Conference v. Fed. Power Commission*, 354 F.2d 608 (2d Cir. 1965). See also A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation*, 17 PACE ENVTL. L. REV. 237, 245–47 (2000).

<sup>62</sup> See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 79–80 (2004). Florida, for example, passed the transformative Florida Water Resources Act of 1972, creating new governmental agencies to protect the state's five major watersheds.

<sup>63</sup> See Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 464, 470 (1972).

<sup>64</sup> A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. LAW 213, 215 (2004) ("The field was created virtually out of whole cloth by a receptive Judiciary and Congress. In the 1960s, environmental protection was a marginal political idea. Lawyers followed the great common law tradition left open to socially marginal groups and pursued a 'rule of law litigation' strategy. To discipline public agencies through what we now call 'public interest' litigation, they had to convince courts that something called environmental law existed, when in fact it did not.").

as recently demonstrated by litigation victories in the contexts of climate change,<sup>65</sup> water quality in the Everglades,<sup>66</sup> and wildlife protection.<sup>67</sup> On subjects such as the Clean Air Act,<sup>68</sup> Clean Water Act,<sup>69</sup> the Endangered

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<sup>65</sup> The arena of climate change litigation demonstrates the special creativity of the environmental advocacy bar, and its ability to shape the law and push for change. In *Massachusetts v. EPA*, states, local governments, and environmental organizations petitioned for review of an order of the Environmental Protection Agency denying a petition for rule-making to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. 549 U.S. 497, 497–98 (2007). The U.S. Supreme Court held that the petitioners had standing to sue based on injuries related to climate change. Later, in *Am. Elec. Power Co., Inc. v. Connecticut*, the Supreme Court further held that under *Massachusetts v. EPA*, at least some plaintiffs had Article III standing to pursue claims for present and future damages caused by greenhouse-gas-induced global warming. 131 S. Ct. 2527, 2532, 2538 (2011). Perhaps even more remarkably, the Supreme Court did not find that the Clean Air Act foreclosed the possibility of litigating under state environmental statutes, leaving the issue open on remand. And in *Comer v. Murphy Oil USA*, coastal property owners alleged that oil and energy companies caused emission of greenhouse gasses, contributed to global warming and added to the ferocity of Hurricane Katrina's destructive force. 585 F.3d 855, 855 (5th Cir. 2009). The Fifth Circuit Court of Appeals held that the landowners had stated justiciable claims for nuisance, trespass and negligence. Not every case, however, has survived judicial scrutiny. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d. 863, 868 (N.D. Cal. 2009) (Alaska Native village public nuisance claim, alleging corporate greenhouse gas emissions caused global warming and melting Arctic ice, was barred by the political question doctrine so plaintiffs lacked standing to sue); *California v. Gen. Motors Corp.*, No. 06-05755, 2007 WL 2726871, at \* 4, 12 (N.D. Cal. Sept. 17, 2007) (dismissing a nuisance claim on political question grounds).

<sup>66</sup> In *Miccosukee Tribe of Indians of Fla. v. EPA*, the Tribe forced the U.S. Environmental Protection Agency to review the State of Florida's Everglades Forever Act, finding it to be a change in state water quality standards. 105 F.3d 599, 600 (11th Cir. 1997). Years later, as the case evolved, U.S. District Court Judge Alan Gold found EPA's review of actions by the State of Florida to be a "dereliction of duty," demanded that state and federal officials appear before him, and eventually imposed an equitable order requiring a rigid schedule for hundreds of millions of dollars in project construction to improve water quality in the Everglades. *Miccosukee Tribe of Indians of Fla. v. United States*, 04-21448-Civ-Gold, Order Granting Plaintiffs' Motions in Part; Granting Equitable Relief; Requiring Parties to Take Action by Dates Certain (S.D. Fla. 2010), available at [http://www.evergladeshub.com/lit/LEGAL/Gold10-Micco-USA-104cv21448\\_404.pdf](http://www.evergladeshub.com/lit/LEGAL/Gold10-Micco-USA-104cv21448_404.pdf); *Miccosukee Tribe of Indians of Fla. v. United States*, 04-21448-Civ-Gold, Omnibus Order (S.D. Fla. 2011), available at <http://www.evergladeshub.com/lit/LEGAL/Gold11-Micco-USA-1-04cv21448ASG-omnibusOrderDoc585-110426.pdf>.

<sup>67</sup> See Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 322 (2004); Ari N. Sommer, *Taking the Pit Bull Off the Leash: Sicking the Endangered Species Act on Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 273, 275–76 (2009).

<sup>68</sup> 42 U.S.C. §§ 7401–7701 (2006).

<sup>69</sup> 33 U.S.C. §§ 1251–1376 (2006).

Species Act,<sup>70</sup> the National Environmental Policy Act,<sup>71</sup> and even Executive Orders,<sup>72</sup> scholars and case-law continuously demonstrate the use of environmental laws and litigation as a tool for achieving policy objectives.<sup>73</sup> Indeed, environmental advocates will undoubtedly continue to serve an essential role in balancing our limited resources with the needs of seven billion people.<sup>74</sup>

The citizen suit is a powerful tool, a point made particularly evident in the context of the Endangered Species Act (“ESA”), the landmark law protecting species and the ecosystems upon which they depend.<sup>75</sup> Under this law, citizens may petition the agencies to list new species as threatened or endangered.<sup>76</sup> The responsible government agencies—the U.S. Department of Commerce (through the National Marine Fisheries Service) or the U.S. Department of the Interior (through the Fish and Wildlife Service)—must promptly act within the ESA’s ambitious one-year statutory deadlines.<sup>77</sup> If the agencies fail to act, the ESA empowers the citizen groups to litigate,<sup>78</sup> and “missed deadline” litigation has been quite common for decades.<sup>79</sup>

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<sup>70</sup> 16 U.S.C. §§ 1531–1543 (2006).

<sup>71</sup> 42 U.S.C. §§ 4321–4347 (2006).

<sup>72</sup> See, e.g., *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1024–25 (9th Cir. 2005); see also Nell Greenfieldboyce, *Complaint Tests Rule Protecting Science from Politics*, NPR (Nov. 30, 2011), <http://www.npr.org/2011/11/30/142895926/complaint-tests-rule-protecting-science-from-politics>.

<sup>73</sup> Christopher Brown, *A Litigious Proposal: A Citizen’s Duty to Challenge Climate Change, Lessons from Recent Federal Standing Analysis, and Possible State-Level Remedies Private Citizens Can Pursue*, 25 J. ENVTL. L. & LITIG. 385, 389, 457 (2010); Jonathan S. Campbell, *Has the Citizen-Suit Provision of the Clean Water Act Exceeded Its Supplemental Birth?*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 305, 305–06, 343 (2000); E. Roberts & J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, ENVIRONMENTAL LAW INSTITUTE, <http://www.inece.org/2ndvol1/roberts.htm> (last visited Nov. 15, 2012); Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, 11 NAT. RESOURCES & ENV’T 20, 20–21 (1997); Michael Penney, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. ENVTL. AFF. L. REV. 399, 407, 424–25 (2002); Joseph T. Phillips, *Friends of the Earth v. Laidlaw Environmental Services: Impact, Outcomes, and the Future Viability of Environmental Citizen Suits*, 68 U. CIN. L. REV. 1281, 1282–83 (2000).

<sup>74</sup> Jeffrey D. Sachs, *With 7 Billion on Earth, a Huge Task Before Us*, CNN OPINION (Oct. 21, 2011), <http://www.cnn.com/2011/10/17/opinion/sachs-global-population/index.html>.

<sup>75</sup> 16 U.S.C. §§ 1531–1543 (2006).

<sup>76</sup> See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 332 (2010).

<sup>77</sup> 16 U.S.C. § 1540(d)(1) (2006).

<sup>78</sup> See Parenteau, *supra* note 67, at 322.

<sup>79</sup> See, e.g., Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 284 (1993).

The U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) routinely decide upon the fate of many potentially endangered and threatened species. But recent lawsuits and rule-making petitions filed by environmental advocacy groups could transform ESA implementation by more than doubling the number of domestic species listed for protection.<sup>80</sup> In 2011, through multiple settlement agreements, federal agencies and environmental advocacy litigants created a process to resolve many of the ongoing disputes and petitions related to endangered or threatened species. One settlement addressed FWS actions related to 270 species,<sup>81</sup> a second settlement addressed FWS actions related to 480 more species,<sup>82</sup> and a third settlement affected the NMFS and eighty three more species of coral.<sup>83</sup> As demonstrated by these petitions and settlement agreements, non-profit environmental advocacy groups (and their lawyers) play a critical role in the implementation of the ESA, and in shaping agency priorities.<sup>84</sup>

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<sup>80</sup> Consider the following: Congress passed the Endangered Species Act in 1973. By the end of 2011, according to the U.S. Fish & Wildlife Service’s “box score,” the federal government had listed 1382 domestic species as threatened or endangered. *Species Reports*, U.S. FWS, [http://ecos.fws.gov/tess\\_public/pub/Boxscore.do](http://ecos.fws.gov/tess_public/pub/Boxscore.do) (last updated Nov. 15, 2012). More than 250 additional species are candidates for listing. U.S. FWS, CANDIDATE SPECIES 1 (2011), available at [http://www.fws.gov/endangered/esa-library/pdf/candidate\\_species.pdf](http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf). However, in 2010, two environmental litigation advocacy groups, in just four petitions to the U.S. Fish and Wildlife Service, sought to list 1643 new endangered or threatened species. Keith Rizzardi, *Bulk Petitions: Breaking the Endangered Species Act, a Few Hundred Species at a Time? (Updated)*, ESABLAWG (Aug. 31, 2010), <http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-88H2VY>. Information provided to Congress in late 2011 indicates that the federal agencies are facing a combined total of over 180 pending ESA-related lawsuits. Doc Hastings, *Chairman Hastings: After Two Decades, ESA Should Be Updated to Focus on Species Recovery, Not Excessive Litigation* (Dec. 6, 2011), [http://hastings.house.gov/UploadedFiles/DH\\_NRC\\_ESA\\_statement\\_12.6.pdf](http://hastings.house.gov/UploadedFiles/DH_NRC_ESA_statement_12.6.pdf); see also Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistle-Blowers, and Private Attorneys General*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 99, 99 (2002).

<sup>81</sup> In re Endangered Species Act Section 4 Deadline Litig., Misc. Action No. 10-377 (EGS) MDL Docket No. 2165 (D.D.C. 2011), available at [http://www.fws.gov/endangered/improving\\_ESA/joint\\_motion\\_re\\_settlement\\_approval\\_FILED.PDF](http://www.fws.gov/endangered/improving_ESA/joint_motion_re_settlement_approval_FILED.PDF).

<sup>82</sup> *Id.*

<sup>83</sup> See *Petition to List 83 Coral Species Under the Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, available at [http://sero.nmfs.noaa.gov/pr/esa/pdf/091020\\_CBD\\_Coral\\_Petition.pdf](http://sero.nmfs.noaa.gov/pr/esa/pdf/091020_CBD_Coral_Petition.pdf); Carolyn Lucas-Zenk, NOAA Given Deadline for Corals’ Endangered Species Status, WEST HAWAII TODAY (Sept. 27, 2011), <http://kona.westhawaiiitoday.com/sections/news/local-news/noaa-given-deadline-corals-endangered-species-status.html>.

<sup>84</sup> The direct effort by a legislature to defund policy implementation is just one potential budgetary consequence that can result from environmental litigation or advocacy. In other instances, success may mean nothing more than a reprogramming, or worse yet a reduction in agency resources. Pursuant to the Equal Access to Justice Act, in some cases where

To some degree, the advocacy is highly effective. Acknowledging the burgeoning controversy over the Endangered Species Act, academic studies recently explored the efficacy of the statute. One well-publicized Emory University study concluded that citizen petitions were especially effective at leading to the listing of particular species.<sup>85</sup> On the other hand, a competing analysis prepared by University scholars in Idaho concluded that ESA litigation accomplishes little for the species, because the threats remained in place, and because the financial resources to support the continued protection of the species were inadequate.<sup>86</sup>

Regardless of which perspective is correct, Congress, prodded by the ultimate consequences of this environmental advocacy, is increasingly establishing environmental policy with budgetary riders and appropriations acts.<sup>87</sup> The prestigious National Bureau of Economic Research has acknowledged the emerging perception of environmental regulation as a “job-killing” and “luxury” item.<sup>88</sup> Some state and federal legislatures, unable to balance the books, do not view the environment as a top priority;

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environmental litigants are the prevailing party, they can recover attorney’s fees. 28 U.S.C. § 2412(d) (2006). However, the fees recovered come from the agency’s budget. As a result, money paid to the litigants is money not available for agency implementation. Moreover, that money comes from somewhere, and other agency priorities may be re-evaluated. *See also* Michael J. Mortimer & Robert W. Malmshemer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, J. FORESTRY 352, 352 (Sept. 2011), available at <http://www.safnet.org/documents/jof006112696p.pdf>; Joshua E. Hollander, *Fee-Shifting Provisions in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter*, 23 GEO. J. LEGAL ETHICS 633, 638 (2010); Julie Ann Ross, *Citizen Suits: California’s Proposition 65 and the Lawyer’s Ethical Duty to the Public Interest*, 29 U.S.F. L. REV. 809, 827 (1995).

<sup>85</sup> Carol Clark, *Democracy Works for Endangered Species Act*, ESCIENCECOMMONS (Aug. 16, 2012), <http://esciencecommons.blogspot.com/2012/08/democracy-works-for-endangered-species.html>. The analysis compared listings of “endangered” and “threatened” species initiated by the U.S. Fish and Wildlife Service, to those initiated by citizen petition, and found that citizens, on average, do a better job of selecting threatened species. “That’s a really interesting and surprising finding,” said co-author Berry Brosi, a biologist and professor of environmental studies at Emory University. *Id.*

<sup>86</sup> *See* Dale D. Goble et al., *Conservation Reliant Species*, 10 BIOSCIENCE 869, 869–70, 872 (2012) (noting that the ESA lists 1400 species as endangered, but as many as 84 percent of currently listed species with management plans will face threats to their biological recovery even after they are considered “recovered” under the act).

<sup>87</sup> Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 619 (2006).

<sup>88</sup> Matthew E. Kahn & Matthew J. Kotchen, *Environmental Concern and the Business Cycle: The Chilling Effect of Recession* 11 (Nat’l Bureau of Econ. Research, Working Paper No. 16241, July 2010), available at <http://www.nber.org/papers/w16241>; *see also* Joseph Perkins, *Jobs Killed by Unendangered Species*, THE EXAMINER (Nov. 6, 2011), available at <http://www.sfexaminer.com/opinion/op-eds/2011/11/jobs-killed-unendangered-species>.



indeed, the U.S. Environmental Protection Agency, the U.S. Department of the Interior and even the National Park Service have all been targeted by the U.S. Congress for substantial budget cuts.<sup>89</sup> And routinely, in the specific arena of ESA implementation, Congress caps expenditures on implementation activities,<sup>90</sup> a maneuver that exacerbates the problems and delays that motivated the citizen suits in the first place.<sup>91</sup>

Recently, Congress chose more radical ways to use its budgetary tools and to manage ESA litigation. Weary of the endless litigation over the protection of the gray wolf,<sup>92</sup> Congress delisted the species in some states,

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<sup>89</sup> See Press Release, Env'tl. Prot. Agency, Adm'r Lisa P. Jackson, Remarks at the UC–Berkeley Center for Law, Energy and the Environment, as Prepared (Nov. 3, 2011), available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/3ad3632d3919b19b8525793e004ff1b0!OpenDocument>; see also Nicole Blake Johnson, *Spending Bill Deals Steep Budget Cuts to EPA, Interior*, FED. TIMES (July 13, 2011), <http://www.federaltimes.com/article/20110713/AGENCY01/107130305/>.

<sup>90</sup> See Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 260 (2003).

<sup>91</sup> In fact, litigation tactics related to the “critical habitat” provisions of the Endangered Species Act ultimately led Congress to change the laws, defeating the very objectives sought by environmental litigators. Buried by litigation over missed deadlines (a troubling reality with both good and bad explanations), the U.S. Fish & Wildlife Service argued in response that their delays in designating critical habitat for endangered species was caused by the litigation, and that the courts were setting the agencies’ priorities for them. Congress responded by capping the total funding available for the agency to work on critical habitat designations. That solution ultimately deprived the species, and defeated the very objective sought by the wildlife litigators in the first place. See, e.g., *Testimony of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, Before the House Resources Committee, Regarding H.R. 2933, The Critical Habitat Reform Act of 2003* (April 28, 2004):

Simply put, the listing and critical habitat program is now operated in a “first to the courthouse” mode, with each new court order or settlement taking its place at the end of an ever-lengthening line. We are no longer operating under a rational system that allows us to prioritize resources to address the most significant biological needs . . . . In short, litigation over critical habitat has hijacked the program.

*Id.*; see also, e.g., PAMELA BALDWIN, CONG. RESEARCH SERV., RS20263, THE ROLE OF DESIGNATION OF CRITICAL HABITAT UNDER THE ENDANGERED SPECIES ACT (July 16, 1999), available at <http://www.cnire.org/nle/crsreports/biodiversity/biodv-36.cfm>; Amy Hagen & Karen Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 CONSERVATION BIOLOGY 399 (2006).

<sup>92</sup> In cases involving the protection of the wolf, the courts, at times, showed less deference to the agencies. In *Humane Soc’y of the U.S. v. Kempthorne*, despite finding statutory language on “distinct population segments” to be ambiguous, the court refused to defer to the agency and struck down delisting of a Western Great Lakes gray wolf population within a broader listing. 579 F. Supp. 2d 7, 18–19 (D.D.C. 2008). In *Defenders of Wildlife v. Salazar*,

thereby removing protection and in theory, eliminating the lawsuits, too.<sup>93</sup> Emboldened by that decision, many members of the U.S. Congress went further in 2011, seeking to entirely defund the process for the listing of *any* new species for ESA implementation—a budgetary tactic environmentalists decried as “the extinction rider.”<sup>94</sup> The initiative failed, but it made a powerful statement.

Congress also noticed other examples of ESA litigation and the multiple settlement agreements. In December 2011, the U.S. House of Representatives held an oversight hearing, inviting the Executive Director of the Center for Biological Diversity to discuss “The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery

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another court held that FWS violated the ESA by partially removing protections for distinct population segments of the gray wolf in the Rocky Mountain, and then further held that the ESA unambiguously prohibits FWS from listing or delisting only part of a distinct population segment. 729 F. Supp. 2d 1207, 1211 (D. Mont. 2010). In *Defenders of Wildlife v. Salazar*, that court also rejected a proposed settlement that would have delisted the wolves in Montana and Idaho, relying upon the logic of its prior opinion. 2011 WL 1345670 (D. Mont. 2011). Finally, in *Wyoming v. Dep’t of Interior*, yet another court held FWS acted arbitrarily and capriciously by rejecting Wyoming’s effort to protect only part of the wolf population in the state. 2010 WL 4814950 (D. Wyo. 2010) (describing that FWS wanted the entire state managed as a trophy game area). While the Congressional delisting rider eventually responded to these decisions, Congress did not amend the ESA. So, arguably, Congress ordered FWS to reissue a final rule in direct contradiction with other court orders. See also Erin Furman, *Quick Summary of Gray Wolf Legal Challenges: 2005 to Present*, ANIMAL LEGAL AND HISTORICAL CENTER (2011), <http://www.animallaw.info/topics/tabbed%20topic%20page/spusgraywolf2005.htm>; W. Ryan Stephens, Note, *Gray Wolf Rising: Why the Clash Over Wolf Management in the Northern Rockies Calls for Congressional Action to Define “Recovery” Under the Endangered Species Act*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 917 (2012).

<sup>93</sup> See, e.g., Phil Taylor, *Budget’s Wolf Delisting Opens Pandora’s Box of Species Attacks, Enviro Groups Warn*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/gwire/2011/04/13/13greenwire-budgets-wolf-delisting-opens-pandoras-box-of-s-99159.html>; Steve Davies, *Congress’s Role in Wolf Delisting Challenged in Court*, ENDANGERED SPECIES AND WETLANDS REPORT (May 6, 2011), <http://www.eswr.com/2011/05/congresss-role-in-wolf-delisting-challenged-in-court/>. For earlier litigation history and related agency actions, see also Rob Dubuc, *The Northern Rocky Mountain Wolf Delisting: What Would Leopold Think?*, 22 UCLA J. ENVTL. L. & POL’Y 215, 215 (2009); Jesse H. Alderman, *Crying Wolf: The Unlawful Delisting of Northern Rocky Mountain Gray Wolves From Endangered Species Act Protections*, 50 B.C. L. REV. 1195 (Sept. 2009).

<sup>94</sup> See Paul Quinlan & Jean Chemnick, *Democrats’ Bids to Shield EPA Climate Regs, ESA Listings Fail* (July 12, 2011), <http://moran.house.gov/democrats-bids-shield-epa-climate-regs-esa-listings-fail>; see also *House Votes Down ‘Extinction Rider’ That Would Have Halted Spending to Protect New Species Under the Endangered Species Act*, CENTER FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/news/press\\_releases/2011/extinction-rider-07-27-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/extinction-rider-07-27-2011.html).



Efforts.”<sup>95</sup> After that hearing, the presiding committee chairman announced his plan for more hearings, and his own vision for ESA reform.<sup>96</sup> In partial response to the criticisms set forth by Congress, the Center for Biological Diversity undertook its own study of the ESA, concluding that the statute worked well and that listed species simply needed sufficient time to achieve the recovery objectives.<sup>97</sup> In a separate but equally responsive statement, the FWS also offered a moderate tone, de-emphasizing the impact of ESA litigation.<sup>98</sup>

Ultimately, in the 2012 budgetary process, Congress proposed budget cuts of more than twenty percent for core ESA programs within FWS, and cuts of as much as thirty-nine percent to protected species programs within NMFS.<sup>99</sup> The Congressional Research Service report on the current

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<sup>95</sup> Rob Hotakainen, *U.S. Rep Doc. Hastings Ready to Tackle Endangered Species Act*, THE NEWS TRIB. BLOG (Nov. 28, 2011, 8:38 AM), <http://blog.thenewstribune.com/politics/2011/11/28/u-s-rep-doc-hastings-ready-to-tackle-endangered-species-act/>.

<sup>96</sup> Doc Hastings, *Chairman Hastings: After Two Decades, ESA Should Be Updated to Focus on Species Recovery, Not Excessive Litigation* (Dec. 6, 2011), [http://hastings.house.gov/UploadedFiles/DH\\_NRC\\_ESA\\_statement\\_12.6.pdf](http://hastings.house.gov/UploadedFiles/DH_NRC_ESA_statement_12.6.pdf) (“Today’s hearing is the first of several this Committee will hold over the next year to examine and review the Endangered Species Act. Enacted in 1973 and last reauthorized in 1988, the ESA’s fundamental goal is to preserve, protect and recover key domestic species . . . . In my opinion, one of the greatest obstacles to the success of the ESA is the way in which it has become a tool for excessive litigation. Instead of focusing on recovering endangered species, there are groups that use the ESA as a way to bring lawsuits against the government and block job-creating projects.”).

<sup>97</sup> See Press Release, The Center for Biological Diversity, Study: 90 Percent of Species Recovering on Time (May 17, 2012), available at [http://www.biologicaldiversity.org/news/press\\_releases/2012/esa-success-southeast-05-17-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/esa-success-southeast-05-17-2012.html) (explaining that the Center for Biological Diversity’s “analysis of 110 endangered species finds that 90 percent, including many in the Southeast, are on track to meet recovery goals set by federal scientists. The review examined population trends of plants and animals protected by the Endangered Species Act in all 50 states, including the Southeast’s red wolves, sandhill cranes, gray bats and Tennessee coneflowers. . . . [T]he analysis finds species on a positive trajectory toward recovery—and in some cases, exceeding expectations”).

<sup>98</sup> See Laura Petersen, *Lawsuits Not Hurting ESA, Says FWS Director*, RED LODGE CLEARINGHOUSE (July 5, 2012), <http://rlch.org/news/lawsuits-not-hurting-esa-says-fws-director>. “On the scale of the challenges that we face implementing the Endangered Species Act, litigation doesn’t even show up on the radar screen,” FWS Director Daniel M. Ashe said. *Id.* He added “Can I get frustrated at [Center for Biological Diversity] and WildEarth Guardians, or my good friend Jamie Clark at Defenders [of Wildlife] when they decide to sue us? Yeah, I can . . . . But on balance, I think it’s a strength for the Endangered Species Act, and not a weakness.” *Id.* (alteration in original).

<sup>99</sup> EUGENE H. BUCK ET AL., THE ENDANGERED SPECIES ACT (ESA) IN THE 112TH CONGRESS: CONFLICTING VALUES AND DIFFICULT CHOICES 18–19 (June 14, 2012), available at <http://www.fas.org/sgp/crs/misc/R41608.pdf>; see also Lucia Graves, *House Republicans Take Aim at Environmental Regulations as Debt Crisis Looms*, THE HUFFINGTON POST (July 25, 2011),

112th Congress also identified twenty more different legislative and budgetary proposals that sought to modify ESA implementation in some way.<sup>100</sup> Thus, Congress can and will use appropriations bills to explicitly reject outcomes achieved in U.S. District Court litigation, with the additional prospect of rendering any ongoing litigation moot.<sup>101</sup>

These types of budgetary alterations to the implementation of environmental law and policy are emerging in the states as well. North Carolina,<sup>102</sup> Pennsylvania,<sup>103</sup> and Texas<sup>104</sup> downsized their environmental budgets.<sup>105</sup> Minnesota legislators battled over the same issues.<sup>106</sup> In Florida, the budget-cutting approach was especially noteworthy. The state cut \$20 million from Everglades' restoration,<sup>107</sup> and budgets for the state's water management districts. Despite their important responsibilities for flood control, management of watershed pollution and water supplies were dramatically downsized by more than thirty percent.<sup>108</sup> Notwithstanding the

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[http://www.huffingtonpost.com/2011/07/25/republicans-criticize-environmental-regulations\\_n\\_909138.html](http://www.huffingtonpost.com/2011/07/25/republicans-criticize-environmental-regulations_n_909138.html).

<sup>100</sup> This report emphasized the budgetary issues: "Appropriations play an important role in the ESA debate, providing funds for listing and recovery activities as well as financing consultations that are necessary for federal projects. In addition, appropriations bills have served as vehicles for some changes in ESA provisions." *Id.* at 17.

<sup>101</sup> *See, e.g.*, *Micosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1300 (11th Cir. 2010) (finding no subject matter jurisdiction over disputed bridge in Everglades based on an interpretation of language in an appropriations rider).

<sup>102</sup> In North Carolina, legislators dramatically cut the state environmental agency's budget. Leslie Kaufman, *G.O.P. Push in States to Deregulate Environment*, N.Y. TIMES (Apr. 15, 2011), [http://www.nytimes.com/2011/04/16/science/earth/16enviro.html?\\_r=1](http://www.nytimes.com/2011/04/16/science/earth/16enviro.html?_r=1).

<sup>103</sup> *See, e.g.*, Donald Gilliland, *State Budget Cuts Deeper into Environmental Funding*, THE PATRIOT-NEWS (June 29, 2011, 10:04 AM), [http://www.pennlive.com/midstate/index.ssf/2011/06/state\\_budget\\_cuts\\_deeper\\_into.html](http://www.pennlive.com/midstate/index.ssf/2011/06/state_budget_cuts_deeper_into.html).

<sup>104</sup> Kate Galbraith, *Texas Forest Service Battles Fires, Budget Cuts*, THE TEXAS TRIB. (Apr. 8, 2011), <http://www.texastribune.org/texas-environmental-news/environmental-problems-and-policies/texas-forest-service-battles-fires-budget-cuts/>.

<sup>105</sup> Kaufman, *supra* note 102.

<sup>106</sup> Stephanie Hemphill, *Governor, Legislature Headed for Collision over the Environment*, MPR NEWS (May 20, 2011), <http://minnesota.publicradio.org/display/web/2011/05/19/environment-legislation/>.

<sup>107</sup> *See, e.g.*, Greg Allen, *Florida Budget Woes Mean Environmental Cuts*, NPR (May 6, 2011), <http://www.npr.org/2011/05/06/135963420/florida-budget-woes-mean-environmental-cuts>; *see also* John Miller, *Environmental Programs Fall Victim to Budget Cuts*, BOSTON (Nov. 26, 2011), [http://www.boston.com/news/nation/articles/2011/11/26/environmental\\_programs\\_fall\\_victim\\_to\\_budget\\_cuts/](http://www.boston.com/news/nation/articles/2011/11/26/environmental_programs_fall_victim_to_budget_cuts/).

<sup>108</sup> Curtis Morgan, *Former Water Board Members Urge Scott to Restore Funding*, MIAMI HERALD (Sept. 18, 2012), <http://www.miamiherald.com/2012/09/18/3008915/former-water-board-members-urge.html>. Although agency officials wore a brave face and emphasized "a return to core mission," there was no legislative debate over good programs or bad ones;

state's susceptibility to sea level rise and a recently enacted law,<sup>109</sup> the Florida Department of Environmental Protection is not pursuing any programs or projects regarding climate change<sup>110</sup> (and some Florida legislators now want to repeal statutory references to the term).<sup>111</sup> And finally, in Arizona, environmental advocates decried budgetary riders that have, in effect, repealed environmental laws.<sup>112</sup>

### B. *The Advocacy Tone, and Its Echo*

At times, and perhaps in partial response to the frustration of the budgetary issues, the environmental litigation organizations adopt an especially sharp tone in their communications. In a striking example, the Center for Biological Diversity ("CBD"), a lead plaintiff in hundreds of federal citizen suits based on the ESA, began a new initiative in 2007.<sup>113</sup> The "Rubber Dodo Award" is presented annually "to a deserving individual in public or private service who has done the most to drive endangered species extinct."<sup>114</sup> To some extent, such statements reflect the accepted intensity

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rather, the decision was framed as entirely financial. Bruce Ritchie, *Water Management Districts' Reserve Funds Drying Up, Senate Panel Told*, THE FLORIDA CURRENT (Oct. 5, 2011), <http://www.thefloridacurrent.com/article.cfm?id=24858910> (The author of this Article was an employee of the South Florida Water Management District.).

<sup>109</sup> Florida Climate Protection Act, FLA STAT. § 403.44; *see also* Executive Order 07-128 (July 13, 2007), <http://www.flclimatechange.us/ewebeditpro/items/O12F15075.pdf> (Establishing the Florida Governor's Action Team on Energy and Climate Change).

<sup>110</sup> Craig Pittman, *Once a Major Issue in Florida, Climate Change Concerns Few in Tallahassee*, TAMPA BAY TIMES (May 16, 2011), available at <http://www.tampabay.com/news/environment/article1169860.ece>.

<sup>111</sup> *See, e.g.*, Bruce Ritchie, *Committee Bill Would Remove Climate Change Language in State Law*, FLORIDA ENVIRONMENTS (Apr. 8, 2010), <http://bruceritchie.blogspot.com/2010/04/committee-bill-would-remove-climate.html>; *PCB EUP 10-06 Economic Incentives for Energy Initiatives*, available at [http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?PublicationType=Committ&CommitteeId=2472&Session=2010&DocumentType=Proposed%20Committee%20Bills%20\(PCBs\)&FileName=PCB%20EUP%2010-06.pdf](http://www.myfloridahouse.gov/Sections/Documents/loadaddoc.aspx?PublicationType=Committ&CommitteeId=2472&Session=2010&DocumentType=Proposed%20Committee%20Bills%20(PCBs)&FileName=PCB%20EUP%2010-06.pdf).

<sup>112</sup> Pete Aleshire, *Groups Protest Backdoor Repeal of Host of Environmental Laws*, PAYSON ROUNDUP (Aug. 2, 2011), <http://www.paysonroundup.com/news/2011/aug/02/groups-protest-backdoor-repeal-host-environmental/> (discussing how "[r]iders attached to unrelated bills would strip protections for Colorado River, Rim Country wilderness areas and endangered species").

<sup>113</sup> *Secretary of the Interior Dirk Kempthorne Wins 2007 Rubber Dodo Award*, CTR. FOR BIOLOGICAL DIVERSITY (Aug. 24, 2007), <http://www.biologicaldiversity.org/swcbd/PRESS/kempthorne-08-24-2007.html>.

<sup>114</sup> *Id.* In 2008, another environmental litigation organization, Wild Earth Guardians, upon learning that President Barack Obama intended to nominate Senator Ken Salazar as Secretary of the Interior, issued an equally harsh critique: "[w]e needed a watchdog to protect endangered species. In Salazar, we're afraid we got a lapdog." *See* Keith Rizzardi,

of environmental policy debates.<sup>115</sup> Some people might even consider the Rubber Dodo Award a fairly tame political statement.<sup>116</sup>

Environmental advocacy is inextricably connected to the art of communication. Achievement of environmental policy objectives necessitates successful communication at both the local and national level.<sup>117</sup> But the often hostile tone of that lawyer advocacy can also have effects.<sup>118</sup> It shapes the language and the emotions of the public dialogue, and it is preserved in the filings submitted to and ruled upon by the courts. Of course, it has a broad range; some groups moderate their tone, others push to extremes.<sup>119</sup> In general, “hard” advocacy communications appeal to the public, to the powerful, to the law, and even to God, and may contain a combination of potent language, even anger.<sup>120</sup> “Soft” advocacy communications might consist of a public awareness campaign, seeking to gain positive media coverage over time, or even a cooperative or consensus-driven approach of uniting otherwise adversarial interests.<sup>121</sup>

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*FWS Denies Listing for 270 Species Based on Insufficient Information; Organization that Filed the Petition Already Skeptical of Incoming Administration*, ESABLAWG (Jan. 7, 2009), <http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-7N37YN> (citing Wild Earth Guardians’ press release).

<sup>115</sup> See ROBERT PAEHLKE AND DOUGLAS TORGERSON, *MANAGING LEVIATHAN: ENVIRONMENTAL POLITICS AND THE ADMINISTRATIVE STATE* (2005); see also Glenn Hurowitz, *Interior Secretary Kempthorne Gets Award for Record Refusal to Protect Endangered Species*, GRIST (Aug. 29, 2007, 12:04 PM), <http://grist.org/article/dirks-dodo/>.

<sup>116</sup> Civil disobedience by Greenpeace, for example, would be mainstream when compared with the radical environmental activism of the Environmental Liberation Front (“ELF”), a group advocating arson and the destruction of new developments and car dealerships. CRAIG ROSEBRAUGH, *BURNING RAGE OF A DYING PLANET: SPEAKING FOR THE EARTH LIBERATION FRONT* (2004).

<sup>117</sup> Zygmunt J. B. Plater, *Law, Media, and Environmental Policy: A Fundamental Linkage in Sustainable Democratic Governance*, 33 B.C. ENVTL. AFF. L. REV. 511, 518 (2006).

<sup>118</sup> Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 1 (2000) (“Legal rhetoric is often over-bearing, even hostile. It employs misdirection and omission, distorts opposing views, ridicules or vilifies opponents, and uses these and other verbal strategies to make arguments that are not convincing even to the speaker. This aggressive and deceptive behavior is plainly inconsistent with the universal moral imperative of respect for all persons. . . . The persona of the court, like that of any author, is revealed in the tone of voice the author adopts and the attitudes the author assumes toward materials and sources, the content of the text, and the parties involved.”).

<sup>119</sup> See, e.g., Rosebraugh, *supra* note 116.

<sup>120</sup> *An Introduction to Advocacy*, BAPTIST WORLD AID AUSTRALIA, available at [http://www.catalystonline.org.au/papers/introduction\\_to\\_advocacy.pdf](http://www.catalystonline.org.au/papers/introduction_to_advocacy.pdf).

<sup>121</sup> See, e.g., Gary Demuth, *Effort to Stress the Value of Art*, SALINA J. (Sept. 22, 2011), <http://www.saljournal.com/news/story/Arts-Initiative-9-22>; see also Jim Shore & Jerry Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims*

Either way, the judiciary cannot escape the advocacy. Following Newton's laws of motion, actions of environmental advocates spawn equal but opposite reactions. On the left, environmental litigators like Earthjustice, with the slogan "[b]ecause the Earth needs a good lawyer," boldly embrace an integrated approach to law and policy in our courts.<sup>122</sup> On the right, the Pacific Legal Foundation calls itself the "representative in the courts for Americans who have grown weary of overregulation by big government [and] overindulgence by the courts."<sup>123</sup> Continuing an American tradition, lawsuits thus serve as policy debates, generating press releases and fundraising opportunities, and forcing the courts to reach conclusions on matters that remain unresolved by the other branches of government.<sup>124</sup>

While the courts may be part of the policy battle, the judges themselves usually seek to avoid the rhetorical and political debates.<sup>125</sup> Courts have long ruled that courts should not be probing the mental process of the administrative decision-makers,<sup>126</sup> and that federal agencies need not

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*Settlement Act of 1987*, 6 J. LAND USE & ENVTL. L. 1, 2 (1990); Dan Charles, *How Two Bitter Adversaries Hatched a Plan to Change the Egg Business*, NPR (Feb. 10, 2012), <http://m.npr.org/news/front/146635596?singlePage=false>. For more on the lawyer's role in the consensus building process, see Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 65 (2002), available at <http://scholarship.law.georgetown.edu/faclub/173>.

<sup>122</sup> See EARTHJUSTICE, <http://www.earthjustice.org> (last visited Nov. 15, 2012).

<sup>123</sup> J. D'Agostino, *Conservative Spotlight: Pacific Legal Foundation*, HUMAN EVENTS (Nov. 4, 2004), <https://www.humanevents.com/2004/11/04/conservative-spotlight-pacific-legal-foundation/>.

<sup>124</sup> Alexis de Tocqueville would be most proud. See *Time, Inc. v. Firestone*, 424 U.S. 448, 478 (1975) (Brennan, J. dissenting) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question") (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 98, 280 (Phillips Bradley ed. 1956)).

<sup>125</sup> In litigation related to the Everglades, even the long admired Judge William Hoeverl—an accomplished jurist whose name accompanies The Florida Bar's distinguished award for professionalism—fell victim to the excesses. In an interview with the press, Judge Hoeverl made the mistake of openly criticizing proposed legislation not even before him as "clearly defective." His words later forced his recusal from the Everglades cases. Years of presiding over the intense disputes in the River of Grass finally took their toll. Craig Pittman, *Judge in Glades Case Removed*, ST. PETE TIMES (Sept. 24, 2003), [http://www.sptimes.com/2003/09/24/State/Judge\\_in\\_Glades\\_case\\_.shtml](http://www.sptimes.com/2003/09/24/State/Judge_in_Glades_case_.shtml).

<sup>126</sup> In *United States v. Morgan*, the Supreme Court gave appropriate respect to the leaders of the Executive branch, holding that:

[c]abinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures, any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.



limit their decisions to solely apolitical factors.<sup>127</sup> Indeed, most efforts to turn every internal disagreement among government staffers into an “ah-ha” opportunity fail.<sup>128</sup> In other words, framing the issue in the context of separation of powers, the judiciary has recognized that the Senators in the legislative branch and the bureaucrats in the executive branch are not the enemy of the environment; rather, they are representatives of their constituents.<sup>129</sup>

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313 U.S. 409, 421 (1991). In fact, the Court expressed its frustration with the lower court proceedings that allowed the Secretary of Agriculture to be deposed.

[T]he short of the business is that the Secretary should never have been subjected to this examination . . . such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that “it was not the function of the court to probe the mental processes of the Secretary.” . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected. . . . It will bear repeating that, although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice, and the appropriate independence of each should be respected by the other.

*Id.* at 422 (internal citations omitted).

<sup>127</sup> *Sw. Ctr. for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).

<sup>128</sup> *See Nat’l Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 227 (D.D.C. 1990) (“That the administrative record . . . reflects a certain amount of disagreement among the countless individuals involved in developing or commenting on the [Fisheries Management Plan] is inevitable and indicates that the debate was as open and vigorous as Congress intended.”).

<sup>129</sup> Consider, for example, the behavior of one environmental attorney, chastised by a U.S. District Court Judge:

Cases that implicate a subject so dear to many, such as the continued existence of Florida’s magnificent panther, tend to excite undue excess. In this case, counsel for the plaintiff has assumed an unusually aggressive stance. First, she suggests that United States Senator Bob Graham has intervened feloniously in an unseemly attempt to thwart her effort to salvage the Florida panther. This suggestion is illogical and regrettable. To say the absolute least, Senator Graham is not widely known as a committed enemy of Florida’s environment in general or Florida’s panthers in particular. Senator Graham is a public official of long and distinguished service. Whether one agrees or disagrees with him on some particular matter, one cannot reasonably doubt his integrity, especially if the doubt arises from a letter reporting secondhandedly that he merely inquired with the Attorney General of the United States respecting the status of a matter affecting his constituents. This court will not countenance any inquiry, as suggested by counsel for the plaintiffs, into the bona fides of Senator Graham’s official activity.

*The Fund for Animals v. Rice*, Case No. 94-1913-CIV-T-23E (M.D. Fl. 1995). Notably, this court opinion shows how the judiciary can get caught up in professionalism lapses as well.

Still, the language and tactics used in the courtroom can have effects outside. In the public, opponents of the environmentalism movement, like the ranchers in the Klamath basin in Oregon, have used protests and civil disobedience when endangered species litigation led to the cutting off of the ranchers' water supplies.<sup>130</sup> And even within the government, nuanced countertactics have emerged, like the naming of policies related to environmental affairs—the “Clear Skies Act” or the “Healthy Forests Initiative”—to disguise the policy objective.<sup>131</sup> One recent example of government abuse was especially disturbing, with a senior policy official fundamentally compromising scientific integrity by forcing Department of Interior biologists to rewrite their scientific conclusions to fit her preordained policy framework.<sup>132</sup> Exposed by the agency's Inspector General in 2007, the political interference subsequently forced the agency to reverse and revisit dozens of decisions pursuant to the ESA.<sup>133</sup>

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Upon further reflection, and after a motion by counsel, the Court above later struck its own statements. Cleansing the record, however, cannot eliminate the disease, and once the professionalism of the judiciary is compromised, the rule of law itself becomes suspect.

<sup>130</sup> See, e.g., Glen Spain, *Dams, Water Reforms, and Endangered Species in the Klamath Basin*, 22 J. ENVTL. L. & LITIG. 49, 78 n. 117 (2007).

<sup>131</sup> Considered economically sensible paths to environmental protection by supporters, but ridiculed as “greenwashing” by opponents, this name game is now politically commonplace. Compare EPA, CLEAR SKIES ACT OF 2003, available at <http://www.epa.gov/air/clearskies/fact2003.html>, with NATURAL RESOURCES DEFENSE COUNCIL, DIRTY SKIES: THE BUSH ADMINISTRATION'S AIR POLLUTION PLAN, available at [http://www.arizonaenergy.org/News\\_06/News%20Jan06/Dirty%20Skies--%20The%20Bush%20Administration%27s%20Air%20Pollution%20Plan.htm](http://www.arizonaenergy.org/News_06/News%20Jan06/Dirty%20Skies--%20The%20Bush%20Administration%27s%20Air%20Pollution%20Plan.htm); compare THE WHITE HOUSE, *Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities*, available at [http://www.fs.fed.us/projects/documents/HealthyForests\\_Pres\\_Policy%20A6\\_v2.pdf](http://www.fs.fed.us/projects/documents/HealthyForests_Pres_Policy%20A6_v2.pdf) with Environmental Protection Information Center, *Healthy Forests Initiative: A Campaign of Severe Forest Policy Rollbacks*, <http://www.wildcalifornia.org/publications/article-57>.

<sup>132</sup> Holly Doremus, *Harnessing the Power of Information for the Next Generation of Environmental Law—Part II: Use and Abuse of Information*, 86 TEX. L. REV. 1601, 1614 (2007).

<sup>133</sup> See *W. Watershed Project v. U.S. Forest Service*, 535 F. Supp. 2d 1173, 1185 (D. Idaho 2007) (reversing U.S. Fish & Wildlife Service decision not to list the greater sage grouse); see also H. Josef Herbert, *After the BigMac Attack: Interior's Mea Culpa*, ESABLAWG (Nov. 27, 2007), <http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-79D3NB> (including links to numerous articles on the subject). Similarly, in 2008, the U.S. Forest Service was berated by a U.S. District Court judge for its blatant failure to meet judicially established deadlines to complete the ESA's “consultation” process, and the Secretary of Agriculture was nearly held in contempt. *Forest Serv., Emps for Envtl. Ethics v. U.S. Forest Serv.*, 726 F. Supp. 2d 1195 (D. Mont. 2008). In this case, the Forest Service failed to meet deadlines previously set by the court to consult with the U.S. Fish & Wildlife Service on the effects of fire retardant on species each year, and considers chemical fire retardant an important firefighting tool. Judge Malloy held that

[t]he Forest Service's position, that if it did not comply with NEPA it cannot be held in contempt because of circumstances beyond its control,



In sum, the tone of environmental advocacy, and the words used by the messengers, can shape the perceptions of and reactions to the message. Sometimes, it may even harm the relationship between the environmental advocates and the governmental officials they hope to persuade. Worse yet, the general public—who in the end are the stakeholders who shape the democratic support for, or lack of support for, the statutes and laws the environmental advocates rely upon—are left confused, misled and maybe angry. So, environmental advocacy becomes exposed to even more radical consequences.

C. *The Risk of Statutory Reform or Repeal*

Environmental law is based upon statutes, so by definition, the shaping of environmental law will consist of cycles of legislation, litigation, and negotiation.<sup>134</sup> A decade ago, it seemed that the Florida Everglades might add a new dimension to that paradigm, as the federal, state, and local government officials worked with diverse stakeholders groups to agree upon a consensus-based negotiation approach to environmental restoration.<sup>135</sup> Instead, in Florida and the nation, the evidence suggests that the different groups of stakeholders chose radically different paths. Earth Jurisprudence thinkers seek to codify greater legal rights for the natural world,<sup>136</sup> while others are repealing the legacy of environmental law.<sup>137</sup> Even though our society faces an existential challenge in the form

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is duplicitous at best. A straight reading of the record here indicates that the Forest Service had no intention to comply with the Court's orders, or, at the very least—considering its lackluster participation in the consultation process—simply did not care enough about its regulatory and legal obligations to engage the process in a manner that meaningfully contributed to it.

726 F. Supp. 2d at 1134; see also *Forest Service Nears Contempt, and Court Threatens Prison for Department of Agriculture Official*, ESABLAWG (Feb. 27, 2008), available at <http://www.esablawg.com/esalaw/ESBlawg.nsf/d6plinks/KRII-7BF76J>.

<sup>134</sup> John J. Fumero & Keith W. Rizzardi, *The Everglades Ecosystem: From Engineering to Litigation to Consensus-Based Restoration*, 13 ST. THOMAS L. REV. 667, 673 (2001).

<sup>135</sup> *Id.* at 685.

<sup>136</sup> See CENTER FOR EARTH JURISPRUDENCE, <http://earthjuris.org/>; see also Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107, 108 (1997).

<sup>137</sup> Although Part II.C. of this article discusses current examples of efforts to repeal environmental laws, a provocative book published in 1996 suggested that an environmental backlash and massive Congressional reform was already underway. MICHAEL GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* 109 (1996) (“[E]nvironmental politics

of global climate change,<sup>138</sup> political and public support for the concerns of the environmental advocates has waned to the point of causing some environmental groups to temper their advocacy.<sup>139</sup> Once a celebration, Earth Day has become a source of social divisiveness.<sup>140</sup> In other words, for the lawyer advising an environmental advocacy client, the budgetary disputes and the coarse verbal exchanges over the cost of environmental regulation

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has undergone a dramatic change, whose themes and directions bear a striking resemblance to the demise of environmental values in the case law. Environmentalism has lost much of its appeal: environmental groups have lost tens of thousands of members. At the same time, the grass roots property rights movement has grown by leaps and bounds, and think tanks that influence environmental policies based on property rights and private markets enjoy increased influence, credibility, and funding. The establishment media have begun to subject environmental policies and their underlying assumptions to critical scrutiny.”). Criticism of the book suggested that it was not intended to trace the rise and fall of excesses in environmental law, but rather, “to advocate the dismantling of twentieth-century government.” Boyd Thompson, *Willful Blindness: The Downfall of the Demise of Environmentalism in American Law*, 10 TUL. ENVTL. L.J. 179, 185 (1996).

<sup>138</sup> While political leaders debate policies as to the degree of anthropocentric causation, and the appropriate solutions, and while the precise range of consequences remains unpredictable, the existence of some degree of global climate change is widely accepted as a scientific fact. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <http://www.ipcc.ch/>; *Climate Change*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/>; *Global Climate Change: Vital Signs of the Planet*, NASA, <http://climate.nasa.gov/> (last visited Nov. 15, 2012); *Global Warming Fast Facts*, NAT'L GEOGRAPHIC (June 14, 2007), [http://news.nationalgeographic.com/news/2004/12/1206\\_041206\\_global\\_warming.html](http://news.nationalgeographic.com/news/2004/12/1206_041206_global_warming.html); Peter Gleick, *Remarkable Editorial Bias on Climate Science at the Wall Street Journal*, FORBES (Jan. 27, 2012), <http://www.forbes.com/sites/petergleick/2012/01/27/remarkable-editorial-bias-on-climate-science-at-the-wall-street-journal/> (noting that “2011 was the 35th year in a row in which global temperatures were above the historical average” and that “every national academy of sciences on the planet agrees with the reality and seriousness of human caused climate change”). Compare Gleick et al., *Climate Change and the Integrity of Science*, 328 SCIENCE 689, 689–90 (2010) (signed by 255 scientists), with Claude Allegre et al., *No Need to Panic About Global Warming: There's No Compelling Scientific Argument for Drastic Action to 'Decarbonize' the World's Economy*, WALL ST. J., [http://online.wsj.com/article/SB10001424052970204301404577171531838421366.html?mod=WSJ\\_Opinion\\_LEADTop](http://online.wsj.com/article/SB10001424052970204301404577171531838421366.html?mod=WSJ_Opinion_LEADTop) (signed by 16 scientists) (last visited Nov. 15, 2012).

<sup>139</sup> Leslie Kaufman, *Environmentalists Get Down to Earth*, N.Y. TIMES, Dec. 18, 2011, at 7 (“On the strategy front, some of these groups are becoming more circumspect in campaigning against global warming, mindful of mixed public sentiment.”). Interestingly, some have theorized that humans are psychologically hard-wired not to accept science that might contradict our views. Chris Mooney, *The Science of Why We Don't Believe Science: How Our Brains Fool Us on Climate, Creationism, and the Vaccine-Autism Link*, MOTHER JONES, June 2011, at 27.

<sup>140</sup> See, e.g., KARL BOYD BROOKS, *BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945–1970* (2009); Joel A. Mintz, *Book Review*, 50 AM. J. LEGAL HIST. 107, 107 (2010).

may be minor considerations. Today, when advising clients of moral, economic, social, and political factors, the lawyer should also warn of the potential for reform or repeal of environmental laws.

At the federal level, support for environmental protection has changed. On the campaign trail, Presidential candidates attacked each other for previously supported environmental protection initiatives.<sup>141</sup> Perhaps most notably, views on climate change and the need for “cap-and-trade” legislation—deemed by former Vice President Al Gore in 2009 to be “one of the most important pieces of legislation ever introduced in Congress”—changed dramatically.<sup>142</sup> In 2011–2012, the President and Congress virtually ceased their efforts on the subject,<sup>143</sup> and one Presidential candidate even apologized for his own prior support for the concept, declaring it “stupid.”<sup>144</sup> The fate of cap-and-trade climate change legislation is not a singular event.

Of course, macro-level debates over the merits of environmental laws can occur within any of the branches of government: legislative,<sup>145</sup>

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<sup>141</sup> See, e.g., *Romney & Obama: Carbon Copies*, YOUTUBE (Oct. 6, 2011), <http://bit.ly/renpjg>; Jonathan Weisman, *Romney Environment Push Is Fresh Target for His Rivals*, WALL ST. J. (Oct. 6, 2011), available at <http://online.wsj.com/article/SB10001424052970203388804576613293746516756.html> (candidate made repeal of laws requiring energy saving light bulbs part of a campaign promise); Suzanne Goldenberg, *Republican Bill to Repeal Law That Promotes Energy-Saving Lightbulbs Fades*, THE GUARDIAN (July 13, 2011, 12:26 AM), <http://www.guardian.co.uk/environment/2011/jul/13/energy-saving-light-bulbs-ban-republican-bill-fails>.

<sup>142</sup> *Compare Cap and Trade, with Handouts and Loopholes: The First Climate-Change Bill with a Chance of Passing Is Weaker and Worse than Expected*, THE ECONOMIST, May 21, 2009, available at <http://www.economist.com/node/13702826>, with John M. Broder & Clifford Krauss, *Advocates of Climate Bill Scale Down Their Goals*, N.Y. TIMES (Jan. 26, 2010), available at <http://www.nytimes.com/2010/01/27/science/earth/27climate.html>.

<sup>143</sup> See Steven Mufson, *Vanishing Cap and Trade in Obama's 2012 Budget*, WASH. POST (Feb. 14, 2011), available at [http://voices.washingtonpost.com/post-carbon/2011/02/vanishing\\_cap\\_and\\_trade\\_in\\_obama.html](http://voices.washingtonpost.com/post-carbon/2011/02/vanishing_cap_and_trade_in_obama.html); Chris Good, *Almost Every 2012 Republican Has a Cap-and-Trade Problem*, THE ATLANTIC (May 13, 2011), <http://www.theatlantic.com/politics/archive/2011/05/almost-every-2012-republican-has-a-cap-and-trade-problem/238776/>.

<sup>144</sup> See Travis Waldron, *Pawlenty's Apology Papers over His Extensive Support for Cap and Trade*, THINK PROGRESS (May 6, 2011, 12:40 PM), <http://thinkprogress.org/politics/2011/05/06/164076/pawlenty-cap-and-trade-apology/>.

<sup>145</sup> For example, through the Information Quality Act, environmental science itself came under intense scrutiny, with Congress passing a statute seeking to ensure that challenges to the quality of science will be heard. See Robert R. Kuehn, *Suppression of Environmental Science*, 30 AM. J.L. & MED. 333, 349 (2004); Kirk T. O'Reilly, *Science, Policy, and Politics: The Impact of the Information Quality Act on Risk-Based Regulatory Activity at the EPA*, 14 BUFF. ENVTL. L.J. 249, 250 (2007); Lori J. Wolf, *Dissecting the Information Quality Act: A Look at the Act's Effect on the Florida Panther and Evidentiary Science*, 11 ALB. L. ENVTL. OUTLOOK 89, 109 (2006).

executive,<sup>146</sup> or judicial.<sup>147</sup> But the lawyer appearing before the judiciary can shape the requested remedies, has an opportunity to respond to the opposition, and can participate in the process on behalf of the client. Similarly, if actions are taken by the executive branch, such as modifications of enforcement practices or alterations of administrative rules, a lawyer can usually seek to intervene in the enforcement cases, or participate in the notice and comment process.<sup>148</sup> In contrast, the lawyer representing

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In another petty but telling example, Congress abandoned, in 2010, its green initiative of using biodegradable materials in its own cafeteria. Trays and utensils made of biodegradable corn starch in the Congressional cafeteria disappeared, plasticware and polystyrene foam plastic coffee cups returned. Suzanne Goldenberg, *Republicans Recycle an Old Idea: The Foam Plastic Coffee Cup*, THE GUARDIAN (Feb. 28, 2011, 4:34 PM), <http://www.guardian.co.uk/world/2011/feb/28/republicans-foam-coffee-cup-environmentally-bad>; David A. Fahrenthold & Felicia Sonmez, *In the House, Compostable Utensils Replaced with Old-Fashioned Plastic*, WASH. POST (March 5, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030406403.html?hpid=topnews>.

<sup>146</sup> Sometimes, the review and repeal of regulations can involve a combination of the executive and legislative branches. See, e.g., Note, *Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2163 (2009).

<sup>147</sup> Within the judicial branch, scholarly work has suggested that changes in judicial appointments and judicial education programs are intended to produce changes in environmental policy. John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 217–18 (2000); Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars Are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405, 405–07 (2001).

<sup>148</sup> Within the executive branch, agencies can use enforcement discretion and rule-making authority to reverse prior outcomes. See, e.g., Robert Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2530–32 (2011). The shifting policies between the last three Presidential administrations demonstrate the practice. *Id.*

The administration of President George W. Bush settled many Clean Air Act enforcement cases begun by President William Clinton's administration. See Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement During The Bush I Administration*, AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION ALI-ABA COURSE OF STUDY (Apr. 21, 2005) 34 ELR 10912 & SK057 ALI-ABA 183. The shift in enforcement policy triggered high-profile resignations. See also Eric V. Schaeffer, RESIGNATION LETTER, available at <http://www.grist.org/article/top-epa-official-resigns>. The Obama Administration reversed course, again. See Holly Doremus, *New Life for New Source Review*, LEGAL PLANET (Apr. 30, 2009), <http://legalplanet.wordpress.com/2009/04/30/new-life-for-new-source-review/>.

The Bush Administration also adopted controversial revised regulations governing the Endangered Species Act consultation process for evaluating risks to listed species. See Eric Biber & Cynthia Drew, *Stopping the Conversation: Amended ESA Section 7 Regulations Put Species At Risk*, 36 ECOLOGY L. CURRENTS 139, 139–41 (2009) (discussing the proposed rule changes of 73 Fed. Reg. 47868, with the final rule changes of 73 Fed.

a local environmental advocacy group probably has less access to Congress or state legislature (which can rewrite environmental law and policy on their own).<sup>149</sup> The lawyers filing citizen suits, however, must recognize the influence their efforts can have upon legislative efforts to reform or repeal environmental laws.

In a 2009 citizen suit, for example, environmental advocates claimed that Florida's water bodies were nutrient enriched, and demanded that the U.S. EPA adopt new nutrient requirements for Florida waters.<sup>150</sup> The subsequent settlement, and its potential consequences for water quality management, triggered a backlash. In 2011, the proposed Cooperative Federalism Act sought to fundamentally restructure the relationship between the state and federal governments, substantially limiting the role of the EPA implementation of the Clean Water Act.<sup>151</sup> A similar but narrower bill—the “State Waters Partnership Act of 2012”—was introduced

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Reg. 76272). The Obama administration eventually reversed the rules. *See* The Endangered Species Act, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, 74 Fed. Reg. 9753 (Mar. 6, 2009). However, when litigation over the listing of the polar bear created the potential for using the Endangered Species Act as a tool for the regulation of global climate change, both presidential administrations adopted and defended agency rules exempting the polar bear from some of the ESA's essential regulatory provisions, concluding that the ESA was not the proper way to regulate greenhouse gases. *See* Jessica Ferrell, *Federal Judge Requires USFWS to Conduct NEPA Review of Polar Bear Rule*, 280 ENV. COUNS. NEWSLETTER 4, 4 (Dec. 2011).

<sup>149</sup> For example, policies can be adopted to provide exemptions or exceptions from the need to comply with environmental laws. Renee Lewis Kosnik, OIL AND GAS ACCOUNTABILITY PROJECT, THE OIL AND GAS INDUSTRY'S EXCLUSIONS AND EXEMPTIONS TO MAJOR ENVIRONMENTAL STATUTES 2 (Oct. 2007) (noting that “the oil and gas industry enjoys sweeping exemptions from provisions in the major federal environmental statutes intended to protect human health and the environment” including the Comprehensive Environmental Response, Compensation, and Liability Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; Clean Water Act; Clean Air Act; National Environmental Policy Act; and the Toxic Release Inventory under the Emergency Planning and Community Right-to-Know Act), available at <http://www.earthworksaction.org/files/publications/PetroleumExemptions1c.pdf?pubs/PetroleumExemptions1c.pdf>.

<sup>150</sup> *See* Fla. Wildlife Fed. v. S. Fla. Water Mgmt., 647 F.3d 1296, 1296–97 (11th Cir. 2011). The author of this Article was counsel for the interveners in this matter. The federal government, after initially defending the suit, reversed course and settled the dispute. *Id.* Although the EPA had previously approved Florida's narrative water quality standards less than three years earlier, the EPA formally concluded that Florida's water quality standards for nutrients must be revised, and a court-ordered consent decree set a deadline for the federal government to adopt new numeric criteria for the State of Florida. *Id.*

<sup>151</sup> Clean Water Cooperative Federalism Act of 2011, H.R. 2018, 112th Cong. (1st Sess. 2011) (passed by a 239 to 184 vote by the U.S. House of Representatives), <http://woodall.house.gov/event/house-rules-committee-meeting-hr-2018-clean-water-cooperative-federalism-act-2011>.



in 2012, seeking to reverse the outcome of the Florida litigation and settlement agreement, and prohibiting the EPA from acting independently of the State of Florida.<sup>152</sup> Environmental advocacy actions triggered reactions.

Across the country, on the Pacific coast, environmental advocates pursued ESA citizen suit litigation to protect the endangered Delta smelt and other protected salmonid species.<sup>153</sup> The Delta smelt is a small, slender-bodied fish found only in the San Francisco Bay and Sacramento–San Joaquin Rivers Delta in California (“Bay-Delta”), which has declined to its lowest-ever observed levels due to entrainment in water export pumps, competition and predation from exotic fish species, and changes in habitat and food supply.<sup>154</sup> The litigation eventually led to additional conditions being imposed on the operation of the regional water supply.<sup>155</sup> And that controversial outcome, in turn, led to legislative reactions. The House of Representative considered repealing agency authority to implement the ESA’s requirements within the Sacramento Bay Delta.<sup>156</sup> For its part, the State of California has also passed water management reforms.<sup>157</sup>

These disputes are not limited to the federal government. States are also enmeshed in these types of philosophical and federalism-based

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<sup>152</sup> H.R. 3856, 112th Cong. (2d. Sess.). The Florida Legislature also sought to prevent the EPA from asserting itself, and passed its own law ratifying actions by the State Department of Environmental Protection, exempting the state agency action from the usual state administrative procedure, and further directing the state agency to send the proposed standards to the EPA. *Effective Date for the Water Quality Standards for the State of Florida’s Lakes and Flowing Waters*, 77 Fed. Reg. 29271–29275 (May 17, 2012).

<sup>153</sup> *The Delta Smelt Consolidated Cases*, 1:09-cv-00407 OWWDLB et al., Final Judgment, Document 851 (E.D. Cal. 2011), available at [http://baydelta.files.wordpress.com/2011/04/851\\_smelt\\_final-judgment.pdf](http://baydelta.files.wordpress.com/2011/04/851_smelt_final-judgment.pdf).

<sup>154</sup> EUGENE H. BUCK ET AL., CONG. RESEARCH SERV., R41608, *THE ENDANGERED SPECIES ACT (ESA) IN THE 112TH CONGRESS: CONFLICTING VALUES AND DIFFICULT CHOICES* 18–19 (June 14, 2012), <http://www.fas.org/sgp/crs/misc/R41608.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* (discussing legislative proposals, including Section 308 of H.R. 1287, stating as follows: “[n]otwithstanding any other provision of law, in connection with the Central Valley Project, the Bureau of Reclamation and an agency of the State of California operating a water project in connection with the Project shall not restrict operations of an applicable project pursuant to any biological opinion issued under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), if the restriction would result in a level of allocation of water that is less than the historical maximum level of allocation of water under the project.”).

<sup>157</sup> In 2009, responding in part to the years of Delta smelt litigation in the Sacramento Bay Delta, the California legislature passed its own reform attempting to improve regional water management. See, e.g., Richard M. Frank, *A New Dawn for the Sacramento–San Joaquin Delta? Assessing the 2009 California Delta/Water Legislation*, 37 *ECOLOGY L. CURRENTS* 17, 17 (2010).



disputes over environmental law. In California, a 2010 ballot initiative sought to suspend the state Global Warming Act of 2006,<sup>158</sup> and in 2012, a new ballot effort seeks to repeal all state environmental laws as unconstitutional.<sup>159</sup> In 2011, the Florida Legislature repealed an entire chapter of growth management laws.<sup>160</sup> In Maine, the Governor announced a sixty-three-point plan to cut environmental regulations.<sup>161</sup> In New Hampshire, twelve different rollbacks or repeals of environmental laws or funding have been proposed in 2012.<sup>162</sup> North Carolina legislators recently suggested repeal of air quality regulations.<sup>163</sup>

Yet none of this is truly new; the environmental advocacy community has had the chance to learn this lesson in the past.<sup>164</sup> Most famously, when the consequences of the Tellico Dam project threatened the tiny

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<sup>158</sup> Margot Roosevelt, *Global Warming: Ballot Initiative Would Curb California Efforts*, LA TIMES (Jan. 25, 2010), available at <http://latimesblogs.latimes.com/greenspace/2010/01/global-warming-ab-32-measure-94-climate-change-schwarzenegger.html>.

<sup>159</sup> Eric Biber, *Tea Party Activist Wants to Repeal All California Environmental Laws*, LEGAL PLANET (Dec. 11, 2011), <http://legalplanet.wordpress.com/2011/12/11/tea-party-activist-wants-to-repeal-all-california-environmental-laws/>.

<sup>160</sup> Property rights advocates declared the change a victory, praising the “ditching of centralized planning” and promoting the need for “a competitive land supply.” Scott Roberts, *Florida Repeals Smart Growth Law*, FREEDOM FOUNDATION (Oct. 12, 2011), [http://www.myfreedomfoundation.com/index.php/site/view/florida\\_repeals\\_smart\\_growth\\_law](http://www.myfreedomfoundation.com/index.php/site/view/florida_repeals_smart_growth_law). However, Audubon of Florida had a different view, declaring Florida Governor Rick Scott to be dishonest, and rejecting the “big lie” that repeal was a necessary step toward economic recovery. *Audubon of Florida Reacts to Gov. Scott’s Approval of Growth Management Repeal*, AUDUBON OF FLORIDA, <http://audubonoffloridanews.org/?p=8419> (last visited Nov. 15, 2012) (explaining that growth management laws that would allow over 1,000,000 new residential dwellings and over 2.7 billion square feet of commercial, office, and industrial space, enough new retail, office and industrial space to create over six million new jobs); see also Anthony Flint, *How the Tea Party Is Upending Urban Planning*, THE ATLANTIC (Dec. 14, 2011), available at <http://www.theatlanticcities.com/politics/2011/12/how-tea-party-upending-urban-planning/718/>.

<sup>161</sup> Mike Tipping, *LePage Proposals Would Dismantle Maine’s Environmental Legacy*, MORNING SENTINEL (Jan. 30, 2011), <http://www.onlinesentinel.com/opinion/columnists/MIKE-TIPPING-LePage-proposals-would-dismantle-Maines-environmental-legacy-.html>.

<sup>162</sup> Suzie Hackler, *A New Year’s Resolution for the NH Legislature: Kill the Dirty Dozen Bills of 2012*, CONSERVATION NH (Jan. 3, 2012), <http://conservationnh.org/water/a-new-year%E2%80%99s-resolution-for-the-nh-legislature-kill-the-dirty-dozen-bills-of-2012/>.

<sup>163</sup> Kathleen Sullivan, *North Carolina Residents Breathe Toxic Pollution as Politicians Cater to Major Polluters*, S. ENVTL. L. CTR. (Sept. 27, 2011), [http://www.southernenvironment.org/newsroom/Press\\_releases/north\\_carolina\\_residents\\_breathe\\_toxic\\_pollution](http://www.southernenvironment.org/newsroom/Press_releases/north_carolina_residents_breathe_toxic_pollution).

<sup>164</sup> As President Harry S Truman said, “The only thing new in the world is the history you don’t know.” MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S TRUMAN* 26 (1974).

snail darter with extinction, environmental advocates obtained a remarkable ruling:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result . . . . This language admits of no exception.<sup>165</sup>

Congress promptly enacted an exception. Just months after the decision, Congress amended the ESA and created a committee (nicknamed the “God Squad”) to authorize federal actions even if they would jeopardize the continued existence of a species.<sup>166</sup> In other words, the result of a decade of litigation, more than a dozen cases, and a historic U.S. Supreme Court victory, was the reform of the very law the environmental advocacy community had relied upon in the first place.<sup>167</sup> Simply put, successful environmental advocacy litigation can and does trigger counterproductive legislative outcomes.<sup>168</sup>

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<sup>165</sup> *TVA v. Hill*, 437 U.S. 153, 173 (1978).

<sup>166</sup> Endangered Species Act, Pub. L. No. 95-632 (1978) (codified as amended at 16 U.S.C. § 1536 (2006)); see also David B. Stromberg, *The Endangered Species Act Amendments of 1978: A Step Backwards?*, 7 B.C. ENVTL. AFF. L. REV. 33 (1978), available at <http://lawdigitalcommons.bc.edu/ealr/vol7/iss1/3>.

<sup>167</sup> See Zygmunt J.B. Plater, *More Than Just a Passing Fad: Article: In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 808 (1986) (footnote 2 cites more than a dozen cases involving the issue); Zygmunt J. B. Plater, *Tiny Fish, Big Battle: 30 Years After TVA and the Snail Darter Clashed, the Case Still Echoes in Caselaw, Politics, and Popular Culture*, 44 TENN. B. J. 14 (Apr., 2008). In its reform, Congress created new ESA exemptions. Two decades later, the Clinton administration adeptly used the Habitat Conservation Planning process (to the dismay of some environmentalists). See, e.g., David J. Sousa & Christopher McCrory Klyza, *New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism?*, 47 NAT. RESOURCES J. 377, 377–79 (2007). We need to learn the lessons again.

<sup>168</sup> Another example of successful litigation generating legislative defeat involved a critically important concept in the Clean Water Act. Disputing EPA's rules exempting some point

So, as this discussion demonstrates, the practice of law and environmental advocacy must acknowledge the larger political and budgetary context. Today, environmental law and policy faces extraordinary budgetary and philosophical challenges. That inescapable truth has ethical implications. Although a swing of the political pendulum might one day reduce the risks, current events dictate that lawyers who represent environmental advocacy clients should advise their clients of moral, economic, social, and political factors, including the reality that the environmental laws relied upon by the environmental advocates could be at risk of defunding, reform, or even repeal.

### III. IN PRACTICE: WHEN THE DUTY TO ADVISE BECOMES MANDATORY

Many committed environmental activists, inevitably, will reject cautionary advice from counsel, declaring lawsuits and progressive advocacy a strategic necessity. They will insist that only court-ordered mandates can change the course and overcome extraordinary industry resistance or governmental inaction.<sup>169</sup> And indeed, an environmental advocacy client who files a petition to list an imperiled species or who pursues a lawsuit to stop environmental degradation has valid objectives at stake. Still, the lawyer who represents environmental advocacy clients has an ethical duty to at least *advise* the client of “moral, economic, social and political factors that may be relevant to the client’s situation.”<sup>170</sup> That lawyer also must

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source agricultural irrigation discharges from National Pollutant Discharge Elimination System (“NPDES”) permitting program, the Natural Resources Defense Council filed suit. *NRDC v. Costle*, 568 F.2d 1369, 1373 (D.C.Cir. 1977). Eventually, they prevailed in the litigation, and the D.C. Circuit held that these types of exemptions were invalid. *See id.* at 1383. The environmentalists victory was short-lived. That same year, Congress amended the Clean Water Act, and categorically exempted agricultural irrigation from NPDES regulation. Pub. L. No. 95-217, § 33, 91 Stat. 1566, 1577 (1977) (codified as amended at 33 U.S.C. § 1362(14) (2006)).

<sup>169</sup> Henry Juszkievicz, *Repeal the Lacey Act? Hell No, Make It Stronger*, THE HUFFINGTON POST (Nov. 2, 2011), [http://www.huffingtonpost.com/henry-juszkievicz/gibson-guitars-lacey-act\\_b\\_1071770.html](http://www.huffingtonpost.com/henry-juszkievicz/gibson-guitars-lacey-act_b_1071770.html); Zygmunt J.B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 60 (2005) (“[T]he environmental movement’s current political failures, of course, are in substantial part attributable to the extraordinary and one could say unfair advantages that industry has been able to mobilize, at taxpayer expense, to overwhelm the environmental media and the political process.”).

<sup>170</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. e (“Matters calling for a client decision”).

adhere to additional duties of competence,<sup>171</sup> diligence,<sup>172</sup> and the fundamental duty to communicate with the client to ensure informed consent.<sup>173</sup> The lawyer could reasonably charge a fee for the service, too, because it is so closely related to the legal representation of the client.<sup>174</sup> But if the lawyer fails to meet this duty, and fails to even suggest to the client the potential for self-destructive harms, then the lawyer may face potential consequences, too.<sup>175</sup>

When the ethical principles associated with the duty to advise—coupled with the duty of communication and the duty to ensure informed consent—are applied in the context of environmental advocacy, they lead to a compelling conclusion. Low levels of client sophistication, and high levels of controversy, may morph the discretionary duty as advisor into a mandatory duty.<sup>176</sup> When a client asks a lawyer to file a lawsuit, or to pursue some other controversial form of representation, the lawyer has a duty to ensure that the client is adequately informed.<sup>177</sup> In the circumstance where a lawyer recognizes that a client's decision to pursue litigation may harm the client's own objectives, Model Rule 2.1 and the *Restatement (Third) of the Law Governing Lawyers* place a responsibility upon the lawyer to speak up.<sup>178</sup> Fundamentally, a lawyer should ensure that a client is adequately informed and protected from substantial harms.

For a matter involving little controversy or little risk to the client, or with a highly sophisticated client, the lawyer probably has *no* duty to advise or engage in further inquiry.<sup>179</sup> But as factors change, and as the need to advise the client of the risks and consequences of advocacy increases, the lawyer *should* probe the client for additional information, and

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<sup>171</sup> "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

<sup>172</sup> Diligence states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* at R. 1.3 (1983).

<sup>173</sup> *Id.* at R. 1.0, 1.3, 1.4 (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. b (rationale).

<sup>174</sup> Gantt, *supra* note 20, at 397 (explaining that an attorney should be justified in charging legal rates for such services if two considerations are satisfied: (1) a principal reason why the attorney is offering the nonlegal services is to aid the client in vindicating or advancing a legal right or interest; and (2) according to Rule 5.7, the services are not "distinct" from the legal services or if so, the client reasonably expects that the services are a part of the legal service provided).

<sup>175</sup> *Id.* at 398.

<sup>176</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000).

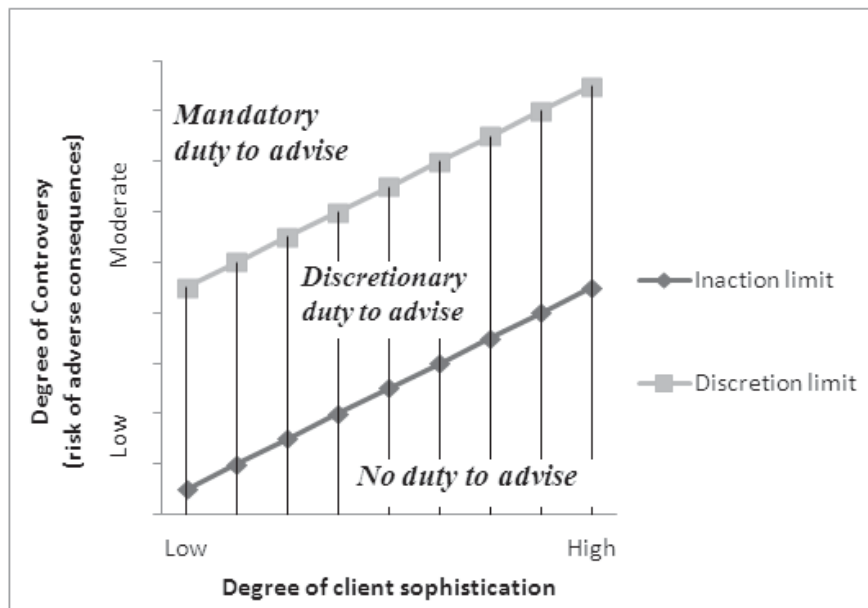
<sup>177</sup> *Id.*

<sup>178</sup> *Id.*; MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

<sup>179</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000).

may need to advise the client and further discuss the potential risks and consequences. At some critical point, when the lawyer knows that the legal action is likely to result in substantial adverse consequences to the client, the discretion gives way to a mandate, and the lawyer *must* advise the client of the risks and consequences ahead.<sup>180</sup>

TABLE 1: THE LAWYER'S DUTY AS ADVISOR



Admittedly, the precise limits of the discretionary and mandatory duties—the point where inaction gives way to discretion, or the point where discretion gives way to a mandate—remain uncertain and dependent upon factual circumstances. That uncertainty explains the repeated emphasis upon lawyer discretion in Model Rule 2.1. However, unlike the *Restatement (Third)*, which applies a reasonableness test to acknowledge a lawyer's increasing duties to less-sophisticated clients, the *Model Rule* commentary goes too far.

Even in extraordinary circumstances, Model Rule 2.1, Comment 5 says only that a lawyer *may* be required to advise the client. This Comment should be revised. If a lawyer *knows* of likely harm—such as the significant potential for statutory reform or repeal—then the lawyer cannot stay

<sup>180</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

silent. The lawyer's advisory duty should be clarified by amending the discretionary phrasing in the second sentence of Model Rule 2.1, Comment 5 to become a mandate, as follows:

*Offering Advice*

[5] . . . . However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. . . .<sup>181</sup>

This conclusion need not be limited to environmental advocacy lawyers. The duty to advise should apply broadly to any circumstances where the client is considering a legal action that the lawyer *knows* is likely to harm the client. Presumably, rational clients do not intentionally pursue legal action for the purpose of harming themselves. But less-informed clients might not recognize concerns that are readily foreseeable to their attorneys. The client may not know that the last legislative session just repealed a whole series of laws, but that fact will be well known to the attorney who monitors the actions of state and federal legislatures. Even informed but ideal-driven clients can make errors in strategic judgment on matters of high controversy. By pursuing a lawsuit or advocacy strategy on a highly controversial issue in a hostile political environment, that client may invite undesirable budgetary, political, and legal consequences.<sup>182</sup>

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<sup>181</sup> *Id.* cmt. 5. In the alternative, this sentence should be rewritten, or entirely eliminated. However, as currently written, the Commentary does have the benefit of a cross-reference to the duty of communication in Model Rule 1.4. So, rather than complete elimination, an alternative informative statement, that emphasizes neither discretion nor mandate, could simply acknowledge that “[a] lawyer’s efforts to advise the client also fulfill the duty of communication in Rule 1.4.”

<sup>182</sup> While this article focuses on the potential for legislative responses to environmental advocacy, the environmental lawyer, in serving as an advisor, may need to consider a host of factors presenting similar risks. For example, the history of sea turtles, shrimp, and the General Agreement on Tariffs and Trade (“GATT”) provides another example of environmental advocacy litigation having counterproductive results, and the story involves legislation, a domestic lawsuit, and the agency rule-making and international legislation it spawned.

The National Marine Fisheries Service requires domestic shrimp fishing boats to install and use Turtle Excluder Devices (“TED”) to reduce the accidental “bycatch” of endangered and threatened sea turtles. 50 C.F.R. §§ 217, 222, 227 (2012). Taking this notion to the global scale, Congress required “certification” of foreign fisheries as having adopted



In those circumstances, where a lawyer knows that a client's proposed actions will create adverse harm to the client, the lawyer fulfilling the duty as advisor must ask the client difficult questions. In particular, the duty as advisor compels the lawyer to discuss the potential outcomes with the client to ensure informed consent<sup>183</sup> and, perhaps, to save the client from a form of self-destruction.<sup>184</sup>

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a regulatory program governing the incidental taking of sea turtles restrictions that is comparable to the United States. Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (1989). The U.S. Department of State sought to apply those restrictions in a phased manner, but when the Secretary of State's guidance documents initially applied the restrictions only to the Caribbean region, Earth Island Institute brought suit in federal court, demanding that the requirements be applied globally. The U.S. Court of International Trade ultimately agreed, ordering the Secretary of State to implement Section 609 on imported shrimp affecting sea turtles, "wherever harvested." *Earth Island Institute v. Christopher*, 913 F. Supp. 559, 580 (Ct. Int'l Trade 1995); *see also* *Earth Island Institute v. Christopher*, 6 F.3d 648, 650 (9th Cir. 1993) (finding exclusive jurisdiction in the Court of International Trade, yet invalidating Section 609(a) as violating the separation of powers.)

Unwilling to abide by the demands of a domestic court decision, the foreign nations of India, Malaysia, Pakistan, and Thailand brought suit. In an important opinion weighing the benefits of environmental protection against the problems of unjustified trade discrimination, a panel of the World Trade Organization held that Section 609, and the U.S. measures to benefit sea turtles, violated GATT. *See, e.g.*, Panel Report, *U.S. Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (Oct. 12, 1998). In response, and to culminate a decade of legislation, guidance and litigation, the U.S. Department of State issued new guidelines governing global shrimp fishery certification. *See* 64 Fed. Reg. 36946 (July 8, 1999). The WTO would even find that Section 609 was justified because the U.S. was making serious good faith efforts to reach a multilateral agreement. Panel Report, *United State-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001). Perhaps, in the grand view of foreign policy, some advocates from Earth Island Institute might even view the tortured history of the shrimping certification requirements as a success.

Yet Earth Island Institute continued to litigate its demand for rapid domestic and global implementation of the TED requirements in the U.S. courts. The resulting Federal Circuit opinion, however, undermined the success already obtained, and reached a conclusion that undermined the reasoning of the WTO: "we find that Congress with remarkable unanimity was focused on protecting the domestic shrimp industry, not the sea turtle, when it enacted section 609. Many of the comments made on the Senate floor reflected deep skepticism about the effectiveness of TED requirements, and about the wisdom of placing sea turtle conservation above the economic well-being of domestic shrimpers." *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1294-1295 (Fed. Cir. 2002).

<sup>183</sup> *See* Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 595 (2005) (discussing the need to engage clients in the advocacy process and decisions).

<sup>184</sup> Jan Ellen Rein, *Clients With Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101,

A. *The Hard Questions an Advisor Must Ask*

The lawyer's duty to advise an environmental advocacy client can be fulfilled, in part, by pursuing two lines of inquiry: one involving the client's sophistication, professionalism, and risk aversion, and the other involving how the client might prepare for the potential controversies ahead and responses by third parties. In other words, the lawyer must advise on matters related to both internal (attorney-client) and external (third-party) relationships, a notion once suggested by Canon 7-3 of the *Model Code*: "a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships."<sup>185</sup>

1. Looking Inward: Should a Client Exercise Self-Restraint?

The lawyer's first line of inquiry, in exercising the duty as advisor, focuses on the client. As a threshold matter, if the lawyer learns that the client is highly sophisticated, and the matter is one of low controversy or one that is unlikely to generate a risk of legal reform or repeal, then the lawyer probably has no further duty to advise. But in the case where there is high controversy, the duty to advise necessitates further inquiry on two additional inward looking points.

First, the lawyer should advise on the tone the client should strike in her endeavors. Specifically, a lawyer should consider advising the client of the benefits and importance of courtesy and professionalism. Should rhetorical flourish be included, or left out? Some scholars have noted that lawyers can hide behind the cloak of zealous advocacy, and then deceive or overreach.<sup>186</sup> Rhetorical advocacy may also come with the high cost of sacrificing public faith in the system of justice, or further incensing the opposing viewpoints.<sup>187</sup> Hostile advocacy is antithetical to the moral values

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1162 (1994) (proposing "directions and mechanisms for avoiding the harm threatened by self-destructive or socially destructive client impulses," including a series of questions to determine whether or not to interfere with client decisions).

<sup>185</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1980).

<sup>186</sup> See Allen K. Harris, *The Effect of Overzealous Advocacy on Professionalism—What Is a Lawyer's Duty Under Rule 1.3?*, OKLA. B. J. (June 10, 2000), available at <http://www.okbar.org/ethics/harris.htm>.

<sup>187</sup> Even the opponents of the environmental movement, whether from industry, property rights or other ideological perspectives, seek to represent their views of the competing interests of humankind. Environmental law is often about respect for the earth, and reflects the evolution of nuisance law, in turn premised upon mutual respect among neighbors. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (air pollution from smelters emitting

of the environmental movement, and even perhaps self-defeating.<sup>188</sup> The tongue (and the pen) can be unruly evils.<sup>189</sup>

Attorneys take oaths,<sup>190</sup> and follow codes of conduct, that call for civility and professionalism.<sup>191</sup> While such professionalism is largely aspirational and hard to define, and even though precise expectations vary from place to place,<sup>192</sup> these concepts should certainly be among the factors considered by the lawyer and client when they evaluate the likely responses to their legal advocacy actions. Professionalism from the outset increases the likelihood of effectiveness in the end.<sup>193</sup>

Next, in addition to evaluating the client's advocacy tone, and as a continued part of this introspective inquiry, the lawyer should assess the client's degree of risk aversion. Is the client prepared for the potential controversies ahead and willing to face the risk that the proposed legal actions could lead to the defunding, reform, or repeal of the laws and policies for which they advocate? If the client is risk adverse, then the lawyer may advise of the need for self-restraint. Again, these types of questions are an essential component of the duty to obtain informed consent which requires the lawyer to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed

sulphurous acid gas in Tennessee was drifting into Georgia and causing damage); *New York v. New Jersey*, 283 U.S. 473 (1931) (new sewage discharge from New Jersey was being proposed).

<sup>188</sup> Fajans & Falk, *supra* note 118, at 2.

<sup>189</sup> *James* 3:8–10 (King James) (“[N]o man can tame the tongue. It is an unruly evil, full of deadly poison.”).

<sup>190</sup> The Florida Bar, *Oath of Admission to the Florida Bar* (Sept. 13, 2011), <http://www.floridabar.org/tfb/TFBProfess.nsf/basic+view/04E9EB581538255A85256B2F006CCD7D?OpenDocument> (“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”).

<sup>191</sup> Professionalism and civility are also discussed in the Florida's Guidelines for Professional Conduct, which note that the judiciary and its lawyers must ensure the respect of the public they serve. The Florida Bar, *Henry Latimer Center for Professionalism, Guidelines for Professional Conduct, Preamble*, <http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a/2f2668cdfd7b99e085256b2f006ccd15#Preamble> (“[A] lawyer must always be conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.”).

<sup>192</sup> Keith W. Rizzardi, *Defining Professionalism: I Know It When I See It?*, 79 FLA. B. J. 38, 38 (2005).

<sup>193</sup> Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137, 137 (2011).

course of conduct.”<sup>194</sup> But if the client remains fully committed to the advocacy cause, then the lawyer has another set of questions to ask.

## 2. Looking Outward: What Happens When Others React?

In this second major area of inquiry, the lawyer and client consider third parties. The lawyer's advice should consider not only the potential adverse effects *on* third parties;<sup>195</sup> rather, it should also include assessments of what those third parties might do, especially *to* the client.<sup>196</sup> In other words, as the risks of controversy and third party opposition increase, so too does the duty of the lawyer to advise the client and to ask the question: *what might others do in response?*<sup>197</sup>

In assessing the risks, the lawyer and client should give special attention to the likely remedies, and to the third parties likely to be affected.<sup>198</sup> With that understanding, the lawyer should then consider the potential for a successful legal action to trigger undesired consequences.<sup>199</sup>

<sup>194</sup> MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (1983).

<sup>195</sup> See, e.g., *id.* at R. 1.2 cmt. 2 (1983) (“[L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”).

<sup>196</sup> In the context of tort reform, scholars have suggested that the lawyers and their interest groups are engaged in a social theory battleground. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 4 (2002).

<sup>197</sup> These types of considerations will reflect the broadest notions of the role of the lawyer as advocate and lobbyist who protects the client from harms by others. See, e.g., Martha F. Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 AM. U. J. GENDER SOC. POL'Y & L. 119, 123 (2001) (discussing Edward V. Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. ILL. L.F. 57, 59–60 (1965) (“The new legal aid lawyer's role should be defined by the broadest reaches of advocacy.”)); see also Christine Schiltz & Dave Swayze, *The Delaware Lawyer as Lobbyist*, 21 DEL. LAW. 18 (2003).

<sup>198</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (1983).

<sup>199</sup> Of course, an analysis of the risk of consequences could require a lawyer to consider countless factors, but in light of current events, certainly necessitates attention to the costs of the remedies and the scope of regulatory consequences. For example, as the economic consequences of the proposed remedies become greater, the risk of legislative reaction increases.

Similarly, a lawsuit seeking to compel one defendant to fix one environmental harm in a specific location probably creates fewer budgetary or policy concerns than an initiative of nationwide scope directed at dozens of companies. A petition to list one new endangered species of plant probably creates less risk than a petition to list a few hundred species. However, careful attention to the scope of the consequences is also important, because the petition to list one plant as a threatened species, due to the effects of human recreation in

As explained above, the worst-case consequences for successful environmental advocacy could include defunding, reform, or repeal of the laws or regulations the client relies upon.

To avoid adverse consequences, the lawyer should ask whether the client has considered retaining members from another profession. For better or for worse, lobbyists,<sup>200</sup> media and communication consultants,<sup>201</sup> and even political campaign strategists<sup>202</sup> might have essential roles to play in the grand scheme of a client's environmental advocacy initiative. In fact, pursuant to Comment 4 to Model Rule 2.1, the duty as advisor encourages lawyers to make exactly these kinds of recommendations:

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.<sup>203</sup>

National environmental groups, with well-developed lobbying or public relations strategies, will be well equipped to make difficult strategic

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a single national park, creates far fewer concerns with expanded regulatory scope than a petition to list one arctic species—the polar bears—could have on the regulation of global climate change.

<sup>200</sup> Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1, 1 (2010).

<sup>201</sup> See, e.g., Scott H. Segal & Ricardo Reyes, *Masks and Mystification: The Challenges of Media Relations and Public Relations for Lawyers*, 67 TEX. B. J. 752, 752–53 (2004) (characterizing the practice of law as an exercise in targeted communication, and discussing the need for audience identification, message development and strategic communications); see also Plater, *supra* note 9, at 511.

<sup>202</sup> See, e.g., Jonathan S. Fox, *Push Polling: The Art of Political Persuasion*, 49 FLA. L. REV. 563, 564 (Sept. 1997) (describing a political strategy to advocate for a cause); Bill Zimmerman, *California Initiatives: If They Ain't Broke, Don't Fix 'Em*, 41 SANTA CLARA L. REV. 1027, 1027–28 (2001) (noting the use of ballot initiatives to achieve codification of environmental policy).

<sup>203</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 (1983).

decisions, and have less need for the lawyer's non-legal cautionary advice.<sup>204</sup> But for an inexperienced client, the lawyer must play a greater role. Comment 3 to Model Rule 2.1 acknowledges that when a request for purely technical advice is made "by a client inexperienced in legal matters . . . the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations."<sup>205</sup> In the context of trial publicity, the *Model Rules* allow lawyers, pursuant to the duty as advocate, to help rebut adverse publicity prejudicing their clients.<sup>206</sup> That responsibility to advise an unsophisticated client on responsive communications strategies readily applies to the environmental advocacy lawyer, too.

Through these two inward and outward looking inquiries, the lawyer can ensure that the client considers likely actions, reactions, and outcomes. Pursuant to the duty as advisor, the lawyer should ask the appropriate probing questions. The answers are then left to the clients.<sup>207</sup>

#### B. *The Consequences of Failing to Advise*

If a lawyer wholly fails to ask the hard questions, and fails to advise a client of the known and significant risks inherent in a client's chosen course of action, then the lawyer may, in effect, be allowing or even be complicit in a client's self-destructive act.<sup>208</sup> In such circumstances, the lawyer might bear a degree of responsibility and liability.<sup>209</sup> Just as health

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<sup>204</sup> See, e.g., Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 1 (2004). See generally SWITCHBOARD: NATURAL RESOURCES DEFENSE COUNCIL STAFF BLOG <http://switchboard.nrdc.org/blogs/legwatch/> (last visited Nov. 15, 2012).

<sup>205</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 3 (1983).

<sup>206</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1983) ("[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.").

<sup>207</sup> As the Model Rules make clear, the client bears the ultimate authority to determine the purposes to be served by legal representation. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (1983).

<sup>208</sup> See, e.g., Roy D. Simon, *Legal Ethics Advisors and the Interests of Justice: Is an Ethics Advisor a Conscience or a Co-Conspirator?*, 70 FORDHAM L. REV. 1869, 1869 (2002) (discussing DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* (2000) (criticizing lawyers "for their passivity—one might even say complicity—in the face of client decisions and goals that are amoral, immoral, or even destructive")).

<sup>209</sup> An environmental lawyer whose client's favorite statute is repealed may evade a cause of action for malpractice, because the intervening legislative actions are probably too attenuated. In general, malpractice applies negligence standards. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: PROFESSIONAL NEGLIGENCE—ELEMENTS AND DEFENSES



professionals adhere to the ethical principle of non-maleficence and bear responsibility to “do no harm,”<sup>210</sup> so too does the environmental lawyer have a duty as advisor to protect the environmental advocacy client from harm.<sup>211</sup> Indeed, regardless of whether the matter is viewed as one of lawyer professionalism or through the lens of lawyering as a business, the lawyer should always work to prevent the client from harm.<sup>212</sup>

It is considered professional misconduct for a lawyer to violate the *Model Rules of Professional Conduct*.<sup>213</sup> As explained above, in some cases, such as where the client is unsophisticated and the risk of controversy and potential reform is high, the lawyer’s duty to advise should be considered a mandate.<sup>214</sup> In those instances, failure to advise the clients of the risk, and thus failure to obtain informed consent, should be considered misconduct, and perhaps even malpractice.<sup>215</sup> The notion of such an enforceable ethical duty to advise is not unprecedented,<sup>216</sup> and similar ethical duties

GENERALLY § 48 cmt. c (2000). Here the negligence would arguably result from a lawyer’s “injury” to an environmental advocacy group based on failure to provide advice as to the risks. But for such a claim to prevail, a court must find that: (1) a duty was owed by the counselor to the client; (2) the duty owed was breached; (3) there is a sufficient legal causal connection between the breach of duty and the client’s injury; and (4) some injury or damages were suffered by the client. In practice, even if a lawyer’s courtroom victory induced a legislature to repeal the law that triggered the matter, the third prong of the negligence test is probably failed, because the attenuation is probably too extended. The actions of an entire branch of government cannot reasonably be placed upon a single lawyer, or even a single case. *Id.* § 53.

<sup>210</sup> The Hippocratic Oath does not contain these exact words. *The Hippocratic Oath*, GREEK MEDICINE, [http://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](http://www.nlm.nih.gov/hmd/greek/greek_oath.html) (last visited Nov. 15, 2012). *But see* HIPPOCRATES, OF THE EPIDEMICS, Book I (Francis Adams trans. 400 B.C.) (“The physician must . . . have two special objects in view . . . namely, to do good or do no harm.”).

<sup>211</sup> *See, e.g.,* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 213 (2008) (discussing ethical challenges for a criminal defense lawyer when a client is “making self-destructive and senseless decisions not as the result of rational thought, but because of a mental illness or impairment that prevents the client from making a rational decision”).

<sup>212</sup> Jeffrey W. Stempel, *Therapeutic Jurisprudence/Preventive Law and the Lawyering Process*, 5 PSYCHOL. PUB. POL’Y. & L. 849, 857–58 (1999) (discussing movements to replace the “professionalism paradigm” of lawyering with a “business paradigm”). *See generally*, MODEL RULES OF PROF’L CONDUCT R. 16 (1983).

<sup>213</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4 (1983) (stating that “[i]t 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”).

<sup>214</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000).

<sup>215</sup> *Id.*

<sup>216</sup> Consider, for example, the lawyer with an elderly client of diminished capacity. That lawyer has a recognized duty to both advise and to act. MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (1983) (“When the lawyer reasonably believes that the client has diminished

have been placed upon mental health professionals.<sup>217</sup> For example, in *Tarasoff v. Regents of the Univ. of Cal.*, therapists were found potentially liable in tort for the violent acts of their patients.<sup>218</sup> The therapists simply had not asked the right questions, and thus, became responsible, in part, for the consequences of the patients' behaviors.<sup>219</sup> Modern ethical codes frequently apply that *Tarasoff* principle, and repeatedly include a duty to protect the patient and to ensure informed consent.<sup>220</sup>

Counselors must recognize the need for informed consent, and respect the clients' right to choose for themselves, while also ensuring that they avoid harm without imposing their own values.<sup>221</sup> Physicians must ensure that they provide adequate medical information to achieve informed consent,<sup>222</sup> and patients also need to be advised of the side effects of their

capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action."'). A lawyer who fails to protect a client with diminished capacity may even be subject to malpractice claims. Kerry R. Peck, *Ethical Issues in Representing Elderly Clients with Diminished Capacity*, 99 ILL. B. J. 572, 573–76 (Nov. 2011), <http://www.isba.org/ibj/2011/11/ethicalissuesinrepresentingelderlyc>; Hope C. Todd, *Representing Clients with Diminished Capacity*, DC BAR (May 2010), [http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/may\\_2010/ethics.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/may_2010/ethics.cfm). Model Rule 1.14(b) also allows a lawyer to take "reasonably necessary protective action" when a client with diminished capacity is at risk of substantial harm and is unable to act in his or her own interest. See AM. B. ASSOC. COMM. ON LAW & AGING; AM. PSYCHOLOGICAL ASSOC., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 2, available at <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>. And notably, the absence of informed consent is a substantial part of the reason for the attorney's malpractice exposure in cases of diminished capacity. *Id.* at 6; see also Arthur C. Walsh et al., MENTAL CAPACITY 17–22 (2d ed. 1994) (discussing the caselaw concerning the lawyer's malpractice liability for knowingly allowing an incapacitated person to execute legal documents).

<sup>217</sup> AM. COUNSELING ASS'N, ACA CODE OF ETHICS 3–4 (2005), available at <http://www.counseling.org/ethics/feedback/ACA2005Code.pdf>.

<sup>218</sup> *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 425, 433–35 (1976).

<sup>219</sup> *Id.* at 439.

<sup>220</sup> AM. COUNSELING ASS'N, ACA CODE OF ETHICS 4 (2005), available at <http://www.counseling.org/ethics/feedback/ACA2005Code.pdf>.

<sup>221</sup> *Id.* at 4–5.

<sup>222</sup> AM. MED. ASS'N, AMA CODE OF MEDICAL ETHICS, OPINION 8.08 INFORMED CONSENT, <https://ssl3.ama-assn.org/apps/ecom/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fE-8.08.HTM> ("The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an informed choice. The patient should make his or her own determination about treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice."').

prescriptions by doctors, pharmacists, and drug companies.<sup>223</sup> Psychologists have ethical duties to obtain informed consent for treatments, and to inform their clients of the potential risks involved, the alternative treatments that may be available, and the voluntary nature of their participation.<sup>224</sup> Social workers, too, must respect and promote the right of clients to self-determination, but have duties to advise the client of responsibilities to the larger society or to specific legal obligations, and to limit clients' rights if the clients' actions could pose a serious, foreseeable, and imminent risk to themselves or others.<sup>225</sup>

Lawyers, like health professionals, have a duty to protect clients from self-inflicted harm.<sup>226</sup> To fulfill that duty, they ask hard questions to help the clients avoid those harms, and prepare clients for worst case scenarios.<sup>227</sup> Indeed, the questions used to evaluate whether a health professional did enough to prevent a suicide bear ready applicability to the lawyer who sits in a role as advisor.<sup>228</sup> With only minor rewriting, those

<sup>223</sup> Helen Kiel, *Pharmacist Advice: Where Should the Line Be Drawn and Who Should Draw It?*, 7 HARV. HEALTH POL'Y REV. 189, 190 (2006).

<sup>224</sup> AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 6–7, 10, 13 (2010), available at <http://www.apa.org/ethics/code/index.aspx>.

<sup>225</sup> NAT'L ASS'N OF SOC. WORKERS DELEGATE ASSEMBLY, NAT'L ASS'N OF SOC. WORKERS, CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS 4, 16–17 (2008), available at <http://www.socialworkers.org/pubs/code/code.asp>.

<sup>226</sup> See, e.g., Carol M. Suzuki, *When Something Is Not Quite Right: Considerations for Advising a Client to Seek Mental Health Treatment*, 6 HASTINGS RACE & POVERTY L.J. 209, 220–21 (2009) (“Model Rule 2.1 supports the . . . argument that the lawyer is a moral actor in fulfilling a broad community role, including considerations of a client’s health and the impact of the client’s health on others. Model Rule 2.1 permits, but does not require, that a lawyer discuss areas outside of the legal field when offering advice. A lawyer may counsel her client on a client matter that is outside of the confines of the legal matter. Moreover, the rule allows the lawyer to use her professional judgment in determining the parameters of the ‘client’s situation’ that the lawyer will address. Although health-related matters are not an enumerated factor under Model Rule 2.1 to which a lawyer may refer, advice to a client to seek mental health evaluation and treatment may fit within the parameters of a ‘client’s situation’ that a lawyer may consider. Of course, neither Model Rule 2.1 nor any other rule allows a lawyer to practice in the area of mental health and render mental health opinions, advice or diagnoses absent relevant education and licensure.”).

<sup>227</sup> See, e.g., Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 U. MO.–KAN. CITY L. REV. 999, 1007 (2007).

<sup>228</sup> CHRISTIANE BREMS, DEALING WITH CHALLENGES IN PSYCHOTHERAPY AND COUNSELING, 165 (Marlene Vasilieff et al. eds., 2000). The author proposed the following questions to determine whether a health professional’s duty as advisor was satisfied in avoiding a suicide:

- (1) Was the counselor aware or should have been aware of the risk?
- (2) Was the counselor thorough in assessment of the client’s suicide risk?
- (3) Did the counselor make “reasonable and prudent efforts” to collect sufficient and necessary data to assess risk?

questions can be used to shape an inquiry as to whether the lawyer's risk assessment fulfilled the lawyer's duty as advisor:

- (1) Was the lawyer aware (or should the lawyer have been aware) of the risk?
- (2) Was the lawyer thorough in assessment of the client's risk?
- (3) Did the lawyer make "reasonable and prudent efforts" to collect sufficient and necessary data to assess risk?
- (4) Were the data misused, thus leading to a different recommendation that would have been provided by another lawyer?
- (5) Was the lawyer negligent in the way she or he advised the client after assessing risk?
- (6) Did the lawyer make adequate attempts to keep the client safe (i.e., considering alternatives, including taking no action)?

Even in cases where the lawyer asks and obtains satisfactory answers to the hard questions, the client may still proceed with the proposed legal action. The lawyer may also continue to represent the client. Having forewarned the client of the risks, but then serving as the client's voice, the lawyer may carry some degree of personal guilt if the harm ultimately manifests as the lawyer predicted.<sup>229</sup> Still, so long as the lawyer asked the

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- (4) Were the assessment data misused, thus leading to a misdiagnosis where the same data would have resulted in appropriate diagnosis by another mental health professional?
  - (5) Did the counselor mismanage the case, being either "unavailable or unresponsive to the client's emergency situation?"
  - (6) Was the counselor negligent in the way she or he designed her or his intervention with the client after assessing risk?
  - (7) Did the counselor make adequate attempts to keep the client safe (i.e., set up a plan of contingencies with appropriate resources, phone numbers, etc)?
  - (8) Did the counselor remove the means to be used by the client in the suicide attempt?
  - (9) In cases of minors, were parents or caretakers informed of the client's potential risk?

*Id.*

<sup>229</sup> Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 380–81 (1992) ("[E]thics rules legislate a required response to the problem of paternalistic loyalty, but this does not make the problem go away. Rather, the rules simply direct lawyers to live with the guilt of harming their clients by acceding to their clients' self-destructive wishes.").

right questions, and identified the risks of harm to the client, the lawyer will have complied with the duty as advisor.

## CONCLUSION

The lawyer's duty as advisor should not be viewed as merely aspirational. As a client's sophistication decreases, and the risk of adverse consequences increases, the lawyer's duty as advisor shifts from discretionary to mandatory. If a lawyer knows that a proposed legal action is likely to cause significant harm to the client, the lawyer must advise the client. Comment 5 to Model Rule 2.1 should be amended to reflect this point.

The duty as advisor becomes especially provocative when applied to the practice of environmental law.<sup>230</sup> What good is a victorious lawsuit if the statute is repealed? Although a particular statute *might* be available as a tool for environmental advocacy, and even though some related objective *can* be pursued, clients should be advised by their lawyer to consider whether or not they *should* pursue their proposed legal strategies. The goal, after all, is informed decision-making. Thus, the duty to advise clients on moral, economic, social, and political factors requires warning the clients of the potential reactions to advocacy success.

The Lorax could not stop the Once-ler, and the Lawyer probably cannot stop the Lorax. The idea of a lawyer statesman may be extinct,<sup>231</sup> and an occasional overreach by environmental advocates may rank among the class of human problems lacking a technical solution.<sup>232</sup> A degree of defunding, reform, or repeal may be the inevitable consequence of environmental advocacy. Still, lawyers have a duty to advise their clients not to lose sight of the forest for the trees.

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<sup>230</sup> Although this article focuses upon environmental advocacy, many of its principles could be applied to other areas of public interest advocacy. The current facts related to environmental law and policy make the risks of reform or repeal quite real, and help to illustrate the points herein. See Pete Aleshire, *Groups Protest Backdoor Repeal of Host of Environmental Laws*, PAYSON ROUNDUP (Aug. 2, 2011), <http://www.paysonroundup.com/news/2011/aug/02/groups-protest-backdoor-repeal-host-environmental-/>.

<sup>231</sup> See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11–13 (1993) (discussing the collapse of the ideal of the lawyer-statesman, and the declining prestige of prudence and public-spiritedness).

<sup>232</sup> See, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1243 (Dec. 13, 1968).