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

Keith W. Rizzardi

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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.

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* Keith W. Rizzardi (Univ. of Florida, J.D.; Florida Atlantic Univ., M.P.A.; Univ. of Virginia, B.A.) is a Visiting Assistant Professor of Law at St. Thomas University in Miami Gardens, Florida. Board-certified by the Florida Bar in State and Federal Administrative Practice, he chairs the U.S. Marine Fisheries Advisory Committee and tweets about the Endangered Species Act @esalawyer. The author thanks Rachel Walker for her research and editorial review.
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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!”).\(^1\) 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.”\(^2\) 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 . . . .\(^3\)

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,\(^4\) in which complex statutory and regulatory schemes govern equally complex

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\(^{1}\) Theodor Seuss Geisel, The Lorax (1971).

\(^{2}\) Id.

\(^{3}\) Id.

\(^{4}\) 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, requiring the lawyers to be negotiators, litigators, economists, business visionaries, crisis managers, and even media managers. To some, environmental law is like history: “just one damn thing after another.” 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. For both budgetary and

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9 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.”).
11 “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.12

This Article is not an ethical assault on the environmental advocate, who serves an important role in our system of environmental law.13 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.14 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.15

12 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).
14 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”).
15 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,\(^\text{16}\) 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.\(^\text{17}\)

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.”\(^\text{18}\)

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

\(^{16}\) 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).

\(^{17}\) 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.

\(^{18}\) MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (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.19

This rule allows lawyers to advise clients on a broad range of non-legal concepts.20 Scholars have applied Rule 2.1 to suggest that lawyers should advise banks of fiduciary risks.21 Others have used it to suggest that in-house corporate lawyers should temper zealous advocacy with realistic assessments of liability22 and idealistic assessments of ethical aspirations.23 A few creative thinkers even used the duty as advisor to support a moral obligation to protect the environment.24 But with a few scholarly exceptions calling for mandatory duties to advise clients of dispute resolution

21 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.”).
23 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), 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.”).
24 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\textsuperscript{25} and non-discrimination laws,\textsuperscript{26} 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\textsuperscript{27} 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:

\textit{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

\textsuperscript{25} Marshall J. Breger, \textit{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, \textit{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).

\textsuperscript{26} Samuel A. Marcosson, \textit{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.’”).

\textsuperscript{27} Although the text of Model Rule 2.1 is authoritative in most states, the comments are a guide to interpretation. \textit{See} CPR Policy Implementation Comm., \textit{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, whereas threatening a client with the wrath of God is not. But in general, a lawyer is not mandated to give unwelcome advice.

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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29 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).
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.32

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.33

But the purely discretionary phrasing of Comment 5 frustrates the ultimate purpose of Rule 2.1.34 The first sentence tells the lawyer not to

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31 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.*

32 *Id.* (italics added).

33 Gantt, *supra* note 20, at 397.

give advice unless asked. 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. The third sentence notes that dispute resolution may be available as a litigation alternative. 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.” The emphasis placed upon a lawyer’s discretion probably goes too far.

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. 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. 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, diligence, 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.” The notion of informed consent is also

35 Id.
36 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).
38 Id.
39 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.
40 MODEL RULES OF PROF'L CONDUCT R. 1.4(a)–(b) (1983).
41 Id. at R. 2.1 cmt. 1.
42 Id. at R. 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).
43 ABA MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).
44 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.”

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.

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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45 Id. at R. 1.0(e).
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.47

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.48

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,

47 § 20 cmt. e (2000).
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.49

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.50

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.51

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

49 § 20 cmt. c (2000).
50 Id.
51 Id.
matters with their clients. 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.

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. For example, some scholars and courts have discussed the duty as advisor as it affects aspirational notions of racial harmony or theology. Others have discussed the duty as advisor in the context of health law. 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.

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

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).
54 See Model Rules, supra note 40.
57 See, e.g., infra Part III.B.
courtroom, but also in the court of public opinion, and even in the halls of Congress. 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. 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. In the 1970s, the U.S. Congress passed an array of federal environmental laws, and states experienced similar eras of environmental awareness. Scholars famously advocated for trees to have standing to sue. Over time, environmental litigants have effectively used citizen suits to break entirely new legal ground.
as recently demonstrated by litigation victories in the contexts of climate change,\textsuperscript{65} water quality in the Everglades,\textsuperscript{66} and wildlife protection.\textsuperscript{67} On subjects such as the Clean Air Act,\textsuperscript{68} Clean Water Act,\textsuperscript{69} the Endangered

\textsuperscript{65} 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 \textit{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 \textit{Am. Elec. Power Co., Inc. v. Connecticut}, the Supreme Court further held that under \textit{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 \textit{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 \textit{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); \textit{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).

\textsuperscript{66} In \textit{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. \textit{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), \textit{available at} http://www.evergladeshub.com/lit/LEGAL/Gold10-Micco-USA-104cv21448_404.pdf; \textit{Miccosukee Tribe of Indians of Fla. v. United States}, 04-21448-Civ-Gold, Omnibus Order (S.D. Fla. 2011), \textit{available at} http://www.evergladeshub.com/lit/LEGAL/Gold11-Micco-USA-1-04cv21448ASG-omnibusOrderDoc585-110426.pdf.


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

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.75 Under this law, citizens may petition the agencies to list new species as threatened or endangered.76 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.77 If the agencies fail to act, the ESA empowers the citizen groups to litigate,78 and “missed deadline” litigation has been quite common for decades.79

78 See Parenteau, supra note 67, at 322.
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.80 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,81 a second settlement addressed FWS actions related to 480 more species,82 and a third settlement affected the NMFS and eighty three more species of coral.83 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.84


82 Id.


84 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. 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.

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. The prestigious National Bureau of Economic Research has acknowledged the emerging perception of environmental regulation as a “job-killing” and “luxury” item. Some state and federal legislatures, unable to balance the books, do not view the environment as a top priority; environmental litigants are the prevailing party, they can recover attorney’s fees. 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. Malmheiser, 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).

85 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.

86 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).


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. And routinely, in the specific arena of ESA implementation, Congress caps expenditures on implementation activities, a maneuver that exacerbates the problems and delays that motivated the citizen suits in the first place.

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, Congress delisted the species in some states,
thereby removing protection and in theory, eliminating the lawsuits, too.93 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.”94 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 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. Dept 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 4814930 (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).


Efforts."95 After that hearing, the presiding committee chairman announced his plan for more hearings, and his own vision for ESA reform.96 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.97 In a separate but equally responsive statement, the FWS also offered a moderate tone, de-emphasizing the impact of ESA litigation.98

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.99 The Congressional Research Service report on the current

96 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 ("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.").
97 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 (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").
98 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).
112th Congress also identified twenty more different legislative and budgetary proposals that sought to modify ESA implementation in some way.\(^{100}\) 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.\(^{101}\)

These types of budgetary alterations to the implementation of environmental law and policy are emerging in the states as well. North Carolina,\(^{102}\) Pennsylvania,\(^{103}\) and Texas\(^{104}\) downsized their environmental budgets.\(^{105}\) Minnesota legislators battled over the same issues.\(^{106}\) In Florida, the budget-cutting approach was especially noteworthy. The state cut $20 million from Everglades’ restoration,\(^{107}\) 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.\(^{108}\) Notwithstanding the


\(^{100}\) 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.

\(^{101}\) See, e.g., Miccosukee 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).


\(^{105}\) Kaufman, supra note 102.


\(^{108}\) 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, the Florida Department of Environmental Protection is not pursuing any programs or projects regarding climate change (and some Florida legislators now want to repeal statutory references to the term). And finally, in Arizona, environmental advocates decried budgetary riders that have, in effect, repealed environmental laws.

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. 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.” To some extent, such statements reflect the accepted intensity

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.).

109 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).


114 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. Some people might even consider the Rubber Dodo Award a fairly tame political statement.

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. But the often hostile tone of that lawyer advocacy can also have effects. 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. 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. “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.

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/osalaw/ESBlawg.nsf/d6plinks/KRII-7N37YN (citing Wild Earth Guardians’ press release).


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).


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.”).

See, e.g., Rosebraugh, supra note 116.


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 Earth-justice, with the slogan “[b]ecause the Earth needs a good lawyer,” boldly embrace an integrated approach to law and policy in our courts. 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.” 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.

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

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124 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)).

125 In litigation related to the Everglades, even the long admired Judge William Hoeveler—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 Hoeveler 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.

126 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.\textsuperscript{127} Indeed, most efforts to turn every internal disagreement among government staffers into an “ah-ha” opportunity fail.\textsuperscript{128} 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.\textsuperscript{129}

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.

\textit{Id.} at 422 (internal citations omitted).

\textsuperscript{127} Sw. Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998).

\textsuperscript{128} 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.”).

\textsuperscript{129} 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.

\textit{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.130 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.131 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.132 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.133

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.134 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).


133 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, ESBLAWG (Nov. 27, 2007), http://www.esablawg.com/esalaw/ESBlawg NSF/d66links/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.\textsuperscript{134} 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.\textsuperscript{135} 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,\textsuperscript{136} while others are repealing the legacy of environmental law.\textsuperscript{137} Even though our society faces an existential challenge in the form of a duplicitous relationship between environmental law and policy implementation, 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.

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\textsuperscript{135} Id. at 685.


\textsuperscript{137} 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).
of global climate change, 138 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. 139 Once a celebration, Earth Day has become a source of social divisiveness. 140 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 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. 138


138 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.

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.141 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.142 In 2011–2012, the President and Congress virtually ceased their efforts on the subject,143 and one Presidential candidate even apologized for his own prior support for the concept, declaring it “stupid.”144 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,145

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144 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/2011/05/06/164076f/pawlenty-cap-and-trade-apology/.

executive,\textsuperscript{146} or judicial.\textsuperscript{147} 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.\textsuperscript{148} In contrast, the lawyer representing


\textsuperscript{146} 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).


\textsuperscript{148} 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. \textit{Id.}


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). 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. 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. A similar but narrower bill—the “State Waters Partnership Act of 2012”—was introduced

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).

149 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.

150 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.

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.\(^{152}\) 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.\(^{153}\) 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.\(^{154}\) The litigation eventually led to additional conditions being imposed on the operation of the regional water supply.\(^{155}\) 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.\(^{156}\) For its part, the State of California has also passed water management reforms.\(^{157}\)

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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\(^{152}\) 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).


\(^{155}\) Id.

\(^{156}\) 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.”).

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

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

160 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. 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/.
164 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 apprized 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.165

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.166 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.167 Simply put, successful environmental advocacy litigation can and does trigger counterproductive legislative outcomes.168

167 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.
168 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. 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.” That lawyer also must


169 Henry Juszkiewicz, Repeal the Lacey Act? Hell No, Make It Stronger, THE HUFFINGTON POST (Nov. 2, 2011), http://www.huffingtonpost.com/henry-juszkiewicz/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.”).

170 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,\textsuperscript{171} diligence,\textsuperscript{172} and the fundamental duty to communicate with the client to ensure informed consent.\textsuperscript{173} The lawyer could reasonably charge a fee for the service, too, because it is so closely related to the legal representation of the client.\textsuperscript{174} 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.\textsuperscript{175}

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.\textsuperscript{176} 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.\textsuperscript{177} 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 \textit{Restatement (Third) of the Law Governing Lawyers} place a responsibility upon the lawyer to speak up.\textsuperscript{178} 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.\textsuperscript{179} But as factors change, and as the need to advise the client of the risks and consequences of advocacy increases, the lawyer \textit{should} probe the client for additional information, and

\textsuperscript{171} “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” \textsc{Model Rules of Prof’l Conduct R. 1.1} (1983).
\textsuperscript{172} Diligence states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” \textit{Id.} at R. 1.3 (1983).
\textsuperscript{173} \textit{Id.} at R. 1.0, 1.3, 1.4 (1983); \textit{Restatement (Third) of the Law Governing Lawyers} § 20 cmt. b (rationale).
\textsuperscript{174} Gantt, \textit{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).
\textsuperscript{175} \textit{Id.} at 398.
\textsuperscript{176} \textit{See Restatement (Third) of the Law Governing Lawyers} § 20 (2000).
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}; \textsc{Model Rules of Prof’l Conduct R. 2.1} (1983).
\textsuperscript{179} \textit{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.180

**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

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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. . . .\(^{181}\)

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.\(^{182}\)

\(^{181}\) 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.”

\(^{182}\) 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\textsuperscript{183} and, perhaps, to save the client from a form of self-destruction.\textsuperscript{184}


\textsuperscript{184} Jan Ellen Rein, \textit{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.”

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. Rhetorical advocacy may also come with the high cost of sacrificing public faith in the system of justice, or further incensing the opposing viewpoints. Hostile advocacy is antithetical to the moral values...
of the environmental movement, and even perhaps self-defeating. The tongue (and the pen) can be unruly evils.

Attorneys take oaths, and follow codes of conduct, that call for civility and professionalism. While such professionalism is largely aspirational and hard to define, and even though precise expectations vary from place to place, 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.

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).

188 Fajans & Falk, supra note 118, at 2.

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


191 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/2f2668cddf7b99e085256b2f006ccd15#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.”).


course of conduct.” 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, rather, it should also include assessments of what those third parties might do, especially to the client. 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?

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. With that understanding, the lawyer should then consider the potential for a successful legal action to trigger undesired consequences.

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194 Model Rules of Prof’l Conduct R. 1.0(e) (1983).
195 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.”).
196 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).
199 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,\textsuperscript{200} media and communication consultants,\textsuperscript{201} and even political campaign strategists\textsuperscript{202} 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:

\begin{quote}
[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.\textsuperscript{203}
\end{quote}

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


\textsuperscript{201} See, e.g., Scott H. Segal & Ricardo Reyes, \textit{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); \textit{see also} Plater, \textit{supra} note 9, at 511.


\textsuperscript{203} \textit{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.\textsuperscript{204} 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.”\textsuperscript{205} 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.\textsuperscript{206} 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.\textsuperscript{207}

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.\textsuperscript{208} In such circumstances, the lawyer might bear a degree of responsibility and liability.\textsuperscript{209} Just as health

\begin{footnotesize}
\begin{enumerate}
\item[205] MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 3 (1983).
\item[206] 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.”).
\item[207] 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).
\item[208] 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”)).
\item[209] 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
\end{enumerate}
\end{footnotesize}
professionals adhere to the ethical principle of non-maleficence and bear responsibility to “do no harm.”\textsuperscript{210} so too does the environmental lawyer have a duty as advisor to protect the environmental advocacy client from harm.\textsuperscript{211} 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.\textsuperscript{212} 

It is considered professional misconduct for a lawyer to violate the \textit{Model Rules of Professional Conduct}.\textsuperscript{213} 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.\textsuperscript{214} 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.\textsuperscript{215} The notion of such an enforceable ethical duty to advise is not unprecedented,\textsuperscript{216} and similar ethical duties

\textsuperscript{210} The Hippocratic Oath does not contain these exact words. \textit{The Hippocratic Oath}, GREEK MEDICINE, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited Nov. 15, 2012). \textit{But see} HIPPOCRATES, \textit{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.”).

\textsuperscript{211} See, e.g., John D. King, \textit{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”).


\textsuperscript{213} \textit{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”).

\textsuperscript{214} \textit{Restatement (Third) of the Law Governing Lawyers} § 20 (2000).

\textsuperscript{215} \textit{Id.}

\textsuperscript{216} Consider, for example, the lawyer with an elderly client of diminished capacity. That lawyer has a recognized duty to both advise and to act. \textit{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.\textsuperscript{217} 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.\textsuperscript{218} The therapists simply had not asked the right questions, and thus, became responsible, in part, for the consequences of the patients’ behaviors.\textsuperscript{219} Modern ethical codes frequently apply that Tarasoff principle, and repeatedly include a duty to protect the patient and to ensure informed consent.\textsuperscript{220}

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.\textsuperscript{221} Physicians must ensure that they provide adequate medical information to achieve informed consent,\textsuperscript{222} 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/ethicalissuesinrepresentingelderly; Hope C. Todd, Representing Clients with Diminished Capacity, DCBAR (May 2010), http://www.dcbar.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).

\textsuperscript{218} Id. at 439.
\textsuperscript{219} Id. at 4–5.
\textsuperscript{221} Id. at 4–5.
\textsuperscript{222} AM. MED. ASS’N, AMA CODE OF MEDICAL ETHICS, OPINION 8.08 INFORMED CONSENT, https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fcontent%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. 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. 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.

Lawyers, like health professionals, have a duty to protect clients from self-inflicted harm. To fulfill that duty, they ask hard questions to help the clients avoid those harms, and prepare clients for worst case scenarios. 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. With only minor rewriting, those

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226 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.”).
228 Christiane Brems, Dealing with Challenges in Psychotherapy and Counseling, 165 (Marlene Vasileff 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. Still, so long as the lawyer asked the

(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.*

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.\(^{230}\) 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,\(^{231}\) and an occasional overreach by environmental advocates may rank among the class of human problems lacking a technical solution.\(^{232}\) 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.