

Ethics, Energy, and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet

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INTRODUCTION

“It is an issue of social justice, human rights and fundamental ethics. We have a profound responsibility to protect the fragile web of life on this Earth, and to this generation and those that will follow.”¹ This statement by Ban Ki-moon, the former Secretary-General of the United Nations, emphasizes the need to act now to protect our world from climate change. According to Ki-moon, we, as human beings, must uphold our moral and historical responsibilities to protect our environment.² Although this may seem like a simple concept that should be followed by all, it is easier said than done. To begin with, there are those who do not believe that climate change is real. Additionally, there are driving forces such as greed and power that are more important to some than protecting the world we live in.

The proposition that climate change is real and that it is affecting our planet has been around for quite some time. Throughout the years, this idea has been rejected by many who have argued that there is no proof that it exists. As time has passed and more research has been conducted, there is now a scientific consensus that climate change is real.³ All major scientific agencies of the United States, including the National Aeronautics and Space Administration and the National Oceanic and Atmospheric Administration, agree climate change exists and is caused by humans.⁴ In 2014, the National Climate Assessment concluded that “global climate is changing and this is apparent across the United States in a wide range of observations. The global warming of the past 50 years is primarily due to human activities, predominantly the burning of fossil fuels.”⁵ Greenhouse gasses from human activity continue to be released into our environment, and climate

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

2. *Id.*

3. See, e.g., *Climate Change Facts: Answers to Common Questions*, TOP BUZZ, https://www.topbuzz.com/article/i6351739454121574915?app_id=1106 [<http://perma.cc/AK99-UGTG>] (last visited Nov. 11, 2016).

4. *Id.*

5. *Id.*

change continues to increase because of it. The most typical ways that greenhouse gasses are emitted are through the burning of fossil fuels, such as oil and coal, and through deforestation and soil degradation that releases a large amount of carbon dioxide into the atmosphere.⁶ Also, environmental pollution such as dumping is a large contributor to climate change.

In addition to the United States, other countries recognize the devastating effects of climate change and are working on developing the best ways to prevent it. The most notable development is the Paris Agreement, which is a treaty by countries all over the world within the United Nations Framework Convention on Climate Change. This treaty has recently gone into force as more than fifty-five countries that produce at least 55 percent of the world's greenhouse gas emissions have ratified it.⁷ The goals of the Paris Agreement are to keep the change in global temperatures below two degrees Celsius, to limit the amount of greenhouse gases emitted by human activity, and to financially assist developing nations in adapting to climate change.⁸ In the wake of the Paris Climate Conference, it is clear that countries around the world are acknowledging that we need to protect the planet on which we live.

The United States has recently supplied new environmental and energy policies to help combat global warming. Before leaving office, President Obama signed a Presidential Memorandum on Climate Change and National Security. In the memorandum, President Obama stated that our national security is endangered by climate change and created a policy where twenty different federal agencies with climate science and national security responsibilities work together to ensure that the newest, most accurate information is maintained in order to strengthen national security.⁹ Additionally, the Environmental Protection Agency (EPA) instituted an initiative in 2014 called Next Generation Compliance to strengthen enforcement of environmental laws. EPA's Next Generation Compliance consists of five interconnected components: (1) innovative enforcement including targeting and data analytics, (2) regulation and permit design that are easy to implement, (3) advanced emissions detection technology, (4) electronic reporting to increase accuracy, and (5) transparency by making information more available to the public.¹⁰ This integrated strategy, aimed at increasing compliance

6. See, e.g., ENVTL. PROT. AGENCY, *Climate Change Indicators: Greenhouse Gases*, <https://www.epa.gov/climate-indicators/greenhouse-gases> [http://perma.cc/R6X2-78ND] (last visited Nov. 11, 2016).

7. See, e.g., U. N. FRAMEWORK CONV. ON CLIMATE CHANGE, *Paris Agreement - Status of Ratification*, http://unfccc.int/paris_agreement/items/9444.php [http://perma.cc/98BW-QS23] (last visited Nov. 11, 2016).

8. See, e.g., EUR. COMM'N, *Paris Agreement*, https://ec.europa.eu/clima/policies/international/negotiations/paris/index_en.htm [http://perma.cc/76V7-ZF9E] (last visited Nov. 11, 2016).

9. Press Release, The White House, Fact Sheet: President Obama Takes a Historic Step to Address the National Security Implications of Climate Change (Sept. 21, 2016), <https://www.whitehouse.gov/the-press-office/2016/09/21/fact-sheet-president-obama-takes-historic-step-address-national-security> [http://perma.cc/46DN-5FY2].

10. See, e.g., ENVTL. PROT. AGENCY, *Next Generation Compliance*, <https://www.epa.gov/compliance/next-generation-compliance> [http://perma.cc/MPD9-ZYEG] (last visited Nov. 11, 2016).

for environmental laws, is one way our country is trying to reduce carbon emissions.

New energy policies are being proposed to help protect our environment as well. The key to a cleaner environment in the energy context is a move away from harmful energy sources such as coal. As electricity production and transportation are the leading generators of carbon dioxide in the United States,¹¹ the key is to use cleaner energy methods in these industries. Through the use of solar power, wind power, geothermal power, and hybrid and electric cars, carbon emissions in our atmosphere will be reduced.¹²

At the North America Leader's Summit last year, United States leaders along with the Mexican and Canadian leaders laid out a goal for North America to have fifty percent clean energy generation by 2025.¹³ To reach this goal, the countries will implement strategic energy development, innovation, and efficiency. In addition to this 2025 continental goal, the United States and countries around the world are attempting to amend the Montreal Protocol to remove hydrofluorocarbons, which are greenhouse gasses more harmful than carbon dioxide.¹⁴ Furthermore, the Department of Energy and Interior have also recently put forward a strategic plan to accelerate the production of offshore wind, which in turn would reduce emissions and water consumption.¹⁵

Taking into account the current findings from scientists and the clean energy policies being implemented by world leaders, one would think there would be a universal acceptance that climate change is real. Although this is not the case, the majority of people believe it exists.¹⁶ To these people, there is a clear correlation between reducing carbon emissions and how long civilization will last on this planet. On the other hand, there are those who either believe climate change is a

11. See, e.g., ENVT. PROT. AGENCY, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [<http://perma.cc/47BK-B5RM>] (last visited Nov. 11, 2016).

12. See, e.g., ENVT. PROT. AGENCY, *Renewable Energy in the Clean Power Plan* (Oct. 16, 2015), <https://www.epa.gov/sites/production/files/2015-11/documents/fs-cpp-renewable-energy.pdf> [<http://perma.cc/Y2S9-WJJW>].

13. See, e.g., Jason Furman & Brian Deese, *The Economic Benefits of a 50 Percent Target for Clean Energy Generation by 2025*, WHITE HOUSE (June 29, 2016), <https://www.whitehouse.gov/blog/2016/06/29/economic-benefits-50-percent-target-clean-energy-generation-2025> [<http://perma.cc/G7TS-DCJ8>].

14. Press Release, The White House, Leaders from 100+ Countries Call for Ambitious Amendment to the Montreal Protocol to Phase Down HFCs and Donors Announce Intent to Provide \$80 Million of Support (Sept. 22, 2016), <https://www.whitehouse.gov/the-press-office/2016/09/22/leaders-100-countries-call-ambitious-amendment-montreal-protocol-phase> [<http://perma.cc/5A4K-MP76>].

15. See, e.g., Dan Utech, *The Offshore Wind Industry Has Wind at Their Back*, WHITE HOUSE (Sept. 9, 2016), <https://www.whitehouse.gov/blog/2016/09/09/offshore-wind-industry-has-wind-their-back> [<http://perma.cc/3V9W-3AFK>].

16. See, e.g., Timothy Cama, *Poll: 70 Percent Believe in Climate Change*, THE HILL (Jan. 5, 2016), <http://thehill.com/policy/energy-environment/264767-poll-70-percent-believe-in-climate-change> [<http://perma.cc/Y2BW-XHCJ>].

hoax or do not care whether it exists due to their own selfish reasons.¹⁷ Many of these climate change naysayers believe that we are wasting resources that can help us achieve prosperity right now. Some of these cynics may come from large corporations that profit off of environmental harm. This does not mean that the people this Note is referring to actually want to harm the environment. The issue is that many of these people refuse to lose power and wealth in order to protect the environment.

A study concluded that in 2008 the world's 3000 largest corporations caused estimated damage to the environment totaling 2.2 trillion dollars.¹⁸ Furthermore, a United Nations study found that "the cost of pollution and other damage to the natural environment caused by the world's biggest companies would wipe out more than one-third of their profits if they were held financially accountable."¹⁹ For example, a current racketeering investigation into ExxonMobil's past activities portrays perfectly the problem at hand. ExxonMobil is being investigated for "misleading the public about climate change risks" for years.²⁰ This investigation is an example of the government's efforts to make big oil companies more accountable for their actions related to environmental issues.

Over the years, there has been a large amount of change relating to policies that detrimentally affect the environment. The case of *United States v. Bestfoods* demonstrated the Supreme Court taking action to determine who should pay the cleanup costs after a chemical manufacturing plant polluted the site with hazardous chemicals.²¹ More recently, Our Children's Trust won a case against the state of Massachusetts for the state's failure to reduce greenhouse gases as obligated.²² In the past few months, there have been protests due to the construction of the Dakota Access Pipeline, which was built to carry oil across the United States.²³ Protesters claim that this will threaten the environment due to possible contamination and eventual release of greenhouse gas emissions. With companies and even state and federal government in some instances still contributing to climate change, it is promising to see that everyone from judges to

17. See, e.g., John Cook, *The 5 Telltale Techniques of Climate Change Denial*, CNN (July 22, 2015), <http://www.cnn.com/2015/07/22/opinions/cook-techniques-climate-change-denial/> [http://perma.cc/FYF2-T2LJ].

18. See, e.g., Juliette Jowit, *World's Top Firms Cause \$2.2tn of Environmental Damage, Report Estimates*, GUARDIAN (Feb. 18, 2010), <https://www.theguardian.com/environment/2010/feb/18/worlds-top-firms-environmental-damage> [http://perma.cc/S7Y8-VR2J].

19. *Id.*

20. See, e.g., Terry Wade, *U.S. State Prosecutors Met with Climate Groups as Exxon Probes Expanded*, REUTERS (Apr. 15, 2016), <http://www.reuters.com/article/us-exxonmobil-states-idUSKCN0XC2U2> [http://perma.cc/LV7M-XKZT].

21. See *United States v. Bestfoods*, 524 U.S. 51, 51 (1998).

22. See, e.g., Brian Bienkowski, *Should Lawyers Be Ethically Obligated to Protect the Environment?*, DAILY CLIMATE (Jun. 6, 2016), <http://www.dailyclimate.org/tdc-newsroom/2016/june/climate-change-green-law-exxon-legal-energy> [http://perma.cc/KT6V-Z2MW].

23. See, e.g., Holly Yan, *Dakota Access Pipeline: What's at Stake?*, CNN (Oct. 28, 2016), <http://www.cnn.com/2016/09/07/us/dakota-access-pipeline-visual-guide/> [http://perma.cc/7L4B-8KQ8].

protesters are doing everything in their power to combat climate change.

As climate change becomes more universally accepted, the moral standard increases to protect the environment from global warming. For most individuals, they are given the scientific facts and left with a choice to decide what they want to believe. There is one profession, however, that may erase one's ability to decide and rather puts one's personal and professional judgment into conflict. As a lawyer, one must balance the representation of one's client with one's own moral and ethical standards. Kassie Siegel, the director of the Center for Biological Diversity's Climate Law Institute, states that "[s]ome of the most important legal issues today are large corporations lying about climate change and being able to pollute a few more years. The role of lawyers helping them do that and the ethical considerations governing our profession will increasingly come under the microscope."²⁴

It has long been advanced in the United States legal system that the client comes first in the eyes of the attorney.²⁵ The issue here is whether that should always be the case. If the client is doing something that detrimentally affects the environment, the attorney must choose whether to report the activity at the jeopardy of the client or look the other way to maximize the client's interests. Two scholars, Sanford Stein and Jan Geht, describe lawyers' ethical dilemma as an "either/or" predicament.²⁶ Attorneys "either act as a 'hired gun' for a client who dumps hazardous waste upstream from an orphanage's playground or try saving the children by actually blowing the whistle on your client to the appropriate authorities."²⁷

These "hired guns" have been around for quite some time. In 1991, criminal charges were brought against the law firm of Sullivan, Roche, and Johnson for allegedly advising a client to abandon toxic waste.²⁸ While the charges were dropped, this is an early example of attorneys encouraging their clients to do what is best for themselves at the expense of the environment. More recently, Volkswagen reached a settlement for 15 billion dollars after cheating on its emission tests.²⁹ Volkswagen engineered 11 million of its cars with "defeat devices" to pass emissions tests while still producing more toxic pollution than what was legal.³⁰ It was alleged that this cover-up was approved by high level

24. Bienkowski, *supra* note 22.

25. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2016) [hereinafter MODEL RULES].

26. 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, 729 (2002).

27. *Id.*

28. Don J. DeBenedictis, *Advice is Legal*, 77 A.B.A. J. 17 (1991).

29. See, e.g., Margaret Cronin Fisk et al., *Volkswagen Agrees to \$15 Billion Diesel-Cheating Settlement*, BLOOMBERG (June 28, 2016), <http://www.bloomberg.com/news/articles/2016-06-28/volkswagen-to-pay-14-7-billion-to-settle-u-s-emissions-claims> [<http://perma.cc/T4WL-YTNS>].

30. *Id.*

officials and went on for almost two years.³¹ Furthermore, it was alleged that many employees, after being tipped off by a senior in-house lawyer in Germany, destroyed incriminating documents.³² Instances such as these are just a few examples of the negative effects a “hired gun” attorney can have.

Does being bound to the highest ethical standards mean that an attorney must take into account environmental harm when giving counsel? Is there a moral obligation to protect our planet that an attorney should be held to regardless of the client’s wishes? Up to this point, the answer to these questions has been no. There have been other areas where attorneys have been held to certain standards, but environmental protection has yet to be one. With the growing acceptance of climate change as real, there is no better time to ask this question than now. The legal profession is one designed to advance the morality and ethics of human beings. Lawyers are looked at as those who live by the highest principles, and it needs to be decided whether environmental protection is something attorneys should be obligated to uphold.

This Note will address the issue of whether attorneys should be ethically obligated to protect the environment from climate change. It will explain the two opposite approaches our legal system can take in regard to the attorney’s relationship to the environment and the arguments in favor of each. Additionally, this Note will explore further the approach that would make attorneys ethically obligated to protect the environment from client harm and address the possible ways to implement such a policy. The different avenues would include an attorney disclosure amendment to the American Bar Association’s (ABA) *Model Rules of Professional Conduct* or a congressional act modeled after the Sarbanes-Oxley Act of 2002. After examining both ways to incorporate an environmental standard for attorneys, this Note will advocate for the approach which is the most effective way of going forward.

I. A SHIFT IN ATTORNEYS’ RESPONSIBILITIES: MOVING AWAY FROM THE TRADITIONAL ATTORNEY-CLIENT RELATIONSHIP TOWARD A MORE ENVIRONMENTALLY FRIENDLY APPROACH

When encountering a situation where the environment is harmed by the actions of a client, a lawyer has two different approaches he or she can take. The first stance is the traditional approach where the attorney is the strict advocate for the client. As stated in the *Model Rules*, the attorney’s number one priority is the client, and the attorney should have the client’s best interests in mind.³³ With this

31. Press Release, New York State Office of the Attorney General, NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi and Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars and SUVs, Violating State Environmental Laws (July 19, 2016).

32. *Id.*

33. *See, e.g.*, MODEL RULES R. 1.6 cmt. 2.

approach, attorneys put the client's interest at the forefront regardless of the negative effect on the environment. Although this traditional approach has always been followed, it may be time to develop a new approach following the escalation in climate change.

A more balanced approach could be appropriate where an attorney can advocate for the client while combatting climate change. It is definitely possible to put one's client at the forefront but also to protect the world in which we live. There are already rules that require attorneys to live up to a certain ethical standard when representing their clients.³⁴ Although there has yet to be any rule relating to an attorney's obligation to protect the environment, it may be the perfect time to implement one due to the rise in awareness of global warming. This balanced approach would include a standard where an attorney must report or advise their client of the negative consequences of his or her actions. Through this approach, attorneys who are looked up to as role models will be obligated to take care of our planet rather than being put in an ethical dilemma.

A. BENEFITS OF THE TRADITIONAL ATTORNEY-CLIENT RELATIONSHIP

Before delving into this new environmentally friendly approach, it is essential to understand the relationship attorneys have had with clients up until this point. Especially in the United States, attorneys' primary obligation has always been to represent their clients.³⁵ This is why attorney-client privilege and work product doctrine exist. These are safeguards to protect the intimate relationship between the attorney and client.³⁶ Comment 2 of Rule 1.6 of the *Model Rules* states, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation This contributes to the trust that is the hallmark of the

34. See, e.g., MODEL RULES R. 1.6. Model Rule 1.6(b) provides, in pertinent part, as follows:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;

E.g., MODEL RULES R. 1.6.

35. See, e.g., MODEL RULES R. 1.6 cmt. 2.

36. MODEL RULES R. 1.6 cmt. 2.

client-lawyer relationship.”³⁷ Is this trust that is the hallmark of the client-lawyer relationship worth disrupting?

Minus a few protections put in place by the ABA and congressional legislation, an attorney’s sole responsibility is to represent his or her client. There are many reasons why this is the case. First off, a client is paying a lot of money to be represented. If an attorney has multiple interests, then the client who is paying for a service might be left with inadequate representation. The reason a client is willing to spend money on an attorney is because she wants a professional to represent her to the best of that professional’s ability, and the representation will be lacking if the attorney does not see her client as her primary responsibility. Additionally, a client needs to be able to trust the attorney he or she chooses with valuable information. If the client knew that there was a possibility that his or her confidential information could be exposed, she might not divulge any information to the attorney. Lastly, it is tradition that our legal system is an adversarial one where lawyers advocate against each other to get the best possible outcome for their clients.³⁸ One can argue that removing the strict advocator approach would limit an attorney’s representation of her client which has been the hallmark of the American legal system.

B. BENEFITS OF THE MORE BALANCED APPROACH

On the other hand, there are arguments in favor of a stance that balances the attorney-client relationship with environmental protection. The most obvious argument in favor of this approach is that it will help protect our planet and the people who inhabit it. Scholar Irma Russell stated, “The modern world has a lot of environmental hazards and a regime where people don’t feel pressure to protect public safety is unbalanced and a bad situation. Allowing lawyers to be true advisors rather than mouthpieces facilitates good decisions by clients.”³⁹ If attorneys are required to report their clients’ environmental harm or at least advise them against such harm, the clients will be less likely to take actions that lead to climate change.

Furthermore, if the legal system was created to achieve justice, then that is all the more reason this approach should be put into place. There is no justice when an attorney helps her client while a threat to our planet accompanies it. Implementation of such a policy, in turn, will alleviate the weight on the shoulders of attorneys who are stuck in a moral conflict of whether to protect the planet or their clients. A requirement for attorneys will protect their reputation as

37. MODEL RULES R. 1.6 cmt. 2.

38. USLEGAL, *Adversarial System Law*, <http://definitions.uslegal.com/a/adversarial-system/> [<http://perma.cc/FYR4-Z3XZ>] (last visited Nov. 12, 2016).

39. Bienkowski, *supra* note 22.

civil servants who want to better the world. Without this standard, attorneys will still be stuck in the unenviable dilemma that puts their principles at risk.

There are many professions where rules exist that regulate how one must interact with the environment. In each profession's individual code of conduct, provisions are included that make environmental protection an ethical responsibility. For example, in the Code of Ethics of Engineers, it states that "[e]ngineers are encouraged to adhere to the principles of sustainable development in order to protect the environment for future generations."⁴⁰ Similar provisions exist for physicians and architects.⁴¹ All of these professions have realized the importance of environmental protection and have employed a duty to hold each professional to a certain level of accountability in their actions related to the environment. Maybe it is time that the legal field follows suit.

II. IMPLEMENTING ATTORNEY DISCLOSURE REQUIREMENTS IN THIS CONTEXT

Bringing about such a policy is definitely the challenging part. With such a controversial topic, there will always be dissenters who do not support such an approach. The two most realistic ways for such a standard to be implemented is either through an ABA amendment or a legislative act. Both have been used in the past to regulate how an attorney interacts with her client, but never before has any regulation controlling the conduct of lawyers had to do with environmental protection. With a scientific consensus that climate change exists, maybe it is time for that to change.

A. AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

One way to implement this change is through amendments to the *Model Rules*. As mentioned previously, advocacy on behalf of one's client has traditionally been the primary role of attorneys. This strict client advocator approach began to shift when ABA's 2000 Ethics Commission permitted attorneys to focus on third-party interests in addition to their client.⁴² Also, Model Rule 1.6 Conduct has clear exceptions to when an attorney may disclose a client's confidential information. These exceptions include preventing substantial injury or death to others and also preventing the client from committing a crime that is reasonably

40. CODE OF ETHICS FOR ENG'RS R. III(2)(d) (2007).

41. WORLD MED. ASSEMBLY, Statement on the Role of Physicians in Environmental Issues (2006) ("The effective practice of medicine increasingly requires that physicians and their professional associations turn their attention to environmental issues that have a bearing on the health of individuals and populations."); see generally CODE OF ENVTL. ETHICS (AM. SOC'Y OF LANDSCAPE ARCHITECTS) (2006) (laying out the obligations of landscape architects to protect the environment).

42. See, e.g., AM. BAR. ASS'N, *Ethics 2000 Comm'n* [hereinafter *Ethics 2000*].

certain to cause some sort of substantial injury to another's financial or property interests.⁴³ It is obvious these exceptions should be expanded to include environmental harm as the increase in greenhouse gases will eventually cause substantial injury to people and their property.

Although nothing exists yet pertaining to an attorney's relationship to the environment, scholars in the past have recommended amendments to these rules. Scholar Tom Lininger recommended many different "green amendments" to the *Model Rules*, which this Note will address in detail.

First, Lininger proposed amendments that he believes can be implemented immediately to the *Model Rules*. He recommended a change to Rule 1.6 of the *Model Rules* to allow attorney disclosure of imminent environmental harm.⁴⁴ By adding new exceptions to a lawyer's duty of confidentiality, attorneys would be permitted to report any imminent environmental harm whether criminal or noncriminal. In order to make this amendment more realistic, this Note recommends that specifics be written in the amendments on what acts by a client constitute environmental harm. They would include hazardous dumping, where a client knowingly dumps harmful waste into the ocean. Furthermore, even if an environmental crime is not being committed, this Note recommends including in the amendments that an attorney must disclose if a client is committing a civil tort that is detrimental to the environment. Lastly, air pollution would be included as an example of environmental harm that can be reported. When it comes to air pollution, this may be more difficult to determine because clients may already have permits that legally allow them to emit limited amounts of pollutant into the atmosphere.

It is important to note that the suggested proposed amendment applies only to current issues in order to prevent future detrimental conduct. This proposed amendment does not apply to past acts unless those environmentally harmful acts are continuing. It would be unfair to a client if he informed his attorney about something he did in the past, having thought he was protected by attorney-client privilege, only to have his attorney run and tell on him. It is only fair and just if a substantial injury to a person or property is imminent and only then may an attorney report the detrimental activity.

Lininger's second proposed change would encourage attorneys to discuss with their clients environmental factors that are relevant to the client's issue.⁴⁵ This would give attorneys the chance to discuss with their clients more environmentally friendly options. For example, if a client was planning on using coal instead of natural gas at his power plant, through this amendment the attorney will be encouraged to persuade the client to use less harmful energy sources. With these amendments included in the *Model Rules*, it ensures that attorneys raise the environmental concerns that they have.

43. MODEL RULES R. 1.6.

44. Tom Lininger, *Green Ethics for Lawyers*, 57 B.C.L. REV. 61, 77 (2016).

45. *Id.* at 80.

Lininger also recommended a reconceptualization of third-party harm that is described in Rule 4.4, which would protect the environment as well as third parties from the misconduct of attorneys.⁴⁶ Additionally, Lininger recommends amendments to Rules 5.1 and 5.3 which would require better supervisor oversight of attorneys' and legal assistants' actions in relation to environmental harm.⁴⁷ He also puts forth changes to Rule 8.4 relating to the misconduct of attorneys.⁴⁸ While Rule 8.4 mentions criminal acts that can lead to attorney sanctions, Lininger advances that civil law violations and common law torts should be covered as well.⁴⁹ As criminal environmental law is currently underdeveloped, this would ensure that attorneys are still held responsible for actions that are a violation of civil law.

There is no doubt that these changes would be great for our planet and society as a whole. However, there are many problems that would preclude these amendments from being passed. First, it is highly unlikely that the ABA would support these amendments due to the established attorney-client relationship. The ABA understands the importance of the attorney-client relationship and wants to put the least amount of restrictions on it as possible. Evidence of this is the fact that the ABA has prioritized the constituencies that the ethical rules are intended to protect—namely, the client first, then in distant second through fourth place, the general public, the legal system, and the legal profession.⁵⁰ Thus, it would be difficult to put the environment into one of these categories. Even if the environment did belong under the general public constituency due to the effect climate change will have on the general public, there is still a lower duty of care owed and therefore may make the protection meaningless.

Second, even if these amendments were passed, the *Model Rules* are guidelines and not binding on anyone.⁵¹ While it is true that every state other than California has adopted the *Model Rules* in whole or in part,⁵² this will likely change if environmental protection amendments are added. Climate change and environmental protection are very controversial topics, and some states may not be ready to impose these obligations on attorneys.

Another problem that may occur is that attorneys will lose work and in turn lose profit due to these amendments. Fewer businesses will seek out attorneys if

46. *Id.* at 84.

47. *Id.* at 85–86.

48. *Id.* at 92–94.

49. *Id.*

50. See AM. BAR ASS'N, *Standards for Imposing Lawyer Sanctions* (Feb. 1992), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf [<http://perma.cc/S2KK-5AS7>].

51. See, e.g., GA. STATE UNIV. L. LIBR., *Ethics and Professional Responsibility Research Guides* (Aug. 27, 2016), <http://libguides.law.gsu.edu/c.php?g=253396&p=1689859> [<http://perma.cc/K9J7-393A>].

52. See, e.g., AM. BAR ASS'N, *About the Model Rules*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [<http://perma.cc/32YF-TVTF>] (last visited Nov. 12, 2016).

the businesses know that their practices could be reported in certain situations. For example, if a company is causing major pollution and its attorney is obligated to report it, the company will likely decide it is better off without a lawyer. Attorneys who were not in favor of these changes will likely be enraged that they are losing clients for something out of their hands. This will lead to a division of the bar between attorneys who are upset about losing business and attorneys who support these environmental regulations.

Lastly, it can be argued that these amendments would cause a never-ending snowball effect, where more and more restrictions would be put on attorneys.⁵³ With the client being the attorney's primary interest, it is a huge concern that imposing so many obligations will stretch the attorney too thin. It will lead to the lawyer being an advocate for all of the world's interests rather than just the client's interests. Although this is a legitimate concern, it can be argued that this is not the intention of the amendments. The amendments are put in place to help protect our environment and life on this planet. In order for unrelated amendments to be passed, there would need to be something similar to protecting human life to make it worth compromising the relationship between the attorney and client.

B. FEDERAL OR STATE LEGISLATION

Another way to regulate attorneys' behavior is through the passing of legislation. Creating a law that would require an attorney to disclose environmental harm caused by his or her client would alleviate the attorney's ethical dilemma. An attorney would be left with no choice but to obey the law and report the conduct. Congress and state legislatures have passed multiple acts governing attorney's behavior in the past.⁵⁴ While none have been related to environmental protection, all of the laws have been passed to protect the interests of third parties that could be harmed by a client's actions. Because climate change can lead to the harming of innocent people, it is not too much of a stretch to create a law to help prevent this harm. But before delving into what this environmental act would entail, it is important to look at the other laws passed by federal and state legislature dealing with attorney disclosure.

In 2002, Congress passed the Sarbanes-Oxley Act.⁵⁵ In order to protect investors, the Act laid out requirements for all publicly traded corporations to follow. It was created in response to the Enron and WorldCom accounting scandals where both companies systematically and fraudulently portrayed their

53. See, e.g., Lininger, *supra* note 44, at 111–12.

54. See, e.g., U.S. SEC. & EXCH. COMM'N, FINAL RULE: IMPLEMENTATION OF STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS (2003).

55. See, e.g., *Sarbanes-Oxley Act of 2002*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sarbanesoxleyact.asp> [<http://perma.cc/U7LY-L88Q>] (last visited Nov. 12, 2016).

financial conditions to investors.⁵⁶ The Act's basic objectives were "to improve financial disclosures from corporations and prevent accounting fraud."⁵⁷ Section 307 of the Act sets out obligations that an attorney must follow.⁵⁸

Section 307 sets out standards that lawyers must follow when appearing and practicing before the SEC.⁵⁹ When representing issuers, Section 307 requires "an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company."⁶⁰ If those at the top who receive the information do not act appropriately, Section 307 requires "the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors."⁶¹ This up-the-ladder reporting requirement ensures that those in charge of the company are aware of the securities violations taking place so they can be corrected.

The Securities and Exchange Commission, as directed by the Sarbanes-Oxley Act, created Part 205 entitled "Standards of Professional Conduct for Attorneys."⁶² Part 205 included Section 307 of the Sarbanes-Oxley Act while also adding additional attorney rights and obligations.⁶³ Most importantly, Part 205 provides attorneys with the right to reveal confidential information without the issuer's consent to the SEC that relates to the issuer's actions under certain circumstances.⁶⁴ The circumstances which allow attorneys to reveal a client's confidential information to the SEC include when the attorney reasonably believes it is necessary "to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors."⁶⁵ Also, an attorney may reveal a client's confidential information when the attorney reasonably believes it is necessary "to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used."⁶⁶

In addition to securities fraud, attorneys' conduct has been regulated by legislation in other fields as well. Many states have adopted legislation that requires mandatory reporting for attorneys when knowledge exists of child

56. *See id.*

57. *Id.*

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

59. *Id.*

60. *Id.*

61. U.S. SEC. & EXCH. COMM'N, *supra* note 54.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

abuse.⁶⁷ In Mississippi, Nevada, Ohio, and Oregon, the state statutes explicitly list attorneys as mandatory reporters.⁶⁸ Specifically in Mississippi, the statute is silent on any privileged communications granted to the attorney and client.⁶⁹ The Mississippi statute states that attorneys must report child abuse if there is “reasonable cause to suspect that a child is abused or neglected.”⁷⁰ While Mississippi puts a child’s well-being ahead of attorney-client confidentiality, Oregon and Nevada’s state statutes exempt attorneys from mandatory reporting when it may be detrimental to the client who is accused of the abuse.⁷¹

Additionally, there are eight states that list “any person” as a mandatory reporter of child abuse.⁷² It is logical to believe that an attorney falls under the “any person” category, and thus attorney-client privilege would not apply if child abuse is taking place. What is crucial to take from this is the clash between doing what is right and protecting one’s clients. State legislatures clearly see a problem with an attorney who knows about children being harmed but chooses to stay silent due to the trust she has to her client. With a portion of states requiring attorneys to disclose their client’s acts of child abuse,⁷³ it brings up the question of whether legislation can be passed modeled after these laws to require attorney disclosure for a client’s negative environmental effects that will also harm our future generations.

It is important to note that there is also the crime-fraud exception, which each state enforces. With the crime-fraud exception, “a client’s communication to her attorney isn’t privileged if she made it with the intention of committing or covering up a crime or fraud.”⁷⁴ This exception applies when the client was in the process or intended to commit a crime.⁷⁵ It also applies if the client told the lawyer that she intended to further the crime or cover it up.⁷⁶ Some of the crimes that fall under the exception include suborning perjury, destroying or concealing evidence, witness tampering, and concealing income.⁷⁷ Although there is a distinction between preventing crime and preventing environmental damage, it is

67. Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 246–49 (1987) (examining the increase in mandatory reporting statutes).

68. *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2015), <https://www.childwelfare.gov/pubPDFs/manda.pdf#page=2&view=Professionals%20required%20to%20report> [http://perma.cc/NUW7-TD9P].

69. *Id.* at 32.

70. *Id.*

71. *See, e.g., id.* at 32, 35–36, 45–46.

72. *See* Brooke Albrandt, Note, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 657 (2002).

73. CHILD WELFARE INFO. GATEWAY, *supra* note 68.

74. Joseph Broadbent, *The Crime-Fraud Exception to the Attorney-Client Privilege*, NOLO, <http://www.nolo.com/legal-encyclopedia/the-crime-fraud-exception-the-attorney-client-privilege.html> [http://perma.cc/S2KA-KC3W] (last visited Nov. 12, 2016).

75. *Id.*

76. *Id.*

77. *Id.*

important to note that some states have extended this privilege to civil tort.⁷⁸ This means that attorneys can still disclose their client's actions under certain circumstances even if a crime was not committed. The fact that states have enhanced when an attorney can disclose information gives more fuel to the proposed legislation.

For all of these laws requiring attorney disclosure, the reasoning is because federal and state legislatures are trying to protect innocent third party interests. Whether it is the protection of investors from fraud or the protection of children from child abuse, legislatures are clearly favoring the interests of parties that are minding their own business over the culprits. Even if there is a longstanding tradition of an unbreakable attorney-client relationship, lawmakers are continuing to require attorneys to break that trust if their client is responsible for a detrimental harm.

Although environmental harm has yet to be included in statutes requiring attorney disclosure, the type of harm to result is the same as the others listed above. If businesses continue to harm the environment and attorneys are not required to do anything about it, the consequences will be an increase in global warming. Climate change, if not prevented, will eventually lead to the end of civilization as we know it. So while there may not be as direct of an effect on the individual when a client pollutes the atmosphere, it is harming each and every individual on this planet in the long run by deteriorating the atmosphere and quickening the pace of the destruction of our planet.

Using the federal and state legislation listed above as a model, a law can be adopted that has the proper language to ensure that the requirements are easy to understand and to be followed. Additionally, the legislation has to be fair and not overreaching. The Sarbanes-Oxley Act in particular is the perfect federal act to base the proposed legislation on.⁷⁹ Just as the Sarbanes-Oxley Act regulates lawyers practicing before the Securities and Exchange Commission, this specialized law would apply to lawyers that practice before the EPA or a state environmental agency. This way the law would only apply to those who are familiar with the law and its consequences.

The following proposed piece of legislation would be more effective as federal legislation because it would be enforced in every state. Although this may be unlikely given the current Congress, a state law would be suitable as well. Regardless of whether it is passed by Congress or is incorporated in state statutes, this proposed legislation would be the next positive step in the battle against climate change. It is important to note that federal and state legislatures have already created laws requiring disclosure of environmental dangers in certain

78. *Id.*

79. See U.S. SEC. & EXCH. COMM'N, *supra* note 54.

cases.⁸⁰ A new law regulating attorney conduct in this field is the logical next step. The proposed statute, titled the Attorney-Client Environmental Disclosure Act, would look like this:

Attorney-Client Environmental Disclosure Act

(a) Duty to report evidence of client's environmental harm

(1) If an attorney becomes aware of evidence of current harm to the environment due to the actions of the client, the attorney shall report such evidence to the client's chief legal officer (or the equivalent thereof) or to both the client's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the client's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of a client. Such actions that can cause environmental harm and should be reported include (but are not limited to):

(i) Breaches of environmental law such as dumping and air pollution (unless client has a permit)

(ii) Civil torts that fall short of environmental crimes

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of environmental harm as he or she reasonably believes is appropriate to determine whether the environmental harm described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no harm has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no harm has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the client to adopt an appropriate response, and shall advise the reporting attorney thereof.

(3) Unless an attorney who has made a report under paragraph (a)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the client (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney may report the evidence of environmental harm to the Environmental Protection Agency. The attorney may do so, without the client's consent, if the attorney believes it reasonably necessary:

(i) To prevent the client from committing acts that are likely to cause substantial injury to the environment and increase the impact of climate change; or

(ii) To rectify the consequences of environmental harm by the client that caused, or may cause, substantial injury to the environment.

80. See, e.g., 42 U.S.C. § 9601 (2012).

(b) Exceptions

(1) If a client's behavior is going to lead to an imminent environmental harm, the attorney may circumvent the disclosure laid out under paragraph (a)(1) to report the imminent harm to the Environmental Protection Agency and the federal government.

For purposes of this statute, "environmental harm" is defined as "any detrimental harm to the environment caused by pollution or other methods that increase the impact of climate change." This broad definition of "environmental harm" is intentional in order to encompass all client activities that trigger climate change. Additionally, as mentioned earlier when discussing ABA amendments, this Act would only apply to current environmental harm. If the client performed a detrimental act in the past that could not be currently corrected through disclosure, this Act would not apply. The policy reasons behind this are that it would be too large of a step to make this Act one where a client is punished for any past act. Rather, it is designed to be more of a preventative law in order to prevent current harm. The attorney-client privilege is a staple of the legal system and is too important to further weaken.

While this proposed legislation would have a positive effect on our environment and in combatting climate change, there are also a few problems that come with it. First, there is the concern about requiring, through legislation, attorneys to report their client's actions. The ABA has been vehemently opposed to the external regulation of the legal profession, and maintains that the point of making ethical rules for lawyers is to keep the legislature away from creating its own standards. Additionally, it will be difficult to get pro-environmental legislation passed on a federal level when there are many Congressmen who will be against it, especially after the recent election. A more likely option is passing the legislation on a state level. While some states will be unlikely to adopt such a law, there are a large amount of states that would support it. This separation between states that pass the law and states that do not might cause some problems for large firms that must train their lawyers depending on the state due to the differing laws. This problem seems minor, though, compared to the problems that may come with an ABA amendment or federal legislation.

CONCLUSION

This Note recommends implementing these changes through legislation rather than the ABA approach. Going forward, this makes far more sense and will be more likely to be accomplished. The ABA emphasizes in its *Model Rules* the trust an attorney owes to his or her client.⁸¹ Thus, the recommended amendments are unlikely to be implemented through the ABA. Even if they were to be

81. See, e.g., MODEL RULES R. 1.6 cmt. 2.

implemented, it is important to remember that they are only guidelines.⁸² On the other hand, passing legislation on a federal or state level will ensure that lawyers must follow the law and protect the environment.

While it may be challenging to get passed, it is important to remember that other attorney disclosure laws have passed on a federal and state level. These laws were intended to protect innocent people from the detrimental actions of a client. Just like these other situations, a business that is harming the environment and contributing to climate change should be stopped. The same justification in protecting innocent third parties applies to this situation. As former President Obama stated, “[N]o challenge . . . poses a greater threat to future generations than climate change.”⁸³ If such attorney disclosure laws have been passed to combat other important threats, then this proposed legislation must be passed to battle what our past President believes is the greatest threat to our future.

82. See, e.g., GA. STATE UNIV. L. LIBR., *supra* note 51. A number of the end of footnote 4 pages do not correspond with the numbers listed in the table of contentsder 608(a))CK

83. President Barack Obama, State of the Union Address at the White House (Jan. 20, 2015).